

# B T R

## **BROADCASTING AND TELECOMMUNICATIONS LEGISLATIVE REVIEW PANEL**

### **Responding to the New Environment: A Call for Comments**

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**Comments of the Canadian  
Media Producers Association**

**January 11th, 2019**

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## EXECUTIVE SUMMARY

1. The emergence and increasing influence of digital technologies bring new challenges and opportunities for all players in the Canadian broadcasting and telecommunications industries, from Canadian audiences, to creators and producers, to programming and distribution undertakings, to internet and wireless service providers (ISPs and WSPs). The distribution of programming by ISPs and WSPs allows Canadians to engage with content and communicate with each other and the world like never before. But these new distribution technologies also challenge our thinking about the role of our broadcasting system and how best to encourage the creation, development, production, exploitation, promotion, and presentation of content made by Canadians.
2. The Canadian Media Producers Association's (CMPA) proposals, set out herein, are about building upon the successes of our broadcasting system. Canada's Broadcasting Policy has fostered, and remains the foundation of, our strong domestic media market. It ensures that Canadian programming reflects Canadian voices and that it will be able to succeed both at home and globally. The *Broadcasting Act* (the Act) recognizes the importance of competing and complementary policy objectives and the diversity of inputs into programming produced within our broadcasting system. Careful balancing of these objectives helps to ensure that our system is diverse in expression and that the creation and presentation of Canadian programming "reflect[s] the needs and aspirations of Canadians in all their diversity."<sup>1</sup> None of these policy objectives are more important than another. For all of these reasons, the Act's **policy objectives must be upheld to ensure that Canadians and Canadian programming remain paramount in the digital age.**
3. In particular, **Canada's Broadcasting Policy must continue to require that Canadian programming includes a significant contribution from the independent production sector.** In our convergent and vertically integrated domestic industry, and in light of the growing influence of global online behemoths, requiring independence remains particularly important to ensure that our broadcasting system continues to reflect a diversity of expression. Without appropriate regulatory measures, and the proper implementation and enforcement of those measures, the Canadian broadcasting system risks representing too few voices, both in terms of the amount of programming available to Canadians and in terms of the ownership and control of the programs themselves.
4. The Canadian Radio-television and Telecommunications Commission (the Commission) plays a critical role in helping Canadians embrace the opportunities and address the challenges associated with the digital shift. To fulfil its mandate to supervise and regulate broadcasting and telecommunications in the public interest, the Commission's toolkit must be updated so that it can address power imbalances in the market and ensure that all those who benefit from the system contribute to it.
5. First, **the Commission must be given the express power to govern commercial relationships between large vertically integrated domestic broadcasting**

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<sup>1</sup> Innovation, Science and Economic Development Canada. "Terms of Reference." Available online: <http://www.ic.gc.ca/eic/site/110.nsf/eng/00001.html>.

**undertakings and large foreign online broadcasting undertakings,<sup>2</sup> on the one hand, and independent producers and independent broadcasting undertakings, on the other, to ensure that negotiations are conducted in a fair manner.**

6. Second, in recognition of the growth and increasing influence of domestic and foreign online broadcasting undertakings and internet and wireless technologies, **the Commission's powers must be strengthened:**
- **The Commission must be given the power to impose administrative monetary penalties on broadcasting undertakings;**
  - **Its power to order broadcasting undertakings to direct expenditures to Canadian programming production funds must be confirmed;**
  - **It must possess all the same powers under a regulation-based regime with respect to broadcasting undertakings as under its licensing regime;**
  - **The Commission's data-gathering powers must be clarified to ensure data collection from all broadcasting undertakings;**
  - **The concept of "exhibition" must be expanded to allow for more effective contributions by broadcasting undertakings to the presentation of Canadian programming; and**
  - **The Commission should be given the express jurisdiction to implement tools to combat internet piracy.**
7. The issue of whether "digital media services" constitute broadcasting and whether they ought to contribute to Canada's broadcasting policy has been debated and discussed for almost twenty years.<sup>3</sup> **We must act now to update the legislative framework for Canada's media industries by fast-tracking a review of the Commission's powers to bring online programming undertakings into the regulatory tent.**
8. Domestic and foreign online programming undertakings are clearly elements of the Canadian broadcasting system. These once-nascent services are now competing head to head with traditional broadcasters and cable companies for subscribers, audiences, and revenues. As they are not currently required to contribute to the Canadian system through expenditures on Canadian programming, programs of national interest, independent production, discoverability, promotion, exhibition, or contribution to production funds, they are putting immense stress on our funding system for the commissioning and production of Canadian content. Moreover, the failure to modernize our system thus far has created a

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<sup>2</sup> Throughout this submission the CMPA is using the definitions provided in section 2 of the Act to describe television-related services. For example, "broadcasting undertaking" means "programming undertaking" or "distribution undertaking." Programming undertakings may be domestic (e.g., YTV, City, TSN), domestic online (e.g., Crave, Sportsnet NOW), or foreign online (e.g., Netflix, Amazon Prime Video, Britbox).

<sup>3</sup> Broadcasting Public Notice CRTC 1999-84 and Telecom Public Notice CRTC 99-14, *Report on New Media*. Available online: <https://crtc.gc.ca/eng/archive/1999/pb99-84.htm>.

regulatory asymmetry between Canadian broadcasting undertakings and foreign services in the Canadian market.

9. In light of the Government's declaration in the Terms of Reference that it will not consider lessening foreign ownership of broadcasters and the policy direction on the ineligibility of non-Canadians to hold broadcasting licences,<sup>4</sup> contribution by foreign online broadcasting undertakings may best be accomplished through regulation or exemption from licensing. While licensing and exemption orders likely remain relevant and useful for the near future, as we move forward, **the system ought to shift towards a regulation-based regime in order to reduce barriers to entry, and encourage innovation and competition in the market.**<sup>5</sup>
10. The online delivery of programming is also impacting the distribution side of our contribution framework for Canadian content. As viewers increasingly cut the cord, broadcasting distribution undertakings (BDUs) are experiencing declining revenues, leading to decreased financial contributions to the Canada Media Fund (CMF) and other independent production funds. In contrast, the internet and wireless segments are continuing on a growth trajectory. They are distributing audiovisual programming to Canadian audiences, but unlike BDUs, are not required to contribute to the creation and presentation of Canadian programming under the existing contribution framework.
11. To ensure the future of a vibrant domestic industry for Canada and Canadian audiences, our contribution system must be modernized to bring ISPs and WSPs (the distributors of online programming services) into the broadcasting regulatory framework. **Legislative amendments must be made to give the Commission the explicit power to order broadcasting undertakings, ISPs, and WSPs to contribute to the objectives of the *Broadcasting Act*.**
12. Finally, Canada needs a strong national public broadcaster with long-term sustainability. Canada's independent producers highly value the Canadian Broadcasting Corporation (CBC) as a broadcasting partner. The CMPA supports the efforts of the CBC to play a greater role in promoting democratic values and being the provider of reliable and trusted information to a global audience. However, **the CBC must continue to prioritize serving Canada and Canadians with high-quality, diverse Canadian programming.** As part of its commitment to serving Canadians, the CMPA submits that **a mandatory Code of Practice between the CBC and independent producers ought to be introduced in the Act to best position the programs the CBC commissions from independent producers for domestic and global success.**

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<sup>4</sup> *Direction to the CRTC (Ineligibility of Non-Canadians)*, SOR/97-192, (the Policy Direction). Available online: <https://laws-lois.justice.gc.ca/eng/regulations/SOR-97-192/page-1.html>.

<sup>5</sup> However, should the Government determine that licensing is the preferred method of regulating and requiring contributions from foreign, online programming undertakings then another option is to amend the Policy Direction to carve out foreign online programming undertakings which are serving Canadians above certain subscriber or revenue thresholds in order to license them directly without lessening the Canadian ownership of traditional broadcasting undertakings. This approach would mean that the Government and the Commission could—and should—act now.

13. Each of these recommendations will help to position Canada to maximize the opportunities that the digital age brings to our audiences, artists, creators, producers, and broadcasting and telecommunications industries.



## INTRODUCTION

14. The Canadian Media Producers Association (CMPA) is Canada's leading member-based advocacy organization for independent producers, representing hundreds of companies engaged in the development, production, and distribution of English-language content made for television, cinema, and digital media. The CMPA works to promote the continued success of the Canadian production sector, and to ensure a future for the diverse range of content made by Canadians for domestic and international audiences.
15. As the national voice of English-language independent producers, we welcome the opportunity to provide our members' perspectives on the important issues raised in this call for comments on the future of broadcasting and telecommunications legislation in Canada.

### **Independent Producers Make Great Canadian Programming**

16. Canada's independent producers create, develop, produce, and distribute film, television, and digital media content for Canadian and international audiences. CMPA members make great Canadian programming and bring audiences an incredible variety of projects, from acclaimed indie films to Indigenous content to animated kids' shows—and everything in between. This content provides viewers with a Canadian perspective on our country, our world, and our place in it.
17. Independent producers play a unique role in the broadcasting system. They are the creative entrepreneurs who start with a spark—an idea, a concept, or a story—and work with creative talent and broadcasting and distribution partners to build it into compelling content for any screen. In other words, independent producers connect ideas and concepts with writers, directors, and actors; they raise and secure financing from a complex system of public and private investments; and they sell their projects to domestic and foreign broadcasters, including online platforms. Independent producers partner with talent, funders, domestic and foreign broadcasters, and platforms, to develop and produce content for Canadian and international audiences. They have built the experience to bring our shows to Canada and the world.
18. Broadcasters have long counted on independent producers to deliver all types of programming—including great Canadian dramas, documentaries, feature films, lifestyle programs, formats, and more—that has both national and international potential.
19. In fact, Canadian film and television production reached an all-time high in 2017, contributing \$3.3 billion in volume, 67,800 full-time equivalent jobs in all regions of the country,<sup>6</sup> and \$3.654 billion to the national GDP.<sup>7</sup>

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<sup>6</sup> *Profile 2017: Economic Report on the Screen-Based Media Production Industry in Canada, (Profile 2017)* Prepared by Nordicity for the CMPA, Association québécoise de la production médiatique (AQPM), Department of Canadian Heritage, Telefilm Canada, in 2018. Available online: <http://cmpawebsite.wpengine.com/wp-content/uploads/2018/04/Profile-2017.pdf>, p. 4.

<sup>7</sup> *Profile 2017*, Exhibit 2 - 4 GDP and labour income impact film and television production in Canada, 2016/17.

20. This high level of domestic creation and production and its impact on the Canadian economy is directly linked to our legislative and regulatory frameworks which ensure that broadcasters support the creation and presentation of Canadian programming, including independently-produced Canadian programming.

**CANADA'S BROADCASTING POLICY OBJECTIVES ARE RELEVANT AND CURRENT;  
THEY MUST BE UPHELD TO ENSURE THE CREATION AND PRESENTATION OF HIGH-  
QUALITY, REFLECTIVE CANADIAN PROGRAMMING AND A VIBRANT DOMESTIC  
MARKET**

21. Canada's Broadcasting Policy, as set out in section 3 of the Act, is the foundation of our strong domestic media industry and helps to cultivate and maintain our cultural sovereignty and national identity.
22. Canadian programming provides an important outlet for Canadian expression and talent, as well as an unparalleled reflection of Canadian attitudes, opinions, ideas, values, and artistic creativity. Quintessential Canadian content includes a wide range of programming, including dramas like *Murdoch Mysteries* and *Cardinal*; comedies like *Kim's Convenience* and *Letterkenny*; kids' and family content like *PAW Patrol*, *Odd Squad*, *Degrassi*, and *Heartland*; documentary series like *Taken* and *Highway Thru Hell*; televised award programs like the Juno Awards; formats like *Love It or List It* and *Canada's Smartest Person*; lifestyle programs like *Property Brothers*; local and national newscasts; and sports programming. This programming reflects a diversity of voices across Canada's regions, cultures, and peoples. All of this programming has a role to play in protecting, supporting, and promoting Canadian culture and in allowing us to share our stories with each other and the world.
23. As currently drafted, the Act recognizes the importance of competing and complementary objectives and the diversity of inputs into the programming produced within our broadcasting system. From encouraging the development of Canadian expression, to reflecting the multicultural and multiethnic nature of Canadian society and the special place of Indigenous peoples, to the provision of educational and community programs, to the exposure of differing views on matters of public concern—our broadcasting policy objectives are all valuable and interconnected. Careful balancing of these objectives helps to ensure that our system is varied and the creation and presentation of Canadian programming “reflect[s] the needs and aspirations of Canadians in all their diversity.”<sup>8</sup> No one can say that one of these policy objectives is more important than another; therefore, we see no reason to prioritize one objective over another. These separately enumerated objectives provide the Commission with flexibility to ensure that each element is contributing to the system in an appropriate manner and making maximum use of Canadian creative (and other) resources in the creation and presentation of Canadian programming.

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<sup>8</sup> Innovation, Science and Economic Development Canada. “Terms of Reference.” Available online: <http://www.ic.gc.ca/eic/site/110.nsf/eng/00001.html>.

24. Suggestions have been made that the policy objectives should be reduced or eliminated in a revised Act to give the Commission greater flexibility in exercising its mandate. The CMPA disagrees with this notion. The Commission already enjoys considerable flexibility in how to interpret, balance, and further these objectives. This is how it should be. The Commission's regulatory flexibility should not, however, be extended so far as to enable it to effectively ignore or "read out" objectives that remain as relevant and important today as they were when they were first adopted in the Act. Upholding the objectives provides an appropriate, flexible policy framework through which the Commission can exercise its powers and balance various interests. This ultimately strengthens the rationale for the Commission's decisions and supports the use of its already considerable discretion within its jurisdiction.
25. That being said, some minor amendments to the broadcasting policy objectives are required. The reference to "as resources become available for the purpose" in sections 3(1)(k), (o), and (p) of the Act should be struck out. English- and French-language, Indigenous, and accessible programming are, and should always be, available within Canada's broadcasting system.

***RECOMMENDATION 1: Uphold Canada's Broadcasting Policy***

26. For all of these reasons, the CMPA submits that the Government must uphold Canada's Broadcasting Policy as declared in section 3 of the Act.

