



3 October 2014

John Traversy
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Mr. Secretary General,

Re: *Let's Talk TV*, Broadcasting Notice of Consultation 2014-190 (Ottawa, 24 April 2014)

The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting. The Forum supports a strong Canadian broadcasting system that serves the public's interests.

We are pleased to have the opportunity to file the attached reply comment in this proceeding, and look forward to the opportunity of reviewing other comments submitted in this proceeding.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,

A handwritten signature in blue ink that reads "Monica Auer".

Monica L. Auer, M.A., LL.M.

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Executive Director



Canadian television in 2025: What can the CRTC help broadcasters achieve in ten years?

Let's Talk TV: A conversation with Canadians about the future of television, Broadcasting
Notice of Consultation 2013-563 (Ottawa, 24 October 2013)

Comments of the Forum for Research and Policy in Communications

3 October 2014

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I Introduction

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization that supports Canada's audio-visual legislation. Our country's laws require Canada's broadcasters to create and present high-quality programming using predominantly Canadian resources. This programming must be available and affordable to all, regardless of the technology used to distribute it.
- 2 The Forum appeared before the Commission on September 18, 2014, and set out its position on broadcasting, which flows from our vision for Canada's communications system: it should be a window to the world – a window for the world – and a mirror for ourselves.
- 3 The Forum's position is also based on what is already known about the future of Canada: that a third of the population is likely to be retired from full-time employment and living on a fixed income, and that the population will be even more diverse than now. These facts were not challenged at the hearing.
- 4 The Forum wishes to reply to two central issues that emerged from the public hearing held from September 8-19, 2014. The first has to do with the CRTC's authority to regulate all broadcasting activity in Canada, and the CRTC's role in ensuring that the competitive market also serves the public interest.
- 5 Before addressing the issues of regulation and the public interest, however, the Forum wishes to set out its concern about the CRTC's decisions to excise evidence Google and Netflix from the public record of BNoC 2014-190. The companies appeared before the CRTC panel on September 8th (Google) and 19th (Netflix), and were asked to answer certain questions.
- 6 The letters of Google and Netflix to the CRTC in which the companies declined to comply with the CRTC's orders to provide information about their activities in Canada could not be found on the CRTC's website.
- 7 The CRTC's response to the companies' decision to flout the CRTC's orders is available, however,¹ and provides grounds for concerns about the CRTC's approach to evidence in this proceeding. The Commission wrote as follows:

To Google:

¹ See letters to Google and Netflix dated 29 September 2014, available at: http://www.crtc.gc.ca/broadcast/eng/hearings/2014/2014_190.htm.

Despite comments made by those who were not parties to the Let's talk TV proceeding, **the information that the Commission is seeking is meant to support the conclusions Google is advocating**, i.e. online distribution platforms for video content can support the policy objectives under the Broadcasting Act, as well as others relating to competition and innovation—without the need for any additional regulatory action by the Commission. **As with any party before the Commission the CRTC will ask for the probative evidence that would support a party's position.**

En dépit des commentaires formulés par certains qui n'étaient pas des parties à l'instance de Parlons Télé, **l'information demandée par le Conseil vise à appuyer les conclusions que vous avez mises de l'avant**, c.-à-d. que les fournisseurs de contenu vidéo sur Internet peuvent très bien contribuer aux objectifs politiques de la Loi sur la radiodiffusion, de même que d'autres objectifs ayant trait à la concurrence et à l'innovation, sans que le Conseil n'ait à imposer de réglementation supplémentaire. **Comme c'est le cas avec toute partie se présentant devant le Conseil, le Conseil cherche à obtenir les éléments de preuve ayant la valeur probante nécessaire pour appuyer les positions d'une partie.**²

To Netflix:

Despite comments made by those who were not parties to the Let's Talk TV proceeding, **the information that the Commission is seeking is meant to support the conclusions that Netflix is advocating**—that Internet video providers can support the policy objectives under the Broadcasting Act, as well as others relating to competition and innovation—without the need for any additional regulatory action by the Commission. **As with any party before the Commission, the CRTC will ask for the probative evidence that would support a party's position.**

En dépit des commentaires formulés par certains qui n'étaient pas des parties à l'instance de Parlons Télé, **l'information demandée par le Conseil vise à appuyer les conclusions que vous avez mises de l'avant**, c.-à-d. que les fournisseurs de vidéo sur Internet peuvent très bien contribuer aux objectifs politiques de la Loi sur la radiodiffusion, de même que d'autres objectifs ayant trait à la concurrence et à l'innovation, sans que le Conseil n'ait à imposer de réglementation supplémentaire. **Comme c'est le cas avec toute partie se présentant devant le Conseil, le Conseil cherche à obtenir les éléments de preuve**