**TO ENSURE A DIVERSITY OF EXPRESSION, PARTICULARLY IN A CONVERGENT WORLD AND IN THE FACE OF GLOBAL BEHEMOTHS, CANADA'S BROADCASTING POLICY MUST CONTINUE TO REQUIRE THAT CANADIAN PROGRAMMING INCLUDES A SIGNIFICANT CONTRIBUTION FROM THE INDEPENDENT PRODUCTION SECTOR**

27. Section 3(1)(i)(v) of the Act, which states that programming provided by the Canadian broadcasting system must include a "significant contribution from the independent production sector," is particularly important to the health of our domestic market. First, the Government must, as with the other objectives, uphold this particular important broadcasting policy objective. Second, the Government must give meaning to the objective by confirming that the Commission can ensure that negotiations between buyers and suppliers (whether they are large vertically integrated domestic broadcasting undertakings or large foreign online broadcasting undertakings, on the one hand, and independent producers or independent broadcasting undertakings, on the other) are conducted in a fair manner.
28. The Canadian broadcasting system seeks to reflect a diversity of expression, voices, cultures, and range of opinions articulated by contributors who are independent of those who control the exhibition of the programming. Requiring independence in Canada's broadcasting system helps to ensure our system reflects this diversity of expression by limiting self-dealing. As noted by Peter S. Grant and Chris Wood in their book *Blockbusters and Trade Wars*,

*The television and film universe falls into two very broad parts: making shows and showing shows. The most direct way competition policy can secure a diversity of expression is to keep the two apart. Policies that limit the extent to which exhibitors of cultural products may own the production houses that supply films or television programs also prevent those exhibitors from favouring their own products and discriminating against others.<sup>9</sup>*

29. The requirement for a significant contribution from the independent production sector is particularly relevant in our convergent and vertically integrated domestic industry. Given the growing influence of global online behemoths, such as Netflix, Amazon, and Facebook, requiring this policy objective remains particularly important to ensure our broadcasting system continues to reflect a diversity of expression.

### **The Domestic Market Is an Oligopsony**

30. From a competition policy perspective, there can be no doubt that the Canadian English-language television program market is an oligopsony.<sup>10</sup> The “Big 3” private broadcasting groups—namely, Rogers Media Inc. (Rogers Media), Corus Entertainment Inc. (Corus Entertainment), and Bell Media Inc. (Bell Media)—dominate the English-language market.<sup>11</sup>
31. The vast majority of conventional television stations and discretionary services are owned by the Big 3. All three entities have their own production facilities and resources to provide programming for their broadcast television assets. In 2016, their combined audience

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<sup>9</sup> Peter S. Grant and Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World*, (Vancouver: Douglas & McIntyre, 2004), p. 275.

<sup>10</sup> The term “oligopsony” simply means a small number of buyers but it is also a key element in determining the ability of buyers to use their purchasing power over sellers to extract more favorable commercial and other terms. Oligopsony primarily relates to the level of market concentration or the level of difficulty that new firms face in entering a market. A handful of economic measures for market concentration have been developed allowing oligopsony to be defined quantitatively; these include the Herfindahl-Hirschman Index (HHI) and concentration ratios. The CMPA commissioned Wall Communications to study the buyer power in the Canadian television market, a copy of which is attached hereto as Appendix A. *Buyer Power in Canadian TV: An Examination of the Domestic Market Structure for the Purchase and Sale of Canadian-produced English Language TV Programming (Buyer Power)*. Prepared by Wall Communications for the CMPA. Ottawa, Ontario. June 2018.

<sup>11</sup> Bell Media and Rogers Media are divisions of two of Canada’s largest publicly traded corporations, BCE Inc. and Rogers Communications Inc., with vertically integrated operations that include cable, telephone, wireless, and broadband services. The combined revenues of BCE Inc. and Rogers Communications Inc. were \$35.4 billion in 2016. BCE Inc. 2016 Annual Report, online: <http://www.bce.ca/investors/AR-2016/2016-bce-annual-report.pdf>. Rogers Communications Inc. 2016 Annual Report, online: <http://netstorage-ion.rogers.com/downloads/IR/pdf/annual-reports/Rogers-2016-Annual-Report.pdf>. Corus Entertainment Inc. (which is wholly owned and controlled by the JR Shaw family) acquired the assets of its sister company Shaw Media Inc. in 2016 creating a combined corporate portfolio of 45 specialty television services, 15 conventional television channels, 39 radio stations, a global distribution arm, and in-house television and digital media production divisions. Shaw Communications operates the JR Shaw family’s broadcasting distribution (i.e. cable/DTH subscription) business. While Corus is not a vertically integrated company, Corus and Shaw Communications Inc. are under the common control of Shaw. Shaw Communications Inc. is vertically integrated and offers cable, telephone, broadband, and wireless services. Taken together, the combined revenues of Corus and Shaw Communications Inc. were \$6.05 billion in 2016. CRTC. Ownership Charts, online: <http://www.crtc.gc.ca/ownership/eng/cht032c.pdf>.

viewing share was 83.1%.<sup>12</sup> The Big 3 represent 95% of English-language private broadcasting revenues and 79% of combined private and public English-language broadcasting revenues. For its part, the CBC represents approximately 17% of English-language television revenues.<sup>13</sup> With the CBC, the four broadcasters hold a 96% market share of English-language broadcasting revenues. This market share is indicative of the buying strength of a very small number of buyers.<sup>14</sup> The Herfindahl-Hirschman Index (HHI)—an alternative means of calculating buyer concentration—of the Big 3 is 6,003. Including the CBC yields an HHI of 2,538. The US Department of Justice considers markets in which the HHI is in excess of 2,500 to be highly concentrated. The EU Commission's Guidelines on Horizontal Mergers sets an HHI of 2,000 as the benchmark for high concentration. The concentration ratio (i.e., the CR4) is 96% in the Canadian broadcasting market.<sup>15</sup> There is no question that market concentration is inordinately high in Canada's English-language market.

32. In addition, there is significant vertical integration in the industry. The three largest BDUs in Canada (Bell, Shaw, and Rogers) are also commonly held by the largest owners of conventional television stations and discretionary television services, which package programs for distribution by BDUs.
33. This dominance gives the Big 3 and the CBC privileged access to Canadian audiences. It also enables them to exercise extraordinary control over which, when, and how many Canadian creative voices and television programs are accessible to Canadians.
34. This high degree of market concentration also translates into a massive inequality of bargaining power. Producers typically approach broadcasters with a request to pitch television program concepts, not the reverse. The number of producers pitching shows greatly outnumbers the opportunities for broadcasters to pick up those shows. With so few domestic buyers, this phenomenon is felt even more acutely with niche shows, where only one or two of the domestic broadcasters serve that niche and would thus even contemplate a particular show. In such negotiations, the broadcaster will generally be provided with the producers' detailed financial information regarding proposed budget and financing sources for the product. The producer, however, will have virtually no inside knowledge of the broadcasters' priorities, programming budgets, or willingness to spend on any given project. A broadcaster's access to detailed viewership data and advertiser revenues also provides it with important information that offers an advantage in negotiating with producers. In addition, producers are highly dependent on broadcaster approval for tax credits and other financing support (such as the CMF). Producers gain access to production tax credits only if they have received confirmation in writing from a Canadian distributor or a Commission-licensed broadcaster. CMF funding (e.g., the

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<sup>12</sup> *Communications Monitoring Report 2017* (2017 CMR), Table 4.2.19 Viewing share of English- and French-language Canadian services, by ownership group in the Quebec francophone market. Available online: <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2017/cmr4.htm#s40>.

<sup>13</sup> *Buyer Power*, p. 18.

<sup>14</sup> *Ibid.*, p. 20.

<sup>15</sup> *Ibid.* Please note that the Competition Bureau uses a CR4 of 65% as a safe harbour threshold.

Performance Envelope Program) is allocated to broadcasters, who then decide which television projects will get funding.

35. Given the substantial vertical integration and consolidation of broadcasters in Canada, the oligopsonistic nature of our domestic market, the information asymmetry between producers and broadcasters, and the resulting significant buying power yielded by broadcasters, there is a real risk that ownership concentration will reduce the programming options and the number of distinct creative and editorial voices available to Canadians. Without appropriate regulatory measures, and the proper implementation and enforcement of those measures, the Canadian broadcasting system risks representing too few concentrated voices, both in terms of the amount of programming available to Canadians and in terms of the ownership and control of the programs themselves.<sup>16</sup>

### **Our Broadcasting Policy that Requires Independence Leads to a Diversity of Expression and Supports Other Cultural Broadcasting Policy Objectives**

36. Our broadcasting policy objectives include serving the interests of all Canadians and their need to express themselves, in order to “safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,”<sup>17</sup> and encouraging Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, and values, by displaying Canadian talent and by offering a Canadian point of view.<sup>18</sup> Independence in our system supports these cultural policy objectives by, among other things, producing local and regional programming, reflecting a diversity of voices, making educational programming, and making programming for Canadians of all ages, backgrounds, interests, and tastes.
37. Canada’s regulatory framework has built a healthy and vibrant domestic industry. Our broadcasting policy objectives have encouraged a number of programs that reflect cultural diversity produced by independent producers, such as:
- *Kim’s Convenience*, produced by Thunderbird Entertainment, which tells the funny, heartfelt story of the Kims, a Korean-Canadian family running a convenience store in downtown Toronto.
  - *Mohawk Girls*, produced by Rezolution Pictures, is a half-hour comedy about four young women figuring out how to be Mohawk in the twenty-first century.

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<sup>16</sup> The Commission recognized the critical role of PNI and independent production expenditure requirements in achieving the objectives of the *Broadcasting Act* at para. 276 of Broadcasting Regulatory Policy CRTC 2015-86 (the Create Policy): *The objectives set out in the Act declare that the programming provided by the Canadian broadcasting system should be varied, comprehensive and encourage the development of Canadian expression by providing programming that reflects Canadian values and attitudes. The objectives also declare that the programming should include a significant contribution from the Canadian independent production sector. To ensure the fulfilment of these objectives, the Commission has encouraged the production of certain types of programs -- drama, long-form documentary, music/variety and award shows--generally through expenditure requirements. These are called programs of national interest (PNI).*

<sup>17</sup> *Broadcasting Act*, S.C. 1991, c. 11, s. 3(1)(d)(i).

<sup>18</sup> *Ibid.*, s. 3(1)(d)(ii).

- *Blood and Water*, a multilingual original drama produced by Breakthrough Entertainment in English, Mandarin, and Cantonese, about a Chinese-Canadian police detective investigating murder in the complicated family of a successful Vancouver real-estate developer.
  - *Becoming Canadian*, a documentary series produced by Antica Productions and Entertainment One, which shares the amazing and inspiring stories of some of the approximately 250,000 people who became Canadians in 2017.
38. Independent producers also produce programs that reflect cultural values for children and youth, such as:
- Numerous generations of *Degrassi*, from *The Kids of Degrassi Street* to *Degrassi Junior High*, *Degrassi High*, *Degrassi: The Next Generation*, and *Degrassi: Next Class*, produced by Epitome Pictures Inc., a DHX Media Company. The *Degrassi* franchise has explored important and relevant topics affecting young people, including teenage pregnancy, HIV/AIDS, mental health, drinking and driving, suicide, gun violence, and LGBTQ issues.
  - *MathXplosion*, produced by GAPC Entertainment in both English and French, features mathematician Eric teaching the magic of math through fun, illusion, and DIY techniques, all the while achieving curriculum goals.
  - *Emerald Code*, produced by Shaftesbury, a series about a 15-year-old girl who discovers web design and programming at summer camp and creates amazing things using science and technology.
  - *Annedroids*, produced by Sinking Ship Entertainment, is a live-action/CGI blended series that follows the story of budding scientist Anne who builds robots to help her perform experiments with her friends Nick and Shania and her android creations.
  - *Wild Kratts*, produced by 9 Story Media and Kratt Brothers Company, follows the amazing adventures of the Kratt brothers as they travel all across the globe to meet and learn about amazing animals and their habitats.
39. Finally, independent producers produce shows that reflect regional diversity, such as:
- *Letterkenny*, produced by New Metric Media, about a group of friends and their hijinks in small-town Ontario.
  - *Still Standing*, produced by Frantic Films, which follows comedian Jonny Harris as he explores small towns on the ropes, performs stand-up shows for the locals who've stuck it out, and proves that Canadians know how to laugh at themselves.
  - The various versions of *Anne of Green Gables*, each reflecting the coming of age of Anne, a Canadian cultural icon, and her life in Prince Edward Island, delighting generations of Canadians and audiences around the world. Its most recent iteration,



*Anne with an E*, produced by Northwood Entertainment, is a hit in Canada and one of Netflix's most-watched shows internationally.

- *Highway Thru Hell*, produced by Great Pacific Media (a Thunderbird Company), which follows heroes of Canada's highways as they fight to keep some of Alberta and BC's most-travelled and economically important highways open through intense winter weather challenges.
- *Dr. Keri: Prairie Vet*, produced by Merit Motion Pictures, a documentary series following cowgirl, dog wrangler, and travelling rural veterinarian Dr. Keri Hudson Reykdal as she travels with her mobile clinic to tend to animals big and small.
- *Heartland*, co-produced by Seven24 and Dynamo Films, one of Canada's longest-running TV dramas, which follows multiple generations of an Alberta ranch family.
- *Corner Gas*, produced by Vérité Films and 335 Productions, revolves around gas station owner Brent Leroy and the colourful characters of tiny Dog River, Saskatchewan. The iconic live-action sitcom and feature film is now an animated series.
- *19-2*, co-produced by Sphere Media Plus and Echo Media in English and French versions, award-winning dramatic series following the day-to-day life of two unwilling partners in the Montreal police department.

### **Our Broadcasting Policy that Requires Independence Also Drives Economic Objectives**

40. In addition to these cultural imperatives, the independent production sector is a key contributor to Canada's creative economy, creating more than \$3.3 billion in Canadian content production activity and 67,800 full-time equivalent jobs last year.<sup>19</sup> Individual independently produced programs also contribute significantly to jobs and economic output in regions across the country. For example:

- Production of three seasons of the television series *Frontier*,<sup>20</sup> produced by Take the Shot Productions, generated \$63.4 million in production expenditure, \$106 million in total economic output, \$82.1 million in GDP, and 888 full-time equivalent jobs in St. John's, Newfoundland and Labrador, Ontario, and other regions of Canada.
- Over eight seasons, production on the long-running hit television comedy series *Mr. D* generated \$126.5 million in economic activity and contributed \$93.9 million in GDP for Halifax, the province of Nova Scotia, and Ontario.<sup>21</sup> *Mr. D* is produced by

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<sup>19</sup> *Profile 2017*, p. 4.

<sup>20</sup> *Case Study – Economic Impacts of Frontier*, prepared by MNP LLP for the CMPA in December 2018. Available online: <https://cmpa.ca/wp-content/uploads/2018/12/MNP-2018-Economic-Impacts-of-Frontier-Report.pdf>.

<sup>21</sup> *Case Study – Economic Impacts of Mr. D*, prepared by MNP LLP for the CMPA in partnership with Screen Nova Scotia in November 2018. Available online: [https://cmpa.ca/wp-content/uploads/2018/11/CMPA\\_Economic-Impacts-of-Mr.D\\_Case-Study-Report.pdf](https://cmpa.ca/wp-content/uploads/2018/11/CMPA_Economic-Impacts-of-Mr.D_Case-Study-Report.pdf).



independent production companies Topsail Productions and Gerard ADHD Productions.

- Filmed and set on the Kahnawà:ke Mohawk Territory in Quebec, across the Saint Lawrence River from Montreal, the television series *Mohawk Girls* (produced by Rezolution Pictures International) contributed \$29.8 million in GDP and generated \$43.1 million in total economic output for the region over the course of its 33-episode run.<sup>22</sup> For each dollar of federal-government incentive received in a single season of the show, *Mohawk Girls* generated \$16.70 in local economic output. Production on the series generated 430 full-time equivalent production jobs and employed roughly 750 background performers. Many of these jobs were filled by individuals from the Kahnawà:ke Mohawk Territory and other surrounding communities. In addition, the study found that the show contracted more than 300 vendors from across the Greater Montreal Area and province of Quebec to help execute production.

41. These case studies represent a small sample of the significant economic impacts that independent productions have across our entire country.

***RECOMMENDATION 2: Uphold and give force to the declaration that Canadian programming includes a significant contribution from the independent production sector***

42. Canada must continue to build off our successes. In order to ensure that Canadian audiences continue to receive programming from different sources and voices, the broadcasting system must include a significant contribution from companies that are truly independent from the few broadcasters that remain. Canada must continue to build off our successes thus far. Requiring “a significant contribution from the independent production sector” in Canada’s Broadcasting Policy objectives thus helps to ensure that there is a diversity of voices and expression in our system, and, if applied properly, helps to balance out the inordinate buyer power of the Big 3 and the CBC.

**All of the Policy Reasons for Requiring a Significant Contribution from the Independent Production Sector Apply Equally to Foreign Services**

43. Requiring independence in our system becomes even more critical as viewers continue to move online and access their programming from foreign services. Canada fought hard to exempt the cultural industries in the recent renegotiation of NAFTA, now the Canada-United States-Mexico Agreement (CUSMA). As Prime Minister Trudeau said, “Waiving the exemption for cultural industries would be tantamount to giving up Canadian sovereignty and identity.”<sup>23</sup> The exemption preserves and supports Canada’s diverse cultural voices. It is key to the continued health of our creative industries. It guarantees that Canada can

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<sup>22</sup> Case Study – *Economic Impacts of Mohawk Girls*, prepared by MNP LLP for the CMPA in collaboration with the Quebec English-Language Production Council (QEPC) in November 2017. Available online: <https://cmpa.ca/wp-content/uploads/2018/04/MNP-2017-Economic-Impacts-of-Mohawk-Girls-Report-Nov-2017.pdf>.

<sup>23</sup> Maham Abedi, “Trudeau says no NAFTA without cultural exemption — is it really that important?” *Global News*. September 5, 2018. Available online: <https://globalnews.ca/news/4428229/nafta-cultural-exemption-canada/>.

adopt and implement cultural policy without undue interference from foreign interests. But we are in significant danger of a backdoor gutting of our cultural sovereignty in the film and television industry: if global online behemoths like Apple, Google, Netflix, and others are allowed to continue to broadcast in Canada without contributing to our cultural objectives, then our fight to maintain the cultural exemption will have been for naught.

44. While claims that online programming services have decimated Canada's broadcasters are certainly exaggerated, it is clear that these online services are increasingly substituting for traditional broadcasting. Our regulated broadcasting system is starting to erode due to the influx of new foreign online programming undertakings that increase the availability of non-Canadian programming to Canadians.<sup>24</sup>
45. In 2017, over half (54%) of all Canadians subscribed to at least one online programming service and over four-fifths of Canadian Anglophones reported watching some type of video on the internet.<sup>25</sup>
46. As of 2018, Netflix provides its internet-based subscription video on demand (SVOD) service in 190 unique countries and a total of 212 distinct territories around the world, putting it in a position to effectively acquire and exploit global rights to content on an unprecedented scale.<sup>26</sup> Netflix briefly became the world's most valuable media company in May 2018, when its market cap overtook Disney's at \$152.6 billion.<sup>27</sup>
47. The Commission estimates the Canadian revenues of online programming services in 2016 at almost \$2 billion. The largest portion of these Canadian revenues is derived from major US-based services such as Netflix (\$766 million), iTunes (\$268 million), YouTube (\$119 million), Facebook (\$66 million), and Microsoft (\$49 million).<sup>28</sup>
48. It is estimated that Netflix alone spends more on original content annually than global players Time Warner, Fox, NBCUniversal, and Disney combined.<sup>29</sup> It is reported that Netflix plans to spend as much as \$8 billion on original and licensed content in 2018, with most of that to be spent in the US and about \$1 billion earmarked to acquire original content in the EU.<sup>30</sup>

<sup>24</sup> Nordicity and Peter Miller, *Canadian Television 2020: Technological and Regulatory Impacts*, Prepared for ACTRA, Canadian Media Guild, Directors Guild of Canada, Friends of Canadian Broadcasting, Unifor. December 2015. Available online: <http://www.actra.ca/wp-content/uploads/Nordicity-Miller-Lets-Talk-TV-economic-impact-forecast.pdf>.

<sup>25</sup> Media Technology Monitor (MTM). "Top Five Media and Tech Trends according to the MTM". *MTM Update*. February 7, 2018.

<sup>26</sup> Yuani Fragata and Francis Gosselin, *Who Said Disruption Would Be Easy: the economic & strategic challenges of Netflix*. Montreal: FG8 Consulting Inc. February 2018. Available online: [http://www.xnquebec.co/pdf/NETFLIX\\_FG8\\_EN.pdf](http://www.xnquebec.co/pdf/NETFLIX_FG8_EN.pdf).

<sup>27</sup> Sophie Downes. "Netflix Bet That \$8 Billion and the Obamas Would Keep It on Top. So Far, That Bet Is Paying Off." *Inc.com*. December 3, 2018. Available online: <https://www.inc.com/sophie-downes/netflix-2018-company-of-the-year-nominee.html>.

<sup>28</sup> CRTC, *Communications Monitoring Report 2017* (2017 CMR), Table 4.2.6 Estimated revenues of top 5 TVOD services in Canada (\$ millions).

<sup>29</sup> Matthew Ball, "Netflix's Content Budget Is Bigger Than It Seems (Netflix Misunderstandings, Pt. 1)." *REDEF*. May 12, 2018. Available online: <https://redef.com/original/netflix-misunderstandings-pt-1-netflixs-content-budget-is-bigger-than-it-seems>.

<sup>30</sup> M. Garrahan. "Netflix plots \$1bn European investment drive." *Financial Times*. April 18, 2018. Available online: <https://www.ft.com/content/952029b0-4311-11e8-93cf-67ac3a6482fd>.

49. With significant reach and massive content budgets, online programming services are increasingly at the centre of global original content production.
50. According to a 2018 report by FG8, original programming will be key to the success and growth of online programming services. In an effort to keep costs low and exploit economies of scale and scope, global online programming services like Netflix employ “own and control” content-commissioning strategies, under which they retain global rights.<sup>31</sup> With US studio content and low-budget English-language “originals” from around the world at the centre of these content strategies, it will be hard for both Canadian content creators and broadcasting undertakings to compete with the large foreign players that are poised to maintain a stranglehold on the lion’s share of the online audience in Canada.
51. Domestic dramas and documentaries that reflect Canadian values, diversity, and culture are particularly vulnerable to the increasing shift of Canadian audiences to foreign online programming services as these types of services flood our market with expensive foreign dramatic and documentary programming. As such, there is a risk that this important Canadian content will be missing from our market if the Act does not continue to require a significant contribution from the independent production sector.
52. All of the reasons we identify for maintaining a significant contribution from the independent production sector in our domestic market applies equally to foreign online services, if not more so. We discuss in further detail our proposals for specific legislative amendments and proceedings to bring foreign online programming services into our regulatory tent at paragraphs 87–128.

## **THE COMMISSION MUST BE GIVEN THE EXPRESS POWER TO REGULATE OLIGOPSONISTIC BEHAVIOUR IN THE CANADIAN BROADCASTING SYSTEM**

53. To effectively regulate and supervise broadcasting in the public interest, the Commission must be able to counter the oligopsonistic nature of the Canadian programming market and balance the relative bargaining power of our large vertically integrated domestic broadcasting undertakings or large foreign online broadcasting undertakings, on the one hand, and independent producers or independent broadcasting undertakings, on the other.
54. In order to ensure our competition, cultural, and economic policy objectives are being met, the system must ensure that independence is meaningful. As noted by the Commission,

*The Canadian production sector plays an essential role in the ultimate success of the future television system. A robust Canadian production sector will be better able to offer compelling high-quality content to Canadians and to global audiences. The creation and promotion of*

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<sup>31</sup> Yuani Fragata and Francis Gosselin, *Who Said Disruption Would Be Easy: the economic & strategic challenges of Netflix*. Montreal: FG8 Consulting Inc. February 2018. Available online: [http://www.xnquebec.co/pdf/NETFLIX\\_FG8\\_EN.pdf](http://www.xnquebec.co/pdf/NETFLIX_FG8_EN.pdf).

*Canadian programs must be supported by appropriate funding models and tools.*<sup>32</sup>

55. To succeed internationally, Canada must first have a healthy and vibrant domestic market. Being able to build off of the success of a show, and reinvest those profits into the next one, will help ensure a vibrant domestic content-creation market. That requires well-capitalized production companies that are able to exploit and monetize their content in true partnerships with both domestic broadcasters and foreign online programming services. Canadian independent producers must retain meaningful ownership in their content and be able to exploit that content in Canada and abroad. Put simply, without the rights to exploit the intellectual property in a program, Canadians have nothing to export.
56. In our increasingly digital economy, a company's intellectual property can be its most valuable asset. IP is the currency of the digital economy. IP builds Canadian companies. As noted by the Government in its Intellectual Property Strategy, "IP means innovation. Canadian businesses, entrepreneurs, creators and innovators have fantastic ideas, do incredible research, and create amazing products and inventions. IP plays a critical role in exploiting the growth and innovation potential of businesses."<sup>33</sup>
57. Domestically, in order to maintain a "robust Canadian production sector" in which sustainable, better-capitalized production companies are able to grow, innovate and are "capable of monetizing the exploitation of their content over a longer period,"<sup>34</sup> producers must be able to meaningfully retain the intellectual property of the content they produce. Indeed, to be truly "independent" and not merely a service provider for domestic broadcasters or foreign online programming undertakings, a producer must meaningfully own and control both its production company and the content the company makes, and must be able to meaningfully share in the economic benefits of its efforts through the exploitation of the IP. Unfortunately, in many cases, producers are increasingly being forced to act like "production contractors operating in a service industry [...] unable [to exploit] their content and intellectual property" in their dealings with domestic broadcasters.<sup>35</sup>
58. In dealings with foreign services, producers report doing "super service" deals with foreign online programming services, where they are hired to produce an entire show from script to final delivery, yet do not own, control, or share in any exploitation rights in the IP.<sup>36</sup> While service production in our country is at an all-time high and helps employ Canadians,<sup>37</sup> the reality of that much service work in our domestic market is that all the value of the IP developed, created, and produced by Canadians—and often partially funded by government programs—is leaving the country. This reality has the potential to

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<sup>32</sup> Create Policy, Introduction Section A.

<sup>33</sup> Innovation, Science and Economic Development Canada, "Intellectual Property Strategy." ic.gc.ca. Available online: <https://www.ic.gc.ca/eic/site/108.nsf/eng/home#accordion-item-2>.

<sup>34</sup> Create Policy, para. 119.

<sup>35</sup> *Ibid.*

<sup>36</sup> Comments from members at the CMPA road show consultations from August–October 2018.

<sup>37</sup> In 2016/17, the total volume of foreign location and service production in Canada increased by 42.1% to \$3.76 billion. *Profile 2017*, page 77.

turn Canada's vibrant domestic independent production industry into a mere branch plant of the U.S.; one that is dictated by U.S. audience programming choices and that is overly dependent on the U.S. market and political environment.

59. Canadian broadcasters' and domestic and foreign online programming services' buyer power allows them to dictate transaction terms such as price, ownership of rights, and creative decisions. Specifically, because of their heft and relative negotiating power, domestic broadcasters and foreign online programming services are able to take the vast majority of the intellectual property rights and associated value without appropriate revenue share back to the producers.

### **The United Kingdom's Successful Industry Is, in Large Part, Due to the Regulator's Ability to Balance Out Bargaining Power**

60. The United Kingdom (UK) has a very healthy and successful independent production sector, due in large part to the implementation of Terms of Trade between the UK public service broadcasters and independent producers.<sup>38</sup>
61. A 2015 study from Olsberg SPI found that the UK's independent television production sector benefited enormously from the establishment of formal Codes of Practice that governed how each of that country's public service broadcasters could commission programs from independent producers.<sup>39</sup> (A copy of the Olsberg SPI study is attached hereto as Appendix B.)<sup>40</sup> These Codes of Practice led to negotiated Terms of Trade, under which independent producers were able to retain secondary and ancillary rights to IP for the first time, allowing them to exploit them globally.
62. Terms of Trade in the UK gave producers control over the secondary rights to their content, and the resulting ability to monetize that content in international markets.<sup>41</sup> With this regulatory intervention, "[t]he British government operated a strategic shift in favour of content producers and created a new intellectual property regime. This regime has enabled producers to keep hold of their rights and become asset-owning businesses."<sup>42</sup>
63. The sharing of rights with independent producers in the UK made these production companies more attractive to capital investment and led to increased market consolidation and significant growth. Ten years later, the UK sector doubled in revenues to CA\$5.67

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<sup>38</sup> Section 243(7) of the *Communications Act* (UK), 2003, c.21, (*UK Communications Act*) defines "public service broadcasters" as the BBC, the Welsh Authority, the providers of the licensed public service channels, and the public teletext provider. "Licensed public service channels" include those providing Channel 3 services, Channel 4, Channel 5, and S4C.

<sup>39</sup> Olsberg SPI, *Impact of the 2003 Communications Act on UK Indie Producers*. (Olsberg Study). Prepared for the CMPA. June 4, 2015.

<sup>40</sup> *Ibid.*

<sup>41</sup> Oliver & Ohlbaum, *The impact of Terms of Trade on the UK's television content production sector*. Prepared for the CMPA. December 2018.