² Broadcasting Commission Letter Addressed to Jason Kee (Google), (Ottawa, 29 September 2014). <http://www.crtc.gc.ca/eng/archive/2014/lb140929a.htm>.

ayant la valeur probante nécessaire pour appuyer les positions d'une partie.³

[bold font added]

- 8 Where the CRTC is expected to act impartially,⁴ and to have regard for all the evidence before it,⁵ the highlighted text raises concerns that the Commission was seeking evidence specifically to *support* the positions of Google and Netflix, rather than seeking evidence *in general* about these positions.
- 9 The Commission may instead have intended to say that it was seeking information to evaluate the conclusions advocated by parties, or the probative evidence about a party's position. If that is the case, there is no problem - except that this is not what has been communicated to the public, which is the impression the Commission had already decided in favour of the arguments made by Google on the first day of the hearing, before it had the opportunity to hear verbal submissions from anyone else, including the Forum. This would contravene the duty of fairness that the CRTC owes to all participants.⁶
- 10 The Commission's decision to excise material from Netflix and Google from the record theoretically means that the Commission will not consider this evidence when developing a new television policy. What Canadians do not know is the effect of this exorcism on the Commission's apparent predetermination - even before it had received any evidence one way or another - that Netflix and Google are correct, and that exempted new media still do not contribute materially

³ Broadcasting Commission Letter Addressed to Corie Wright (Netflix), (Ottawa, 29 September 2014. <http://www.crtc.gc.ca/eng/archive/2014/lb140929.htm>.

⁴ *R. v. S. (R.D.)*, [1997] 3 SCR 484, per Cory J., at ¶¶104-105:

... impartiality can be described - perhaps somewhat inexactly - as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. ...

⁵ See *e.g., Vidéotron Ltée. v. Netstar Communications Inc.*, 2004 FCA 299, in which the Federal Court of Appeal referred a matter back to the CRTC for reconsideration when new evidence established that the evidence on which the CRTC had based a decision was misleading, if not false. Pelletier J.A. held, for the Court that the CRTC was required to base its determinations on all, not some, of the relevant evidence:

[29] There is no question here of allowing either of the parties to reopen the matter and file new evidence so as to obtain a decision favourable to its arguments. This is a special situation in which the CRTC may have been led to base its decision on misleading, if not false, evidence. It is the CRTC's function to assess this new evidence and, if necessary, accept additional evidence relating to it. It must do this based on all the evidence and decide whether its original decisions should be altered.

⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para. 27:

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision

towards the achievement of Parliament's broadcasting policy. The absence of agreed-to evidence on these points is why the CRTC should hold a second proceeding in 2015, to review the terms of its current exemption order for new media.

II The CRTC should regulate all broadcasting activity in Canada

A Act's definition of broadcasting limits and gives CRTC discretion

11 Canada's broadcasting legislation declares that Canada's broadcasting system is a single system.⁷ It requires the Commission to regulate broadcasting regardless of the mechanism of its delivery,⁸ or whether the broadcasting activity is carried "as part of, or in connection with, any other ... activity".⁹ The effect of this regulation should be to implement Parliament's broadcasting policy.¹⁰

12 Our written submission opposed the dismantling of the over-the-air television transmission system in Canada, as did other parties (in particular, Dr. Gregory Taylor¹¹). In our view, the Commission lacks the jurisdiction to permit or require over-the-air television broadcasters to turn off their transmitters, as the effect - granting BDUs sole control over the distribution of broadcast television programming in Canada - would for the moment be outside the CRTC's jurisdiction:¹²

... nowhere in the *Act* is there a reference to the creation of exclusive control rights over signals or programs. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*.¹³

13 Parliament has instead given the *Broadcasting Act* "a primarily cultural aim",¹⁴ and has given the CRTC the discretion to require Canadian broadcasters to create and present Canadian television programming, whether the broadcasters

⁷ *Broadcasting Act*, s. 3(2).

⁸ *Infra*, note 15.

⁹ S. 4(3).

¹⁰ S. 5(1).

¹¹ Principal investigator, Canadian Spectrum Policy Research, Ryerson University, int. 2077; CRTC, *Public Hearing Transcript*, vol. 7 (Gatineau, 16 September 2014) at ¶16346: "... calls for over-the-air shutdown from major broadcasters in Canada are ... premature."

¹² *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 SCR 489, at ¶11.