<sup>42</sup> Jean K. Chalaby, "The rise of Britain's super-indies: Policy-making in the age of the global media market." *International Communication Gazette*, 72(8), December 9, 2010. pp. 675-693. Available online: <https://journals.sagepub.com/doi/10.1177/1748048510380800>.

billion a year.<sup>43</sup> A 2018 study commissioned by the CMPA from Oliver & Ohlbaum (a copy of which is attached hereto as Appendix C) indicates that, as a result of Terms of Trade, television-related revenues increased from £1.5 billion in 2004 to more than £2.6 billion in 2017. International UK television rights income grew at an average rate of 22% between 2004 and 2008, and continues to grow at 7% per year.<sup>44</sup>

64. Section 285 of the *UK Communications Act* requires every licensed public service channel to adhere to a Code of Practice that sets out the principles that will apply when agreeing to terms for the commissioning of independent productions. The British regulator, the Office of Communications (“Ofcom”), is responsible for ensuring that such codes are appropriate for the conditions of the broadcaster’s licence and that the broadcaster complies with the codes.<sup>45</sup>
65. While the question of *whether* to implement a Code of Practice like those imposed in the UK can be left to the regulator at a future time, it is critical that the Commission be given the power to impose one should it determine it is in the public interest to do so.

### **The Commission Recognizes the Imbalance of Bargaining Power in the Canadian Market**

66. The challenges associated with market concentration in the Canadian communications industry are not unique to independent producers. The Commission has already identified concerns around the increasing vertical integration of broadcasting undertakings and the resulting concentration of market power. Beginning in 2011, the Commission implemented a voluntary code<sup>46</sup> that contained measures intended to prevent vertical integration from occurring at the expense of a healthy wholesale market for the sale of program content, programming diversity, and consumer choice. In 2015, the Commission replaced that code with the comprehensive and binding *Wholesale Code*.
67. The *Wholesale Code*, *inter alia*, sets out terms that are not permitted in affiliation agreements between programming undertakings and BDUs, precludes commercially unreasonable practices, describes what the Commission considers to be commercially reasonable practices, mandates factors to be considered during negotiations to establish the fair market value of the wholesale rate for programming, and prevents vertically integrated entities from discriminating against independent programming services.<sup>47</sup> In establishing the *Wholesale Code*, the Commission explained that its purpose was

*to ensure that subscribers have greater choice and flexibility in the programming services they receive, that programming services are diverse, available and discoverable on multiple platforms, and that*

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<sup>43</sup> Olsberg Study, p.3.

<sup>44</sup> *Ibid.*, p. 8.

<sup>45</sup> *Ibid.*, p. 12.

<sup>46</sup> Broadcasting Regulatory Policy CRTC 2011-601, *Code of conduct for commercial arrangements and interactions*.

<sup>47</sup> Bell Canada and Bell Media Inc. and 7262591 Canada Ltd. (D.B.A. Gusto TV), [2018] FCA 174, (the Wholesale Code Decision).

*negotiations between programming services and BDUs are conducted in a fair manner.*<sup>48</sup>

68. Bell Media recently challenged the Commission's powers to impose such a code, claiming that the Act provides "no legislative basis for intruding into 'the economic terms of the carriage relationship' between BDUs and programming undertakings." In a 2:1 decision released on October 1, 2018, the Federal Court of Appeal held that it is not reasonable to interpret paragraph 9(1)(h) as granting the Commission a general power to regulate the terms and conditions of affiliation agreements.<sup>49</sup> As such, the Commission does not have the power under paragraph 9(1)(h) to regulate commercial arrangements between BDUs and programming undertakings.
69. In addition, the 2012 SCC Fee for Carriage reference considered whether the Commission had the jurisdiction to implement a proposed "value for signal regime," which sought to regulate the economic relationships between broadcasters and BDUs. The majority of the Supreme Court of Canada found that the Commission's general power to make regulations under subparagraph 10(1)(k) and its broad licensing power under subparagraph 9(1)(b)(i) of the Act were insufficient to constitute a jurisdiction-granting power to control the direct economic relationship between BDUs and broadcasters.<sup>50</sup> In addition, the majority held that the policy statements under section 3 were also not jurisdiction-conferring provisions.<sup>51</sup>
70. While the Commission's jurisdiction to govern commercial arrangements may be found elsewhere in the Act, given the recent case law, it is important that this power be expressly recognized in the legislation.

***RECOMMENDATION 3: Give the Commission the express power to govern commercial arrangements between large vertically integrated domestic broadcasting undertakings and large foreign online broadcasting undertakings, on the one hand, and independent producers and independent broadcasting undertakings, on the other***

71. For all these reasons, the CMPA submits that the Commission must be given the express power to govern fairness in commercial arrangements and otherwise impose Codes of Practice to govern commercial arrangements. Such a power could read as follows:

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

*(i) require any broadcasting undertaking entering into commercial arrangements with independent producers or independent broadcasting undertakings to comply with any such terms, conditions, and codes of practice as the Commission deems appropriate,...*

<sup>48</sup> Broadcasting Regulatory Policy CRTC 2015-428, *Let's Talk TV, A World of Choice - A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market* (the Choice Policy).

<sup>49</sup> Wholesale Code Decision, paras. 167-169.

<sup>50</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, para. 27.

<sup>51</sup> *Ibid.*, para. 22.



72. As explained more fully below, similar powers should be afforded to the Commission under its regulatory authority. Such express powers could be added as a subsection to section 10(1) and read as follows:

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

*(k) requiring broadcasting undertakings entering into commercial arrangements with independent producers or independent broadcasting undertakings to comply with any such terms, conditions, and codes of practice as the Commission deems appropriate,...*

### **CANADA'S BROADCASTING SYSTEM IS SHOWING SIGNS OF STRESS DUE TO THE ONLINE DISTRIBUTION OF PROGRAMMING**

73. The distribution of programming by online programming services, ISPs, and WSPs, is starting to have a negative impact on the Canadian broadcasting system. The BDU sector is showing declining revenues as well as declining contributions to Canadian programming production funds. Online and traditional broadcasting undertakings do not currently compete on an equal playing field, because online players have no regulatory requirements, while traditional broadcasting undertakings make significant contributions to the creation and presentation of Canadian programming. As Canadians shift in greater numbers to online content instead of television programming delivered by broadcasters and BDUs, there is a real and significant risk that our broadcasting policy objectives will no longer be achievable.
74. The television broadcasting sector is now in a period of decline.
75. For the third consecutive year, BDUs have recorded a negative growth rate. Overall revenues dropped by 2.3% (or \$202 million), from \$8,740 million in 2016 to \$8,538 million in 2017. The total number of subscribers decreased by 1.9% in 2017, similar to the decrease of 2.2% reported in 2016. In 2017, BDUs contributed \$17 million less to the production of Canadian programming than the previous year.<sup>52</sup>
76. Private conventional television stations' revenues are also continuing their downward trend; their revenues are declining faster than any other industry in the broadcasting sector. Total revenues declined by 4.1% (or \$70 million) during the last broadcast year, from \$1,678 million in 2016 to \$1,608 million in 2017. This is the sixth consecutive year that conventional television services have reported revenue declines. Canadian programming expenditures (CPE) declined for the second consecutive year, with a decrease of 2.4%. Private conventional television stations reported \$618 million in CPE this year, compared to \$634 million in 2016.<sup>53</sup>

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<sup>52</sup> CRTC, *2017 Broadcasting Financial Summaries Highlights*, Television Service Providers (Broadcasting Distribution Undertakings). Available online: <https://crtc.gc.ca/eng/publications/reports/branalysis/fin2017.htm>.

<sup>53</sup> *Ibid.*, Commercial stations.



77. Finally, discretionary and domestic video on-demand (VOD) services are now also reporting slight declines both in terms of revenues and expenses in 2017. Expenditures on Canadian programming are now flat for these services as well.<sup>54</sup>
78. In stark contrast, the revenues associated with the broadcasting and telecommunications sectors participating in the distribution of programming online are growing at an extraordinary rate. Estimated revenues for online programming services in Canada reached almost \$2 billion in 2016, an increase of 17.8% from 2015.<sup>55</sup> SVOD services available in Canada (including Netflix, Crave, and Club illico) accounted for half of this revenue, which saw a nearly fivefold increase from 2012.<sup>56</sup> Likewise, the revenues generated by the internet and wireless sectors in 2017 grew by 7% (to reach \$11.5 billion) and by 5.4% (to reach \$25.8 billion) since the previous year.<sup>57</sup> These increases reflect the observed trends in subscriptions to higher internet speeds and to mobile plans with more data—both of which are being driven by the increase in online video consumption.
79. As highlighted in the Department of Canadian Heritage’s report *Creative Canada Policy Framework (Creative Canada)* and the Commission’s report *Harnessing Change: The Future of Programming Distribution in Canada (Harnessing Change)*, the downward trends in the BDU and broadcaster sectors are expected to continue as Canadians increasingly turn to internet and wireless service providers to watch content from online programming services like Netflix, Crave, Sportsnet NOW, and Amazon Prime Video. As point out in *Harnessing Change*, the “true driving force behind the rise of broadband Internet in this country is demand for real-time entertainment, and particularly video, which accounts for two-thirds of the capacity of fixed networks and one-third of the capacity of mobile networks.”<sup>58</sup>
80. As Canadians increasingly cut the cord, the broadcasting system will be less able to support and fund the creation of Canadian programming. This is especially true for particular types of programming like local news, dramas, documentaries, kids’ programs, accessible programming for persons with disabilities, content by and for Indigenous peoples, and third-language content.<sup>59</sup> In *Harnessing Change*, the Commission points out that “while there are stresses on the [video market] and the current broadcasting system, as well as immediate threats to certain sectors, there is little likelihood of imminent collapse.” However, in order to achieve “a vibrant domestic market in the future, it will be necessary to do more than prevent or postpone such a collapse.”<sup>60</sup>

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<sup>54</sup> *Ibid.*, Discretionary and On-Demand.

<sup>55</sup> 2017 CMR, Table 4.2.5 Estimated revenues of Internet-based video services in Canada by type of service (\$ millions).

<sup>56</sup> 2017 CMR, Table 4.2.5 Estimated revenues of Internet-based video services in Canada by type of service (\$ millions).

<sup>57</sup> 2018 CMR, Telecommunications Overview, infographic 4.1. Available online:

<https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2018/cmr2018-telecom.pdf>.

<sup>58</sup> CRTC, *Harnessing Change*, Market Insight 3. Broadband Internet usage erupting, pushed by demand for real-time video entertainment. Available online: <https://crtc.gc.ca/eng/publications/s15/mar1.htm#m3>.

<sup>59</sup> *Ibid.*, Market Insight 20. Public policy is sustaining a level of domestic production the market would not naturally bear. Available online: <https://crtc.gc.ca/eng/publications/s15/mar5.htm#m20>.

<sup>60</sup> *Ibid.*, Opportunities and Risks. Available online: <https://crtc.gc.ca/eng/publications/s15/eval.htm>.

## THOSE WHO BENEFIT MUST CONTRIBUTE

81. Canada's Broadcasting Policy requires that those who benefit from the Canadian broadcasting system must contribute by supporting the creation and presentation of Canadian programming. This principle is enshrined as the declaration that "each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming."<sup>61</sup> Canada has successfully adapted this principle in the past to keep up with changes in programming distribution technology and consumer behaviour,<sup>62</sup> and with the disruption to the broadcasting framework caused by the online distribution of programming it must be updated again now.

***RECOMMENDATION 4: Uphold and give force to the policy declaration that each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming***

82. We can no longer afford to ignore today's reality that all broadcasting undertakings (whether they are BDUs, broadcasters, or online programming services—both domestic and foreign) and ISPs and WSPs are engaged in broadcasting activities. They are all elements of the Canadian broadcasting system, and they must therefore each contribute to the creation and presentation of Canadian programming.
83. The Commission addressed this issue in *Harnessing Change* when it proposed that future legislative and regulatory approaches to content and distribution must "[r]ecognize 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."<sup>63</sup> Those social and cultural responsibilities have long meant contributing to the creation and presentation of Canadian programming—and they must continue to do so if Canada's vibrant domestic market, cultural sovereignty, and national identity remain important.
84. The Commission also confirms that it is the contribution framework for Canadian programming embedded in our regulatory framework that is sustaining a level of production in the Canadian market that it would not otherwise bear in a free market. Virtually all genres of Canadian programming benefit from regulatory support, without which various categories of Canadian programming would simply not be sustainable. Canadian dramas, documentaries, and children's programming would also be particularly hard hit in the absence of regulatory support.<sup>64</sup>

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<sup>61</sup> *Broadcasting Act*, section 3(1)(e).

<sup>62</sup> For example, the Structural Public Hearings for cable providers and the advent of satellite technology in Canada.

<sup>63</sup> CRTC, *Harnessing Change*, ii. 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. Available online: <https://crtc.gc.ca/eng/publications/s15/pol1.htm#pr2>.

<sup>64</sup> *Ibid.*, Market Insight 20. Public policy is sustaining a level of domestic production the market would not naturally bear. Available online: <https://crtc.gc.ca/eng/publications/s15/mar5.htm#m20>.

85. The CMPA agrees with the Commission that the future legislative and regulatory approach to content and its distribution should i) focus on production and promotion; ii) all players should participate; and, iii) be nimble, innovative and rapidly adapt to change.<sup>65</sup>
86. The impact of online services on our broadcasting system has been debated for almost 20 years. It is now time to modernize the contribution framework for Canadian programming. In determining the new contribution framework, it should be equitable, readily adaptable to future programming distribution technologies, platform agnostic, appropriate to business models, easy to implement and navigate, effectively deliver a stable level of financial support to Canadian programming, and should not materially result in increased costs for Canadian consumers.

## **ALL PROGRAMMING UNDERTAKINGS—INCLUDING ONLINE AND FOREIGN—MUST CONTRIBUTE TO THE CREATION AND PRESENTATION OF CANADIAN PROGRAMMING**

### **The Act Covers Online and Foreign Programming Undertakings in Its Definitions**

87. The Act clearly states that the Commission has the jurisdiction to regulate “programming undertakings”<sup>66</sup> whether they are local television stations delivered over-the-air, discretionary services delivered over cable or satellite, or on-demand programming services delivered over the internet or through mobile networks. No matter the means of delivery, “programming undertakings” that deliver “programs”<sup>67</sup> to Canadians are within the Commission’s jurisdiction to regulate and supervise.<sup>68</sup>
88. While it is clear that the Commission may regulate programming undertakings, the Commission has thus far exempted services that deliver programs over the internet or through mobile networks from licensing or regulatory requirements other than data collection.<sup>69</sup>

<sup>65</sup> *Ibid.*, Conclusions. Available online: <https://crtc.gc.ca/eng/publications/s15/pol.htm>.

<sup>66</sup> Pursuant to section 2 of the *Broadcasting Act*, “programming undertaking means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus.”

<sup>67</sup> *Ibid.*, “program means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.”

<sup>68</sup> Courts have repeatedly held that Canadian jurisdiction applies to broadcasting operations outside the country where they are targeting Canadians, whether they are foreign radio stations beaming signals into Canada (*Jenner v. Sun Oil*, [1952] 2 D.L.R. 526; *CAPAC v. International Good Music*, [1963] S.C.R. 136.), cable systems with their head ends outside Canada (*R. v. Continental Cablevision*, (1974), 5 O.R. (2d) 523; *R. v. Maahs and Teleprompter Cable Communications Corp.*, (1975) 21 C.C.C. (2d) 497.), or foreign DBS operators sending signals to Canadians without CRTC or copyright authorization (*WIC Premium Television Ltd. v. General Instrument Corp.*, (2000) 243 A.R. 329).

<sup>69</sup> Clause 4 of the DMEQ requires the following from digital media undertakings: *The undertaking submits such information regarding the undertaking’s activities in broadcasting in digital media, and such other information that is required by the Commission in order to monitor the development of broadcasting in digital media, at such time and in such form, as requested by the Commission from time to time.*

## **The Commission Is Constrained by the Policy Direction that Prohibits Non-Canadians from Holding Broadcasting Licences**

89. The Commission may be reluctant to regulate online and foreign services because (a) it is currently unable to grant a broadcasting licence to non-Canadians, and (b) its existing enforcement powers outside of licensing are inefficient or ineffective.<sup>70</sup>
90. The Terms of Reference state that the Government will not consider lessening foreign ownership of broadcasters because it would undermine Canadian ownership and control over our broadcasting system. In addition, the *Direction to the CRTC (Ineligibility of Non-Canadians)* (the Policy Direction) prevents the Commission from granting non-Canadians broadcasting licences.
91. The constraints imposed by the Policy Direction may have been a factor in leading the Commission to propose its “binding service agreement” approach in *Harnessing Change*.<sup>71</sup> The CMPA’s main concerns with the Commission’s proposal of binding service agreements is that they validate the notion that contributing to Canada’s broadcasting policy objectives is, first, voluntary when the Commission arguably has no leverage to motivate foreign online services to act; and second, a negotiation rather than a decision made after due consideration and process.
92. The lack of transparency around how a deal might be struck is also a serious concern.<sup>72</sup> Transparency is not just a preference, but is required in order to demonstrate that these agreements serve the public good, and that a fair consultation process was followed in the public interest.
93. If the Government is open to allowing the Commission to license online foreign broadcasting undertakings, then the Policy Direction would need to be amended to carve out online foreign broadcasting undertakings. This approach would preserve the Canadian ownership and control of traditional or non-online broadcasting undertakings and could be implemented almost immediately. Once the Policy Direction is amended, the Commission could launch a proceeding to review the Digital Media and Video On-Demand Exemption Orders to determine appropriate contributions for online broadcasting undertakings to the creation and presentation of Canadian programming.
94. The challenge, of course, with allowing the Commission to license online foreign broadcasting undertakings is that it could undermine the broadcasting policy objective that our system “shall be effectively owned and controlled by Canadians.” As noted earlier, the CMPA fully supports that the broadcasting system be owned and controlled by Canadians.

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<sup>70</sup> What should not be a barrier to regulating online services is fear of a legal challenge. Indeed, the Commission should expect foreign or domestic online players to appeal any substantive exercise of its jurisdiction, but act regardless.

<sup>71</sup> CRTC, *Harnessing Change*, Replace prescriptive licensing with comprehensive and binding service agreements that include traditional and new players. Available online: <https://crtc.gc.ca/eng/publications/s15/pol1.htm#p1>.

<sup>72</sup> Daniel LeBlanc, “Netflix in campaign to ‘set record straight’ on \$500-million pledge for Canadian productions.” *The Globe and Mail*. October 10, 2017. Available online: <https://www.theglobeandmail.com/news/politics/netflix-launches-pr-campaign-to-set-record-straight-on-500-million-pledge/article36528636/>.

95. While the Policy Direction remains in place, we must consider how to effect contribution by foreign online services outside of the Act's licensing regime. Any of the contribution mechanisms proposed in this submission could be accomplished either through regulation or exemption order. Given the Government's existing Policy Direction and its statements in the Terms of Reference with respect to foreign ownership of broadcasters, we have limited our specific proposals below to regulation-based, as opposed to licensing, solutions. Indeed, as we move forward, regulation-based solutions may be a more desirable approach to impose appropriate contributions for online programming undertakings.

### **The Act Is Based on a Presumption of Licensing**

96. Licensing is the default regulatory scheme under the Act. All broadcasting is prohibited, unless it is expressly permitted through a licence or is exempted from a licence.<sup>73</sup> This presumption of licensing—i.e., need for permission—offends some internet advocates, who claim that requiring a *licence* (i.e., first seeking permission) from the Commission to operate an online programming service is no longer appropriate as we shift from a closed system to an open one.
97. Unlike our traditional broadcasting system, there are very low barriers to entry in operating a programming undertaking online. Given the ubiquitous nature of the internet, a new entrant can simply launch a website and it will be immediately accessible to people around the world. A prospective entrant does not need to bargain for a public good like spectrum, and thus, there is no practical *quid pro quo* for a licence. Simply put, we are no longer operating in a closed system where we can, or arguably should, choose who can be part of the market.
98. As online broadcasting becomes the dominant medium, it may be increasingly difficult to maintain the Act's presumption of licensing. In fact, the underlying presumption of licensing may be prejudicial to attracting new entrants to the market. It takes a long time to obtain a licence, creating significant market uncertainty, which may have the undesirable effect of dissuading competition and slowing innovation in our market. As noted by the Commission in its first iteration of the *Digital Media Exemption Order* (DMEO), such regulatory uncertainty "may stifle the growth of new media markets and thereby limit the access of Canadians to such services."<sup>74</sup> Ultimately, as we look to the future, the system's presumption of licensing may need to be flipped on its head.
99. None of these arguments, however, supports the notion that we should just throw up our hands and treat online broadcasting as the Wild West. As described throughout our submission, there are strong public-policy reasons why online programming services must contribute to the creation and presentation of Canadian programming.

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<sup>73</sup> *Broadcasting Act*, section 32(1).

<sup>74</sup> Public Notice CRTC 1999-197, *Exemption order for new media broadcasting undertakings*, para. 7.

100. Historically, the Commission has exercised its regulatory authority by granting exemptions from licensing. While these exemption orders likely remain appropriate for the near future, requiring an exemption from licensing suffers from the same shortcomings as requiring a programming service to obtain a licence prior to entering a market. Indeed, they are two sides of the same coin: exemption first presumes that permission is required to operate; it takes time to seek such an exemption; and ultimately, requiring an exemption from licensing prior to operating can have the effect of slowing innovation and competition in the market.

***RECOMMENDATION 5: Reduce barriers to entry by shifting broadcasting regulation for online programming services to a regulation-based regime instead of licensing***

101. Instead, known, transparent, and appropriately tailored regulations favour innovation and entry into Canada that do not first require permission from the regulatory authority. Under a regulation-based regime, the Commission would still set the rules via regulation, but one need not seek permission or exemption from the Commission before operating. All a new entrant need do is abide by the regulations. Indeed, the Commission has been moving toward this approach by, for example, allowing discretionary services to launch and operate under lighter regulatory requirements without first seeking permission for a broadcasting licence.<sup>75</sup> As compared to the existing licensing regime, this proposal constitutes a lighter-touch regulatory scheme, reduces barriers to entry, and encourages competition.

**Amend the Act to give the Commission appropriate and effective regulation-based tools to regulate and supervise broadcasting in an online world**

102. The CMPA submits that the Act must be amended to ensure that the Commission has the appropriate tools to effectively regulate all broadcasting undertakings, including online programming undertakings. These tools include the ability to require various forms of contribution to the creation and presentation of Canadian programming. Granting the Commission the powers listed below will provide the opportunity for the Commission to regulate nimbly and flexibly in response to major changes in the broadcasting environment.
103. Regulators around the world are moving forward with required contributions to local programming from online services. For instance, the EU intends to impose a 30% requirement for EU content on the libraries of foreign online programming services, promotional requirements for EU content, and the ability to institute further levies by territory, such as France and Germany, which intend to impose 2.5% and 2% programming expenditure levies.<sup>76</sup>

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<sup>75</sup> Broadcasting Order CRTC 2015-88, *Exemption order respecting discretionary television programming undertakings serving fewer than 200,000 subscribers*.

<sup>76</sup> Stewart Clarke and Elsa Keslassy, "Netflix, Amazon Face New Parameters and Challenges in Europe." *Variety*. December 6, 2018. Available online: <https://variety.com/2018/tv/news/netflix-amazon-europe-quota-tax-1203081373/>.



104. The Commission can later determine when and how it will use the following enforcement tools, but this legislative review must empower the Commission to effectively and efficiently regulate all broadcasting undertakings and ensure that those who benefit from our system also contribute to it.

***RECOMMENDATION 6(a): Give the Commission the power to impose administrative monetary penalties on broadcasting undertakings***

105. In order to regulate effectively outside of the licensing regime, the Commission requires the ability to impose administrative monetary penalties (AMPs) on all broadcasting undertakings, including online and foreign players. While the Commission may now impose summary convictions or fines as criminal offences,<sup>77</sup> AMPs offer much more administratively efficient remedies. The Commission itself has indicated that this power is now prudent in the current broadcasting environment:

*The Broadcasting Act, as it's currently written, does not allow the CRTC to impose administrative monetary penalties when broadcasters do not respect their obligations. We can revoke a broadcaster's licence for non-compliance, or require them to appear before us. However, these processes take time and cost taxpayers money. [...] Administrative monetary penalties would be an easy-to-implement tool that could address non-compliance more quickly and efficiently. Given our experience in enforcing the telemarketing rules over the past decade, we can confidently state that such penalties are a real deterrent to non-compliance when used with other enforcement methods.<sup>78</sup>*

106. While the Commission already indirectly requires payments by broadcasting undertakings in the licensing regime through conditions of licence for Canadian programming and other expenditures, AMPs will allow the Commission to more effectively regulate broadcasting entities outside of the licensing process. As discussed above, this power is especially critical when regulating domestic and foreign online broadcasting undertakings.
107. The Commission already possesses this power with respect to ISPs and WSPs in the *Telecommunications Act* and for telemarketing and spam.<sup>79</sup> The time is right to synthesize the Commission's regulatory powers between the two acts.

***RECOMMENDATION 6(b): Give the Commission the explicit power to order broadcasting undertakings to direct expenditures to production funds***

108. The CMPA submits that the Act should be amended to introduce an explicit power for the Commission to order broadcasting undertakings to pay into Canadian programming

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<sup>77</sup> *Broadcasting Act*, sections 32, 33.

<sup>78</sup> "Ian Scott to the annual conference of the Canadian Chapter of the International Institute of Communications." Speech, Ottawa, ON, November 1, 2018. Available online: <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>.

<sup>79</sup> For instance, section 72.001 of the *Telecommunications Act*.

production funds. While the Commission already possesses general powers to require support for Canadian programming through conditions of licence—for example, the Commission currently requires BDUs and VOD services to contribute to the CMF and certified independent production funds (CIPFs)—introducing an explicit power for all types of broadcasting undertakings would confirm the Commission’s ability to require the creation of Canadian programming, and explicitly recognize this power in a regulation-based regime.

109. As well, the Commission could then direct any AMPs to be paid to various funds, including the CMF, CIPFs, Broadcasting Accessibility Fund, and others.
110. For suggested language for this power related to Canadian programming production funds, please refer to the section of this submission following “Recommendation 8: Give the Commission the explicit power to order ISPs and WSPs to contribute to broadcasting policy objectives and, specifically, to direct expenditures to production funds.”

***RECOMMENDATION 6(c): Give the Commission all of the same powers in a regulation-based regime that it currently has under its licensing regime***

111. In order to ensure that the Commission possesses all the same powers under a regulation-based regime that it currently holds under licensing, we propose the following amendment to mirror the language in section 9(1)(b):

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

*(i) as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1);*

112. This change will ensure that the Commission may require broadcasting undertakings to make expenditures on Canadian programming, PNI, independent productions, and impose any other requirement on regulated undertakings similar to current conditions of licence.

***RECOMMENDATION 6(d): Confirm the Commission’s data-gathering powers***

113. The CMPA submits that the Commission’s data gathering powers must be confirmed by introducing explicit information-gathering or subpoena power into the Act.
114. The Commission’s ability to enforce requirements on online foreign programming undertakings was brought to the fore at the Let’s Talk TV policy hearings. Netflix refused to provide data and in response the Commission chose to strike Netflix’s appearance from the public record, instead of pressing forward with any data collection under the authority of clause 4 of the DMEO.<sup>80</sup> The Commission again requested data from online foreign programming undertakings, including Google, Netflix, in the broadcasting consultation that

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<sup>80</sup> Broadcasting Commission Letter Addressed to Corie Wright (Netflix), dated September 29, 2014. Available online: <https://crtc.gc.ca/eng/archive/2014/lb140929.htm>.



resulted in *Harnessing Change*.<sup>81</sup> This time, the Commission took the unprecedented step of declaring that any response to this data request would be granted full confidentiality. As a result, the public has no idea whether any of these undertakings provided information to the Commission at all.

115. Effective regulation requires good data. Financial, subscriber, expenditure, and presentation-related data relating to various types of programming is invaluable in regulating and supervising the system.
116. Similar to section 37 of the *Telecommunications Act*, the Commission should have the explicit power to collect information from any relevant source necessary for the administration of the *Broadcasting Act*.
117. As a proposed amendment, an explicit information-gathering or subpoena power could specify that, “the Commission can require any person, whether a broadcasting undertaking or not, to provide any information relevant to a Commission inquiry under the Act.”

***RECOMMENDATION 6(e): Expand the concept of “exhibition” in section 10 of the Act to allow for more effective contributions by broadcasting undertakings to the presentation of Canadian programming***

118. Finally, the CMPA submits that section 10(1)(a) of the Act must be expanded to include the concept of exhibition in relation to online programming undertakings. The current exhibition requirements only address the proportion of time that shall be devoted to Canadian programming. While linear schedules make sense for the appointment viewing offered by local television stations and discretionary services, they simply do not exist in an on-demand world. Accordingly, this section must be expanded to incorporate the concepts of shelf space, discoverability, priority, prominence, and promotion—in other words, any manner of “exhibition” related to Canadian programming:

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

*(a) respecting the proportion of time or programming inventory that shall be devoted to the broadcasting or availability of Canadian programs or otherwise require that priority be given to the promotion or presentation of Canadian programs;*

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<sup>81</sup> For an example of the letter requests to various domestic and foreign broadcasting undertakings, please see Broadcasting Procedural Letter Addressed to Corie Wright (Netflix), dated February 2, 2018. Available online: <https://crtc.gc.ca/eng/archive/2018/lb180202m.htm>.