¹³ *Ibid.*, at ¶33.

¹⁴ *Ibid.*, at ¶32.

- operate solely using over-the-air transmitters, through satellite distribution, and/or online.¹⁵ The duty to provide this programming should not lie solely with conventional television broadcasters, whether their services are distributed over the air, or by satellite.
- 14 Rather, support for Canadian content production, creation and distribution should come from all broadcasters - licensed or not. Many parties, including the Forum, have advocated that large new media programming services that are operating in Canada are able to and should support Parliament's broadcasting policy. Support should include the availability of Canadian programming content, and/or material financial commitments.
- 15 These requirements are relatively easy to apply to existing, licensed broadcasters that also choose to operate online. They are more difficult to apply to exempted broadcasters headquartered in other countries which feel free to ignore the laws of countries where they earn significant portions of their revenues, particularly in the absence of federal policies that would guide the regulation of foreign companies that sell data (whether alphanumeric or audio-visual) to buyers in Canada.
- 16 The Forum's evidence, however, was that audiences may not actually be using the internet (the exempt vehicle for distributing audio-visual content in Canada) when they access Netflix or Google, because these companies lease and control servers in Canada from which this content is obtained:

20659 MR. HARRIS-STEVENSON: ...

20660 The story I always tell people when they ask me about my research is that they probably don't know that when they're using Google or watching a YouTube video that they are very likely not using the Internet.

20661 It's quite likely, and I would say in Ottawa, Toronto, Montreal, Calgary, these sorts of cities, it's guaranteed that if they're requesting content from Google and also from probably from Netflix, that that content must be served from a Canadian server.

20662 And now getting specifics on which servers are located in what location is a challenge, but I do know that Bell, for example, has servers posted from Google, that are controlled by Google, that are serving YouTube videos and Google content, that 70 to 90 per cent of that content that you request in

¹⁵ S. 2(1): "'broadcasting' means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus"

Meaning of "other means of telecommunication"

(2) For the purposes of this Act, "other means of telecommunication" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.

Montreal is coming from that server. And if it isn't on that server, the server goes and gets it and then serves it to you. And this would be for all of the services that Google provides.

20663 So, YouTube would be the big storage, where the storage is, but it would be maps, it would be Gmail, it would be Google docs, it would be the whole suite of services.

20664 Netflix has an appliance that has 100 -- I think 100 terrabites of storage or 1,000 terrabites. It's a big amount of storage that it will place in an ISP and that is how Netflix is able to distribute high definition video in Canada, and in most of any other jurisdiction in which it operates.

20665 ... the point is that Netflix and Google can't operate their services in Canada, without partnerships, without investments in Rogers, Bell, Shaw, these ISPs.¹⁶

17 While this evidence raises very serious questions about the degree to which Netflix and Google truly lack presence in Canada, the CRTC's decision to excise the evidence from Google and Netflix from this proceeding also excised its jurisdiction to set new rules of the game, so to speak, for foreign-controlled broadcasting services that are operating in Canada without a licence, as evidence from the parties most affected by such determinations is now not to be considered.)

18 The Forum therefore respectfully recommends that after the Commission issues the results from this proceeding, it should hold a policy hearing in 2015 to consider changing the current new media exemption order, if only to ensure that the Commission has ready access to the evidence it needs to make decisions in the public interest.

B Regulations should cover non-traditional broadcast revenues

19 The CRTC's authority to exempt broadcasters from the requirements of Part II of the *Broadcasting Act* -- having to do with licensing, regulation, mandatory orders, complaints and public hearings - can only be exercised if the CRTC "is satisfied that compliance with those requirements will not contribute in a material manner to the implementation"¹⁷ of Parliament's broadcasting policy.

20 The absence of substantive evidence in this proceeding about non-traditional broadcast revenues makes it impossible for the Commission to maintain its exemption order, since it has no evidentiary basis to conclude that new media services cannot contribute in a material manner to Parliament's broadcasting policy.

¹⁶ CRTC, *Public Hearing Transcript*, (Gatineau, 18 September 2014), Vol. 9.

¹⁷ S. 9(4).

21 We note that in 2009 the CRTC unreasonably placed the onus for collecting such evidence on parties seeking the regulation of new media services:

23. For the reasons set out above, the Commission concludes that traditional broadcasting frameworks should not be imposed in the new media environment without evidence that intervention is warranted. The Commission is of the view that **parties advocating repeal of the exemption orders did not establish that licensing undertakings in the new media environment would contribute in a material manner to the implementation of the broadcasting policy set out in the Act.** ...¹⁸

22 The determination from this proceeding should include reporting requirements to enable the CRTC to monitor and measure indicators about distribution and programming – and, for broadcasters operating in Canada, to set the specific, quantitative targets the new approach is intended to achieve. Rather than the working-group approach that was used unsuccessfully following Broadcasting Regulatory Policy 2009-329, the CRTC should initiate a written process to develop new media distribution and programming measures.