## The Time to Act Is Now

119. It has been reported that this legislative review could take as long as seven years.<sup>82</sup> That timeline may be optimistic, given the impending election this year and the protracted process that typically characterizes legislative reform. In addition, if and when legislation is finally amended, we would expect the Commission to launch policy proceedings to review the exemption orders, impose licences, and/or set regulations to determine appropriate contributions to the creation and presentation of Canadian programming. This step would add at least an additional year to the process. We can also reasonably expect appeals of the Commission's decisions, which may add another year or two to the process. So, at best, this entire process will take us until 2027 or 2028 before required contributions start flowing from online programming undertakings operating in Canada.
120. In recognition of diminishing cable and satellite subscription revenues in *Creative Canada*,<sup>83</sup> the Government pledged an increase to its federal contribution in order to maintain the level of funding in the CMF, starting in 2018. Specifically, the Government committed \$172 million over five years, starting with \$15 million in 2018–19, \$29 million in 2019–20, and \$42.5 million for the following three years.<sup>84</sup> This top-up provides a stopgap measure for the CMF until 2022. The \$500 million Netflix deal under the *Investment Canada Act* announced as part of *Creative Canada* also expires in 2022.
121. Both of these measures were put in place as interim measures to help stem the growing deficits of the Canadian broadcasting system due to the digital shift. While they are very welcome, useful stopgaps for the immediate future, there is little possibility that a full review, complete legislative reform of the Acts, and regulatory proceedings applying the new laws will be achieved before these interim measures terminate. If concrete steps are not taken before they expire, the Government may need to again buttress the losses, or the industry will surely contract.
122. The Government and the Commission can and must take decisive action today that will help to future-proof our system—at least as far as online programming undertakings go.
123. This issue of whether “digital media services” constitute broadcasting and whether they ought to contribute to Canada's broadcasting policy has been debated and discussed for almost twenty years now.<sup>85</sup> Today, there is little doubt that both domestic and foreign online platforms “are part of the Canadian marketplace and compete with traditional

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<sup>82</sup> Douglas Barrett, “ANALYSIS: Why we're still seven years away from new Acts,” *Cartt*, September 20, 2018. Available online: <https://cartt.ca/article/analysis-why-were-still-seven-years-away-new-acts>.

<sup>83</sup> Department of Canadian Heritage, *Creative Canada Policy Framework*, 1.2 Invest in television and digital media content. Available online: <https://www.canada.ca/en/canadian-heritage/campaigns/creative-canada/framework.html#a52>.

<sup>84</sup> Canada Media Fund, “CMF thanks Government of Canada for new funding contribution.” News release. February 28, 2018. Available online: <https://www.cmf-fmc.ca/en-ca/news-events/news/february-2018/cmf-thanks-government-of-canada-for-new-funding-co>.

<sup>85</sup> Public Notice CRTC 1999-84.

broadcasters for subscribers, audiences and revenues.”<sup>86</sup> As noted in the press release launching this legislative review,

*The Broadcasting Act has always been one of the most important tools we have to protect and promote our culture and our diversity. This review will help us fulfill our commitments in Creative Canada to invest in our artists and artisans, promote Canadian content at home and globally, and strengthen our national public broadcaster. The principle guiding this review is clear: if you profit, you contribute—there is no free ride.*<sup>87</sup>

124. As such, the vast majority of stakeholders, the Commission, and the Government ought to be supportive of mechanisms that will more quickly address the issue of requiring contribution by domestic and foreign online programming services. The time to act is now.

***RECOMMENDATION 7: Immediately launch and fast-track a review of the Commission’s enforcement tools and jurisdiction over domestic and foreign online broadcasting undertakings***

125. We submit that the question of the Commission’s regulatory enforcement powers and jurisdiction over domestic and foreign online services ought to be put on a separate “fast track,” apart from the full legislative review process, so that contributions can start flowing—as appropriate—before the stopgap measures expire.
126. There is recent precedent for this: heading into a statutorily mandated five-year review of the *Copyright Act*, in August 2017, the Departments of Canadian Heritage and Innovation, Science, and Economic Development Canada (ISED) launched a fast-track review of the Copyright Board. At the time, the Honourable Navdeep Bains stated, “A modern Copyright Board will better support both creators and users of copyrighted content by providing them with an efficient, transparent, stable and predictable regulatory environment.” The (then) Vice-Chairman of the Copyright Board Claude Majeau stated, “The Board looks forward to input from all stakeholders, including copyright owners, creators, users, and consumers on the Board’s role in preserving the public interest by regulating efficiently and fairly the process of establishing copyright royalties in a modern and innovative economy.”<sup>88</sup>
127. At the end of October, the Government tabled Bill C-86 (its omnibus budget bill), which includes proposed reforms to the Copyright Board. The Bill received Royal Assent on December 3, 2018.
128. There are direct parallels between the reasons for the fast-tracked review of the Copyright Board and the need for immediate regulatory reform and action by the Commission.

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<sup>86</sup> Innovation, Science and Economic Development Canada. “Terms of Reference.” p. 10.

<sup>87</sup> Department of Canadian Heritage, “Government of Canada launches review of Telecommunications and Broadcasting Acts.” News release. June 5, 2018. Available online: <https://www.canada.ca/en/canadian-heritage/news/2018/06/government-of-canada-launches-review-of-telecommunications-and-broadcasting-acts.html>.

<sup>88</sup> Innovation, Science and Economic Development Canada, “Consultations launched on reforming Copyright Board of Canada.” News release. August 9, 2017. Available online: [https://www.canada.ca/en/innovation-science-economic-development/news/2017/08/consultations\\_launchedonreformingcopyrightboardofcanada.html](https://www.canada.ca/en/innovation-science-economic-development/news/2017/08/consultations_launchedonreformingcopyrightboardofcanada.html).

Ensuring the Commission today has the tools it needs to regulate efficiently and fairly in the digital environment is imperative, and must be an immediate priority of this review.

**ALL THOSE WHO DISTRIBUTE PROGRAMMING UNDERTAKINGS TO CANADIANS MUST CONTRIBUTE TO THE CREATION AND PRESENTATION OF CANADIAN PROGRAMMING, INCLUDING INTERNET AND WIRELESS SERVICE PROVIDERS**

129. The broadcasting distribution side of Canada's contribution framework currently only requires contribution from cable, satellite, and IPTV television service providers (i.e., BDUs). In other words, the revenues generated by the distribution of programming undertakings by BDUs result in financial contributions to Canadian production programming funds and local expression, but the online distribution of programming undertakings by ISPs or WSPs does not. This is an unsustainable model.
130. As detailed above, it is clear that Canadians are increasingly cutting the cord and shifting to the online distribution of programming. Declining broadcaster and BDU revenues lead to declining expenditures on Canadian content as well as BDU contributions to programming production funds and local expression. As noted in the independent study commissioned by the CMPA *Modelling a new broadcasting distribution system financial contribution framework for Canadian audiovisual content* from PricewaterhouseCoopers (the "PwC Study"), a copy of which is attached hereto as Appendix D,

*The current trajectories of each of the segments involved in the distribution of media content are not uniform. BDUs, the sole contributors under the existing contribution framework, are currently, and are expected to continue, experiencing declining revenues. In contrast, the Internet and wireless segments of the broadcasting sector, which are on a growth trajectory, are not required to contribute under the existing framework. This misalignment in revenue trajectory and contribution requirements of these three segments has, and will continue to have, a direct negative impact on the level of private-sector funding available to support the production of Canadian content.<sup>89</sup>*

131. Shifts in viewing habits mean that Canada's broadcasting policy objectives will become increasingly difficult to achieve if the distribution side of our contribution framework is not modernized. When it comes to the online distribution of programming undertakings, the new contribution framework for the creation and presentation of Canadian programming must include ISPs and WSPs (as the Commission wisely recognized in *Harnessing Change*). Otherwise, the amount of high-quality, diverse Canadian programming available to Canadians and funded by the distribution side of our framework will disappear from our system.

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<sup>89</sup> PwC Study, p. 14.

## **Legislative Change Is Required to Implement a New Contribution Framework that Includes Internet and Wireless Service Providers**

132. According to the 2012 Supreme Court of Canada decision in *Reference re Broadcasting Act*, ISPs are not subject to the *Broadcasting Act* (in terms of contributions to broadcasting policy objectives), and, as a consequence, the Commission has no power under the *Broadcasting Act* to regulate, or otherwise require contribution from, ISPs or WSPs.<sup>90</sup> Therefore, legislative change is required to make it clear that ISPs and WSPs are key elements of the Canadian broadcasting system and that they have a role and responsibility in contributing to the *Broadcasting Act*'s policy objectives. This could be done by either amending the *Broadcasting Act* or the *Telecommunications Act*, or both.

### ***RECOMMENDATION 8: Give the Commission the explicit power to order internet and wireless service providers to contribute to broadcasting policy objectives and, specifically, to direct expenditures to production funds***

133. In addition, there is no explicit power in sections 9 or 10 that gives the Commission the power to order broadcasting undertakings, ISPs, or WSPs to pay into funds. As discussed earlier, in *Reference re Broadcasting Act*, the Supreme Court of Canada found that the general powers under section 3 and the basket clauses under s. 9(1)(b)(i) and 10(1)(k) of the Act were insufficient to give the Commission jurisdiction to implement the value for signal regime.<sup>91</sup> While the Commission has the power to order broadcasting undertaking payment into funds, we submit that this power ought to be expanded and expressly recognized in the legislation. In order to explicitly give the Commission the power to require telecommunications carriers to contribute to the objectives of the *Broadcasting Act* and expressly recognize the power to require broadcasting undertakings and telecommunications service providers to contribute to production funds, we propose the following amendments to the *Broadcasting Act*:

2(1) **Definitions** – In this Act,

“Canadian production fund” means the Canada Media Fund or its successor.

“independent production fund” means a production fund, other than the Canadian production fund, designated by the Commission.

[...]

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

(l) requiring any broadcasting undertaking or telecommunications common carrier to make payments to the Canadian production fund or an independent production fund;

<sup>90</sup> *Reference re Broadcasting Act*, 2012 SCC 4.

<sup>91</sup> *Ibid.*

134. Alternatively, one could impose a broadcasting requirement on ISPs and WSPs through the *Telecommunications Act*. The *Telecommunications Act* already contains section 28, which states that the Commission shall have regard to the broadcasting policy for Canada in determining whether any discrimination is unjust or any preference is undue or unreasonable in relation to any transmission of programs.<sup>92</sup> An amendment to the *Telecommunications Act* could thus be written as follows:

28(4) Notwithstanding section 4 of this Act, where a telecommunications common carrier is engaged in the provision of Internet service to the public, the Commission may, in furtherance of its objects under the *Broadcasting Act*, impose a requirement on that carrier to contribute to the Canada Media Fund or its successor or to an independent production fund as designated by the Commission, or both.

### **Proposed Amendments Giving the Power to the Commission to Require ISP and WSP Contribution Do Not Conflict with the *Copyright Act* or Offend Net Neutrality Principles**

135. The Supreme Court of Canada has long recognized the interconnected nature of the *Broadcasting Act* and the *Copyright Act*, along with the *Telecommunications Act* and *Radiocommunications Act*, as part of a larger statutory scheme regarding broadcasting in Canada. It is thus important to ensure that any amendments made to the *Broadcasting Act* or *Telecommunications Act* are harmonious with other federal legislation.
136. The intermediary status of ISPs is a central legal and policy consideration underlying the current copyright regime. The 2012 amendments to the *Copyright Act* clarified internet service providers' liability to copyright owners, and in doing so, insulated ISPs from liability for the copyright infringement of their subscribers (section 31.1), and determined that, to attract liability, an ISP must either fail to satisfy its statutory obligations under the notice and notice regime (subsection 41.26(3)) or provide a service designed primarily to enable acts of infringement (subsection 27(2.3)).<sup>93</sup>

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<sup>92</sup> Specifically, section 28 states: (1) *The Commission shall have regard to the broadcasting policy for Canada set out in subsection 3(1) of the Broadcasting Act in determining whether any discrimination is unjust or any preference or disadvantage is undue or unreasonable in relation to any transmission of programs, as defined in subsection 2(1) of that Act, that is primarily direct to the public and made (a) by satellite; or (b) through the terrestrial distribution facilities of a Canadian carrier, whether alone or in conjunction with facilities owned by a broadcasting undertaking; (2) Where a person who carries on a broadcasting undertaking does not agree with a Canadian carrier with respect to the allocation of satellite capacity for the transmission by the carrier of programs, as defined in subsection 2(1) of the Broadcasting Act, the Commission may allocate satellite capacity to particular broadcasting undertakings if it is satisfied that the allocation will further the implementation of the broadcasting policy for Canada set out in subsection 3(1) of that Act; (3) Before the Commission exercises its power under subsection (2), it shall take into account the carrier's role as a telecommunications common carrier and any operational constraints identified by the carrier.*

<sup>93</sup> The CMPA and other rightsholders have sought amendments to the safe harbour provisions in the *Copyright Act* in the ongoing statutory review of that legislation, but it is important to note that none of those amendments are necessary to effect the changes sought here.

137. Neither of our proposed amendments seek to undermine the intermediary status of ISPs or the protections afforded to them under the *Copyright Act*. Neither do the proposed amendments attribute any level of control over programming or programming services transmitted by ISPs. As such, the proposed amendments do not conflict and can be read harmoniously with the other federal legislation dealing with related subject matter.
138. Similarly, these proposed amendments do not offend net neutrality principles. Nothing in these proposed amendments suggests that an ISP could or should control or influence the content passing through its network.
139. Current legislative provisions are also well positioned to protect net neutrality in the future. Sections 27(2) and 36 of the *Telecommunications Act* provide the necessary flexibility for the Commission to uphold the principle of net neutrality in Canada. The net neutrality provisions of the *Telecommunications Act* are most effective when strongly rooted in objectives related to the equitable flow of internet traffic and consumer protections related to accessing lawful content. We submit that legislative provisions related to net neutrality should not be as broad as to duplicate existing Canadian laws, nor should they supplant, or create a bottleneck for, the application of domestic economic and cultural policy to businesses operating in the online environment.

**A New Contribution Framework Supported by All Those Who Distribute Programming Undertakings to Canadians (including BDUs, ISPs, and WSPs) Is Possible**

140. A new contribution framework supported by all those who distribute programming undertakings to Canadians is justified, desirable, and, most importantly feasible. For these reasons, the CMPA, in partnership with Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), Association québécoise de la production médiatique (AQPM), and Directors Guild of Canada (DGC), commissioned the PwC Study. This study confirms the Commission's suggestion in *Harnessing Change* that a new contribution framework could be revenue-neutral across the broadcasting and telecommunications industries, while ensuring continued support for Canadian programming and keeping costs down for consumers.
141. Few would deny that the Canadian broadcasting system is facing significant pressures as a result of the digital shift, new business models, the growing influence of foreign players, and changes in content-consumption patterns. At the same time, when viewed in their proper context, all of these trends merely bring back to the forefront policy issues that the Commission and industry stakeholders have successfully addressed in the past. The regulatory bargain that was struck then laid the foundation for the successful system that we have today.
142. It is, in fact, impossible not to be struck by a strong sense of *déjà vu* when looking back at the Commission's seminal 1992 review of the evolving communications environment, and its impact on the existing and future structure of the Canadian broadcasting system. In the Structural Public Hearings, the Commission focused on developing policies that would

support strong Canadian programming and, at the same time, ensure that the Canadian distribution system was technologically competitive.

143. In launching the Structural Public Hearings, the Commission specifically recognized that the two major elements of the Canadian broadcasting system—program production and program distribution—had to work increasingly in tandem to maximize the strength and vitality of the system, and to increase the attractiveness of Canadian programming to audiences, particularly in an era of increasing choice and competition. Further, it highlighted that neither of these two elements could serve the system successfully in isolation from the other.

144. The Commission specifically noted that

*[a]n increasing challenge facing the Canadian broadcasting system and the Commission in an era of expanding viewer choice will be to ensure that Canadian information, ideas, values and creativity are given maximum exposure on our television screens. The Commission emphasizes that consistent with section 3 of the Act, not only must the Commission see to it that there are Canadian undertakings in operation, it must also ensure that those undertakings are distributing a diverse range of quality Canadian programming that is attractive to Canadian viewers.*

*It is only by providing distinctive, indigenous programming with which Canadians can identify that Canadian programming undertakings will be distinguishable amidst the vast number of programming choices that new technological developments will make possible.*

*At the hearing, a number of environmental and structural obstacles to the funding of Canadian program production were discussed.*

*Canada's small domestic market continues to make it difficult to finance the creation of competitive Canadian programs. Whereas U.S. producers can recover the majority of their production costs through domestic licence fees, the licence fees earned in Canada by most Canadian program producers represent only a fraction of their total production costs. Many Canadian producers thus rely on tax credit programs and public and private funding services to finance their productions. In most cases, however, producers are still left with funding shortfalls and must look to offshore markets to make up the difference through foreign investment and/or pre-sales. While greater access to foreign funding may result in the ability to produce more programming, it has been argued that this may also lead to increased pressure to alter the content of a program to appeal to foreign markets, while potentially rendering the programming unrecognizable as Canadian.*



*Most parties in this proceeding agreed that more money needs to be raised within Canada for the production of Canadian programming to serve Canadian audiences if such programming is to compete in the multi-channel universe.*<sup>94</sup>

145. Accordingly, in June 1993, the Commission introduced a package of policy and regulatory changes designed to bring the program production and program distribution industries into closer and more effective cooperation with each other.<sup>95</sup> The package included, among other things, changes to the capital expenditure cable fee increase mechanism (which had been approved in 1990) that would provide incentives leading to the creation of a new fund to support Canadian programming.
146. The Structural Public Hearings, and subsequent proceedings that took place in 1993 and 1994 to explore a number of issues related to the new fund, are effectively what led to the establishment in 1995 of the regulatory framework that is still in place to this day, which requires BDUs to contribute 5% of their gross revenues to Canadian programming (the “BDU regime”).
147. It is notable that it was the Canadian Cable Television Association (CCTA) (i.e., the cable television industry) that first proposed the BDU regime during these hearings. The CCTA argued that the capacity of the cable industry to compete in a modern communications environment would not rest solely on its ability to offer Canadians a technically superior distribution system, but that it would also need more distinctive, high-quality domestic programming to distribute. Thus, the CCTA noted, complementary measures would be desirable to support the development of Canadian programming.
148. What the above history reveals is that when the programming production or distribution sectors faced structural and persistent challenges, or when Canada’s broadcasting policy objectives were at risk of being undermined, all stakeholders worked together to find viable, meaningful, and sustainable solutions that achieved a fair and equitable balance across various interests to help achieve our key policy objectives. And while there are several new players and platforms that form a part of the Canadian broadcasting system today, the fundamental policy goals and challenges identified by the Commission in its Structural Public Hearings remain essentially the same: namely, the need to ensure a diverse array of Canadian programming that is attractive to Canadian viewers, while at the same time providing Canadians with access to modern and affordable telecommunications services.<sup>96</sup>

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<sup>94</sup> Public Notice CRTC 1993-74, *Structural Public Hearing*.

<sup>95</sup> *Ibid.*

<sup>96</sup> That being said, the CMPA acknowledges that the regulatory bargain that was struck through the Structural Public Hearings was in part the result of the fact that, at that time, the Commission directly regulated the prices charged by BDUs to their subscribers. It may therefore be necessary for the Commission at some point to consider direct regulatory intervention in the setting of fair and reasonable rates for the provision of cable, internet, and wireless services. This would also considerably assuage consumer concerns that these providers were using any future requirement to financially contribute to Canadian programming—a requirement that these providers themselves

149. History therefore shows us that it is indeed possible to implement a new broadcasting distribution regulatory framework, supported by BDUs, ISPs, and WSPs, that will continue to foster the development of a world-leading and affordable communications sector while ensuring that quality Canadian programming can be made and is available to consumers.
150. Such an approach will be distribution (or platform) agnostic and will ensure a consistent and ongoing supply of financial resources in support of Canadian programming, regardless of when (and ultimately if) consumers fully migrate from BDUs to the newer internet- and wireless-based distribution systems for programming.
151. The Commission broadly supports such a framework and suggests possible approaches in *Harnessing Change*. It suggests that an integrated fund supported “through existing contributions by all broadcasting and broadband connectivity services (BDUs, radio and appropriate telecommunications services), all of which benefit directly from the distribution of [...] video content” could be implemented to “support content production, promotion and distribution without diminishing support for broadband development in underserved areas.”
152. The Commission proposes that this integrated fund could be based on a fixed percentage from BDUs and “appropriate telecommunications services earning more than a minimum exempted level of revenues.” It estimates that even a level of contribution of only 1% of revenues would result in increased financial contributions to the creation and presentation of Canadian programming and “the burden of supporting content by and for Canadians” would be borne by all those who benefit from the delivery of programming, whether online or not. Finally, the Commission points out that most ISPs and WSPs are part of highly vertically integrated companies that also include BDUs and programming services of various types—thus these companies are both contributing toward and benefiting from our current contribution framework for Canadian programming.<sup>97</sup>
153. The CMPA agrees with the Commission’s determinations that a new, broader, sustainable funding model is justified, desirable, and, most importantly, feasible, while minimizing any cost increases to Canadian consumers. We fully support accessible and affordable telecommunications services and have no intention of advancing a proposal that would materially increase the costs of internet and wireless services for Canadians. Accordingly, the CMPA is putting forward various options for a new contribution framework to support the creation and presentation of Canadian programming through the distribution of programming undertakings by BDUs, ISPs, and WSPs.
154. The PwC Study demonstrates that there are a number of possible approaches to developing a new, sustainable, distribution-based funding regime in support of Canadian

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proposed twenty five years ago for their BDU services—as a pretext to artificially increase rates charged to their subscribers.

<sup>97</sup> CRTC, *Harnessing Change*, Restructured funding strategy. Available online: <https://crtc.gc.ca/eng/publications/s15/pol1.htm#p2>.

programming.<sup>98</sup> Most importantly, the study shows that there would likely be little or no impact on prices for consumers attributable to the new contribution approaches.

155. The PwC Study was guided by seven key principles, intended to ensure that a new contribution framework would support Canada's broadcasting policy objectives while refraining from undermining potential growth in the telecommunications industry and especially limiting any impact on consumers. The principles are as follows:

1. **Comprehensiveness:** models should broaden the contribution base to include new domestic content distribution industry segments provided through retail Wireless Service Providers (WSPs) and Internet Service Providers (ISPs). We refer to BDUs and the relevant media content distribution portions of WSPs and ISPs collectively as "Funding Segments";
2. **Minimum funding level:** the future funding levels achieved are, at a minimum, equal to the historical levels achieved in the existing framework in order to continue supporting Canadian content production in a sustainable manner. Based on an assessment of historic funding levels, a minimum target of funding (corresponding to the historical peak funding year) was set for the purpose of this report;
3. **Dynamism:** models allow for adjustments in market shares over time such that cumulative funding level and growth remains in line with the overall revenue level and growth of the Funding Segments;
4. **Fairness:** models should reflect the contribution shares in an equitable manner across Funding Segments;
5. **Minimum growth impediment:** a Funding Segments' contribution share will be determined such that it does not lead to an increased obligation for the distribution sector as a whole;
6. **Pro-SME (small and medium enterprises):** consideration should be given to the viability of smaller companies; and
7. **Minimum consumer impact:** models should minimize as much as possible any direct cost increases to Canadian consumers, in particular low income households.<sup>99</sup>

156. Based on these guiding principles, PwC developed six possible models for a new contribution framework with the overarching objective of sustainable funding for Canadian programming.<sup>100</sup>

157. Each of the models explored by PwC are comprehensive, would achieve minimum funding-level targets, respect industry dynamics, and could be adapted to take into account issues specific to SMEs.

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<sup>98</sup> The CMPA notes that this study only encompasses the contribution framework for the distribution of audiovisual content. An additional or revised model addressing ISPs and WSPs would be necessary to account for declining contributions by radio broadcasters to Canadian content development (CCD).

<sup>99</sup> PwC Study, p. 4.

<sup>100</sup> PwC Study, p. 18.

158. Scheme 3 under Model Type U, in particular, would achieve virtually all of the seven guiding principles listed above. Moreover, this approach would not only be the simplest and the most analogous to the current BDU regime, but it would also ensure the greatest-possible funding in support of Canadian programming, in a fair manner across the funding segments, and in lockstep with the revenue growth of each of those segments.
159. This scheme is deemed “market share-based reallocation,” and it is designed to allocate the funding targets between the three funding segments in proportion to their relative market share of revenue. With this scheme, the percentage contributions of each of the funding segments would be set at 1.8% of total revenue and would remain constant over time.
160. If Scheme 3 under Model Type U were implemented, it is expected that contributions to Canadian programming from the BDU sector would decrease by 63%, from about \$428 million to \$157 million in 2019. Given the expected decline of the BDU sector over time, its contribution is also expected to slowly decrease to \$155 million by 2022. Contributions from the residential internet sector, for its part, would amount to \$160 million in 2019, steadily increasing to an estimated \$176 million by 2022 in relation to its expected market-share growth over that period. And, lastly, contributions from the wireless data sector—the largest sector and the one poised for the greatest growth—would notionally begin at about \$261 million in 2019 and increase to an estimated \$342 million by 2022.<sup>101</sup>
161. Moreover, PwC states that, while an increase in costs resulting from additional funding might normally lead to a price increase to consumers, there are other factors at play that are likely to push prices downward. Thus, it concludes that “the scope to significantly increase prices in the market as a response to the implementation of a new contribution framework would be fairly limited.”<sup>102</sup> To minimize consumer impacts, PwC posits that a funding contribution framework that provides greater relief to SMEs will implicitly provide greater relief to lower-income consumers.<sup>103</sup>
162. Some may argue that applying a set percentage to ISP and WSP gross revenues fails to account for the fact that not all revenues earned in these sectors stems from the delivery of online programming. While it is notionally possible to estimate the share of ISP and WSP revenues derived from audiovisual content and apply a percentage only to that proportion, this would unnecessarily complicate a new contribution framework. It would increase its complexity and thus the cost to administer and to monitor for all stakeholders. In any case, as mentioned earlier in *Harnessing Change*, the true driving force behind the rise of internet and wireless in Canada is demand for video entertainment, which accounts

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<sup>101</sup> PwC Study, p. 26.

<sup>102</sup> PwC Study, p. 33

<sup>103</sup> PwC suggests that, in response to changes in consumer demand for bundled services, “regulatory authorities may clearly define a basic package at affordable rates (similar to that defined for TV services) for low-income household groups...” (PwC Study, p. 34)

for “two-thirds of the capacity of fixed networks and one-third of the capacity of mobile networks.”<sup>104</sup>

163. While a Commission policy hearing, complete with public consultations from industry stakeholders, will need to be launched to determine a new distribution contribution framework in support of Canadian programming, the PwC Study confirms the Commission’s suggestion in *Harnessing Change* that it is possible. This new framework could be revenue-neutral across the entire system, while ensuring continued support for Canadian programming and keeping costs down for, at least, lower-income consumers.
164. For all of these reasons, we submit that the legislation must be amended to allow contribution from internet and wireless service providers.

### **The Commission Must Have the Express Power to Address Online Piracy**

165. Creators, producers, and other rightsholders require practical tools to fight online piracy. In light of the Commission’s recent decision on the FairPlay application,<sup>105</sup> the CMPA submits that the *Telecommunications Act* ought to be amended to give the Commission express jurisdiction to implement these tools.
166. Piracy remains a major issue in Canada. Canada is ranked at 11 in the world for piracy of television, with over 2.5 billion visits to piracy sites in 2017.<sup>106</sup> A May 2018 ISED/Heritage report noted that 26% of consumers reported consuming at least one illegal file online in the past three months, over half of whom claim they did it “because it’s free.”<sup>107</sup>
167. In 2017, an estimated 314 million pirated movies and television programs were downloaded using BitTorrent in Canada. Today, 30% of online piracy is from P2P download sites and 70% is from web-based sites (including host and link sites). There has also been an explosion in preloaded set-top boxes—fully loaded Android boxes that let people stream content without paying for cable packages or online streaming services.
168. Services that are designed to enable acts of copyright infringement, or those that offer content for free without authorization from the copyright owner, are clearly illegal under Canada’s copyright laws. Unfortunately, Canadian creators and other copyright owners do not currently have practical tools that allow them to enforce their rights in an expeditious manner, particularly when these services are located out of country. For all of these

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<sup>104</sup> CRTC, *Harnessing Change*, Market Insight 3. Broadband Internet usage erupting, pushed by demand for real-time video entertainment. Available online: <https://crtc.gc.ca/eng/publications/s15/mar1.htm#m3>.

<sup>105</sup> Telecom Decision CRTC 2018-384, *Asian Television Network International Limited, on behalf of the FairPlay Coalition – Application to disable online access to piracy websites*.