III **CRTC must ensure 'competitive market' serves public interest**

A **New TV policy must make public interest the priority**

23 Throughout the proceeding the Commission heard that it should not protect special interest groups. Respectfully, the laissez-faire approach to broadcast regulation has tended to subordinate the public interest to private interests.¹⁹ We agree that the CRTC should not base its decisions in this proceeding on the protection of any 'status quo' - but should make decisions based on the public interest, as set out by Parliament's broadcasting policy for Canada.

24 The Forum respectfully submits that the public interest is best served by ensuring that Canadian programming services are widely available to everyone in Canada. Like many others, we believe that the counter-intuitive impact of a pure pick'n'pay system will be to raise prices, and disenfranchise lower-income individuals from the broadcasting system. This cannot have been Parliament's intention when it gave the CRTC the authority to ensure that BDU rates be affordable.

25 We also do not believe that Parliament intended to divide the responsibility for deciding which broadcasting services are to be made available to Canadian

¹⁸ *Review of broadcasting in new media* (Ottawa, 4 June 2009), Broadcasting Regulatory Policy CRTC 2009-329, <http://www.crtc.gc.ca/eng/archive/2009/2009-329.htm>, at ¶123.

¹⁹ See *infra*, note 21.

audiences between a number of BDUs. The *Broadcasting Act*, after all, specifically states that "the objectives of the broadcasting policy ... can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority"²⁰--the CRTC.

26 Contrary to the views of some of Canada's largest BDUs, the CRTC is the final arbiter of the services that must be made available to Canadians is the Commission - not BDU management, on behalf of BDU shareholders. The problem, as the evidence from Shaw found, is that BDUs ignore the interests of their subscribers when it is in their financial interest to do so.²¹

27 If private corporations were the best judge of Canadian cultural policy, Parliament would not have repeatedly enacted legislation establishing institutions to regulate broadcasting since the 1920s. The Forum therefore supports a decision to create a rate-regulated streamlined basic BDU service, which includes local, regional and national (ie, 9(1)(h)) Canadian television services.

B Clear, measurable and enforceable objectives - with semi-annual reporting

28 As the sole agency responsible for ensuring the implementation of Parliament's broadcasting policy for Canada, the CRTC bears a duty to Parliament and to the people of Canada to set clear, measurable and enforceable goals for broadcasters which will enable them to meet Parliament's objectives.

29 'Trust, but verify'²² objectives set by the Commission - which should increase the broadcast of and financial support for original Canadian programming over time - will enable Canada's private television broadcasters to understand the terms under which they will be required to operate the services for which currently hold broadcasting licences. They will also enable the Commission to report to

²⁰ S. 3(2).

²¹ Shaw explained that 20% of the cost of its basic package is attributed to sports services that half of its subscribers do not want:

8820 MR. BISSONNETTE: We carry both TSN and Sportsnet.

8821 COMMISSIONER MOLNAR: As part of that \$40.00 package?

8822 MR. BISSONNETTE: As a part of that package.

8823 And so, we would be selling a skinnied-down Personal TV that did not include sports.

8824 And if you look at the wholesale fees of those sports services in our Personal TV, it amounts to around \$8.00. And so, if you look at our 39.95 Personal TV, our skinnied-down Personal TV without sports would be the difference between the sports wholesale fees.

...

8847 Sports is there because, at that moment, contractually, we couldn't not have sports there. **But it's the one thing that's there, even though 50% of our customers say they don't want it there.**

(CRTC, *Public Hearing Transcript*, vol. 4 (Gatineau, 11 September 2014) bold font added).

²² *Ibid.*, at ¶18981.

Parliament and Canadians on the way in which Canada's broadcasting policy is being met.

- 30 The CRTC should invite comments on the information it should publish regularly about broadcasters' achievements in meeting the objectives of the *Broadcasting Act*. In our view, quarterly reporting should be the goal (as Ofcom does, in the United Kingdom), but if that is beyond the capacity of Canada's largest broadcasters, twice-yearly reports should be published to show broadcasters' progress in increasing levels of original national and local programming, and in ensuring that the resources used to create, produce and acquire this programming are predominantly Canadian.

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