<sup>106</sup> MUSO, *Annual Piracy Report, TV, Canada*. 2017. Available online: [https://static1.squarespace.com/static/5a68f49af6576e4326f50337/t/5aba7b21575d1f1ca382ed4c/1522170661046/FairPlay\\_Canada\\_COMMISSION\\_Report\\_2018\\_EN.PDF](https://static1.squarespace.com/static/5a68f49af6576e4326f50337/t/5aba7b21575d1f1ca382ed4c/1522170661046/FairPlay_Canada_COMMISSION_Report_2018_EN.PDF)

<sup>107</sup> Kantar TNS, *Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada*. Prepared for Innovation, Science and Economic Development Canada. May 2018. Available online: <https://www.ic.gc.ca/eic/site/112.nsf/eng/07649.html>.

reasons, the CMPA joined the FairPlay coalition seeking the Commission's assistance in implementing an efficient and effective regime to combat piracy.

169. The CMPA agrees with the coalition that the Commission currently has the jurisdiction to establish the FairPlay regime: the regulation of ISPs falls within the Commission's mandate under the *Telecommunications Act*; section 36 of the *Telecommunications Act* grants the Commission the express power to authorize the blocking of websites; section 24 and 24.1 grant the Commission broad powers that can be used to require the blocking of websites necessary for the fulfilment of policy objectives; and paragraph 70(1)(a) allows for the creation of the Internet Piracy Review Agency.<sup>108</sup>
170. However, a number of interveners in the FairPlay application challenged these conclusions. The Commission, for its part, found that the proposed regime would create conflicts with the *Copyright Act* and with Parliament's intent with respect to copyright remedies by seeking to impose new obligations and remedies on ISPs. Moreover, the Commission found that sections 24 and 24.1 of the *Telecommunications Act* do not contain explicit language conferring copyright jurisdiction on the Commission, and that—in contrast—other sections of the Act (such as section 41, which deals with unsolicited telecommunications) use clear statutory language enabling the Commission to regulate the use of telecommunications based on their content. Ultimately, the Commission found that it does not have the power to intervene in content for copyright purposes and that the power to mandate blocking must be found elsewhere, and must relate to subject matter that is clearly within the Commission's jurisdiction under the *Telecommunications Act*.<sup>109</sup>
171. The CMPA and other rightsholders have recently sought amendments in the statutory review of the *Copyright Act*. In this review, we submit that the *Telecommunications Act* should be amended to explicitly confer copyright jurisdiction on the Commission and give it the power to mandate site-blocking for copyright purposes. Mirroring the language of section 41 of the *Telecommunications Act*, such an amendment could read as follows:

The Commission may, by order, prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of copyright-infringing telecommunications to the extent that the Commission considers it necessary to prevent access to websites and services that are blatantly, overwhelmingly, or structurally engaged in copyright infringement, giving due regard to net neutrality and freedom of expression principles.

***RECOMMENDATION 9: Give the Commission the express jurisdiction to implement tools to combat internet piracy***

172. The question of *whether* to implement the regime proposed by the FairPlay coalition can be answered after legislative amendments. Today, however, these changes will give the Commission the power to help equalize the playing field for content production and online

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<sup>108</sup> Telecom Decision CRTC 2018-384, para 31.

<sup>109</sup> Telecom Decision CRTC 2018-384, paras. 57-67.

distribution and support the continuation of—and ensure there remains—a distinct Canadian rights market for the discoverability, access, and consumption of content online.

**THE CBC IS FOUNDATIONAL TO A HEALTHY DOMESTIC INDUSTRY; IT IS A LEADER IN SHOWCASING CANADIAN CONTENT; AND ITS MANDATE MUST BE TO PRIORITIZE SERVING CANADA AND CANADIANS WITH A DIVERSE RANGE OF HIGH-QUALITY CANADIAN PROGRAMMING**

173. As Canada's national public broadcaster, the CBC holds a special place in our broadcasting system and in our country. As noted by the CBC itself, "CBC/Radio-Canada is woven into the fabric of the country, rooted in the communities we serve and committed to sharing stories as Canadians live them, each and every day." The CBC tells our "stories, actively contributing to Canada's cultural expression, promoting a shared national identity and consciousness, and reflecting the country's multicultural and multiracial nature."<sup>110</sup>
174. The CBC is highly valued by Canadian audiences. It provides a wide range of programming that promotes diversity and connects every region of the country, in a variety of languages, including both official languages. As well, of all the Canadian broadcasters, the CBC commissions the vast majority of all independently-produced programming in Canada. Through this programming, Canadians "see themselves, their interests, their values, and their country come alive."<sup>111</sup> For all of these reasons, the CBC is foundational to the health of our domestic industry, and specifically to the creation and presentation of Canadian programming. Independent producers value their partnerships with the CBC and the CMPA fully supports initiatives that ensure the long-term sustainability and stability of a strong national public broadcaster.
175. The CBC's role as a public broadcaster contributes to the economy, providing employment, particularly in regions outside of the major production centres of Toronto, Vancouver, and Montreal, and contributing to national and provincial GDP. The CBC also provides economic opportunities for diverse populations, as evidenced in its diversity and inclusion reports,<sup>112</sup> which includes a commitment to increase the number of female directors on CBC-commissioned scripted television to 50% of all episodes (or half or more of all directors), among other initiatives.

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<sup>110</sup> CBC Website "Who we are, what we do." Available online: <http://www.cbc.radio-canada.ca/en/explore/who-we-are-what-we-do/canadian/>.

<sup>111</sup> CBC Website "Independent Producers." Available online: <https://www.cbc.ca/independentproducers/>.

<sup>112</sup> For a full list of CBC's diversity and inclusion reports, please visit: <http://www.cbc.radio-canada.ca/en/reporting-to-canadians/reports/diversity-inclusion/>.



176. The CBC's economic impact is examined by the CMPA through our ongoing economic impact studies and Profile reports,<sup>113</sup> the CBC's public reporting,<sup>114</sup> and the Commission's data collection activities. Additional evidence supporting the CBC's economic impact is examined in Deloitte's report *The Economic Impact of CBC/Radio-Canada*,<sup>115</sup> which found that the Corporation "contributed a gross value add of \$3.7B to the Canadian economy arising from an expenditure of \$1.7B" in 2010 and [provides] "a consistent revenue source for independent producers, helping to drive investment in the sector, increase competitiveness in international markets, and indirectly helping to drive export growth." Finally, Nordicity's study *Analysis of Government Support for Public Broadcasting and Other Culture in Canada* found high potential sociocultural benefits for the CBC as compared to eighteen other Western countries, despite lower funding levels.<sup>116</sup>
177. Given the significant influence that our national public broadcaster has on Canadian audiences and the important role it continues to play in our society, we submit that any discussion of the CBC's mandate and role in our broadcasting system ought only be considered through a much more far-reaching public consultation than this current legislative review. With all due respect to the Panel, the role of the CBC is about more than legislative amendments. The policy implications of any changes to its mandate ought to be carefully considered, through wide consultation with Canadians across the country.
178. That being said, the Terms of Reference ask whether the public broadcaster's mandate ought to be "updated in light of the more open, global, and competitive communications environment."<sup>117</sup>
179. The CMPA supports the CBC's mandate as set out in the Act, which requires the CBC to provide a wide range of programming that "informs, enlightens, and entertains; is created for both English and French linguistic markets; reflects regions; promotes cultural expression; and serves linguistic minority communities."<sup>118</sup> The CMPA also fully supports the CBC playing an enhanced role in promoting democratic values and being the provider of reliable and trusted information to a global audience. CBC's news and current affairs services are exemplary and well-suited to fulfilling this expanded mandate.

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<sup>113</sup> The CMPA's economic impact studies related to programs broadcast by the CBC include examples such as *Heartland* and *Republic of Doyle: Case Study – Economic Impacts of Heartland*, prepared by MNP LLP for the CMPA in October 2017. Available online: <https://cmpa.ca/wp-content/uploads/2018/04/MNP-2017-Economic-Impacts-of-Heartland-Report-Oct-2017.pdf>; *Case Study – Economic Impacts of Republic of Doyle*, prepared by MNP LLP for the CMPA in November 2016. Available online: <https://cmpa.ca/wp-content/uploads/2018/04/MNP-2016-Economic-Impacts-of-Republic-of-Doyle-Report-Nov-2016.pdf>.

<sup>114</sup> For a full list of CBC's reports and plans, please visit: <http://www.cbc.radio-canada.ca/en/reporting-to-canadians/reports/>.

<sup>115</sup> Deloitte. *The Economic Impact of CBC/Radio-Canada*. Prepared for CBC/Radio-Canada. June 8, 2011. Available online: <http://www.cbc.radio-canada.ca/files/cbcrc/documents/latest-studies/deloitte-economic-impact-en.pdf>.

<sup>116</sup> Nordicity. *Analysis of Government Support for Public Broadcasting and Other Culture in Canada*. Prepared for CBC/Radio-Canada. October 2013. Available online: <http://www.cbc.radio-canada.ca/files/cbcrc/documents/latest-studies/nordicity-analysis-public-broadcasting-en.pdf>.

<sup>117</sup> Innovation, Science and Economic Development Canada. "Terms of Reference." Available online: <http://www.ic.gc.ca/eic/site/110.nsf/eng/00001.html>.

<sup>118</sup> *Broadcasting Act*, sections 3(1)(l) and (m).

180. It is, however, imperative that the CBC continue to serve Canadians first by reflecting the diversity of voices of our country. Particularly in light of its Parliamentary appropriation, the CBC's mandate ought to prioritize Canada.
181. In addition, the CMPA would be deeply concerned if the CBC's intention was to act as a global distributor of the content it commissions from Canada's independent producers. The CBC's efforts to bring Canada to the world should not interfere with an orderly and efficient domestic marketplace. In its negotiations with independent producers, the CBC should not be entitled to take international rights that may impact producers' ability to finance their programs. The CMPA thus submits that the Act be revised to expressly require the CBC to enter into a binding Code of Practice that would govern its commercial relationships with independent producers, which would be enforced by the Commission. This differs from our recommendation above that the Act be amended to provide the Commission with enforcement powers with respect to Codes of Practice, but to leave the exercise of such powers to the Commission's discretion.
182. This distinction in our proposed approach lies in the fact that the CBC is itself different from any other broadcaster in the system. Most obviously, it is the only broadcaster that is vested with a specific mandate and requirements under the Act with respect to the commissioning of Canadian programming. In return, it receives a \$1.2 billion annual Parliamentary appropriation. This combination of its special status under the Act and the subsidy it receives from the Canadian public imposes on the CBC the mantle of leadership. More than any other broadcaster, it should be setting the example by, among other things, treating its programming suppliers fairly, and in a manner that leverages their expertise for the benefit of both parties —expertise that the CBC itself may not have. For example, under a previous era of CBC management, the CBC would routinely require that independent producers provide the CBC with both national and international distribution rights on shows they commissioned. Typically, such rights would then be exploited by CBC's distribution arm, usually with results that were demonstrably inferior than had those rights been retained and exploited by the independent producer. It was therefore hardly surprising when the CBC spun off its distribution arm in 2007. As a senior CBC executive noted at the time, "[L]ooking at our international sales activities, we determined that we lacked the scale and the resources required to be competitive in a market dominated by large, specialized firms."<sup>119</sup>
183. As a publicly subsidized Crown corporation, the CBC often lacks the market incentives, scale, and expertise to fully leverage the economic value of the shows it commissions from independent producers in the global marketplace. Rather than try to replicate this expertise and impose it on every project, the CBC should leave it to independent producers to develop the best international distribution strategy for their programs. Of course, where the CBC has made a significant investment in a program, it should also share in the rewards when the program is an international hit. A mandatory Code of Practice—one that is "Made in Canada" and appropriately tailored to the Canadian

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<sup>119</sup> "CBC to sell distribution business." *CBC Arts*. December 19, 2007. Available online: <https://www.cbc.ca/news/entertainment/cbc-to-sell-international-distribution-business-1.656979>.

market—would address these kinds of issues, setting out a framework that enables both the CBC and independent producers to maximize their respective contributions, and thereby best position the programs the CBC commissions from independent producers for domestic and global success.

***RECOMMENDATION 10: Require the CBC to enter into a Code of Practice to govern its commercial relationships with independent producers***

## **CONCLUSION**

184. In conclusion, the CMPA respectfully submits that the Broadcasting and Telecommunications Legislative Review Panel should make the following recommendations in its report to the Department of Canadian Heritage and ISED in order to modernize Canada's broadcasting and telecommunications legislation:

- **RECOMMENDATION 1:** Uphold Canada's Broadcasting Policy;
- **RECOMMENDATION 2:** Uphold and give force to the declaration that Canadian programming includes a significant contribution from the independent production sector;
- **RECOMMENDATION 3:** Give the Commission the express power to govern commercial arrangements between large vertically integrated domestic broadcasting undertakings and large foreign online broadcasting undertakings, on the one hand, and independent producers and independent broadcasting undertakings, on the other;
- **RECOMMENDATION 4:** Uphold and give force to the policy declaration that each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;
- **RECOMMENDATION 5:** Reduce barriers to entry by shifting broadcasting regulation for online programming services to a regulation-based regime instead of licensing;
- **RECOMMENDATION 6(a):** Give the Commission the power to impose administrative monetary penalties on broadcasting undertakings;
- **RECOMMENDATION 6(b):** Give the Commission the explicit power to order broadcasting undertakings to direct expenditures to production funds;
- **RECOMMENDATION 6(c):** Give the Commission all of the same powers in a regulation-based regime that it currently has under its licensing regime;
- **RECOMMENDATION 6(d):** Confirm the Commission's data-gathering powers;

- **RECOMMENDATION 6(e):** Expand the concept of “exhibition” in section 10 of the Act to allow for more effective contributions by broadcasting undertakings to the presentation of Canadian programming;
  - **RECOMMENDATION 7:** Immediately launch and fast-track a review of the Commission’s enforcement tools and jurisdiction over domestic and foreign online broadcasting undertakings;
  - **RECOMMENDATION 8:** Give the Commission the explicit power to order internet and wireless service providers to contribute to broadcasting policy objectives and, specifically, to direct expenditures to production funds;
  - **RECOMMENDATION 9:** Give the Commission the express jurisdiction to implement tools to combat internet piracy;
  - **RECOMMENDATION 10:** Require the CBC to enter into a Code of Practice to govern its commercial relationships with independent producers.
185. These recommendations will help Canada to build upon the successes of our broadcasting and telecommunications industries and to maximize the opportunities that the digital age brings to our audiences, artists, creators, producers, and broadcasting and telecommunications companies.