SUBMISSION OF SHAW COMMUNICATIONS INC.

TO THE BROADCASTING AND

TELECOMMUNICATIONS LEGISLATIVE REVIEW PANEL

11 JANUARY 2019

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

INTRODUCTION AND EXECUTIVE SUMMARY

1. Shaw Communications Inc. (**Shaw**) is pleased to provide our comments and recommendations to the Broadcasting and Telecommunications Legislative Review Panel (the **Panel**) in response to the Call for Comments issued on September 24, 2018.[1] We are mindful of the following context provided by the Government in announcing the appointment of the Panel:[2]

    - New technologies and business models have been disruptive; the entry of internet-based, global players into the Canadian market has resulted in a disparity in the competitive playing field and an asymmetry of regulation among traditional broadcasters and online players;

    - Canada needs to maximize the benefits the digital age brings to our citizens, artists and creators, communications industry, and economy as a whole; and

    - Both the broadcasting and telecommunications sectors benefit from policies that encourage competition, innovation, and affordability of service, including the continued support for an open and transparent internet.

2. Consistent with these observations, Shaw submits that Canada's goals for a modernized *Broadcasting Act, Telecommunications Act* and *Radiocommunication Act* will only be achieved through an approach that:

    - recognizes and supports continued facilities-based investments by broadcasting distribution undertakings (**BDUs**) and telecommunications service providers (**TSPs**) in powerful converged networks that can evolve, with innovation and scale, to meet Canadians' increasing demands for data, accessibility and affordability;

    - prioritizes the needs and demands of Canadians customers and viewers when considering support for content creation; and

    - achieves a symmetrical regulatory and financial framework in the treatment of all services operating in Canada.

3. There is no question that the unrelenting, rapid pace of technological change in the communications industry has challenged the ability of regulation to adapt and to remain relevant and effective. Accordingly, Canada requires, in this dynamic environment, a legislative and regulatory framework that enables companies to move in an agile and proactive manner to address technological change. This will increase the efficiency and competitiveness of Canadian telecommunications providers and broadcasters, and

[1] Broadcasting and Telecommunications Legislative Review Panel, "Review of the Canadian Communications Legislative Framework" (24 Sep 2018), online: http://www.ic.gc.ca/eic/site/110.nsf/eng/00003.html.

[2] Canadian Heritage, News Release: "Government of Canada launches review of Telecommunications and Broadcasting Acts" (5 Jun 2018), online: https://www.canada.ca/en/canadian-heritage/news/2018/06/government-of-canada-launches-review-of-telecommunications-and-broadcasting-acts.html.

advance the objectives of the *Broadcasting Act* and *Telecommunications Act*, as well as Canadians' engagement and success in the digital economy. Such an approach does not require wholesale change to the current framework for broadcasting, telecommunications or radiocommunication. Indeed, Shaw strongly believes that – subject to certain targeted modifications and fine-tuning to ensure the effective realization of their respective policy objectives – the *Broadcasting Act, Telecommunications Act* and *Radiocommunication Act* in their current form are technologically neutral and appropriately designed to maximize the public interest.

4. At the dawn of the era of 5G, and the new data-intensive applications that 5G will facilitate (including Internet of Things and autonomous vehicles), it is critical that we do not compromise competition and innovation in the Canadian economy through excessive regulatory intervention or extensive revisions to the legislative framework. Examples of actions that Shaw would not support include a move to merge the Acts, or subjecting TSPs to the *Broadcasting Act*. In order to ensure that all Canadians are empowered to participate in the future digital economy, Government policy must be focused on supporting the building of world-leading broadband networks that can evolve with innovation and scale to meet increasing demand.

5. With respect to telecommunications regulation, there is currently, and appropriately, a flexible regulatory approach, which supports the system's ability to evolve dynamically in response to technological and market developments. To the extent that competition is lacking, such as in the wireless market, legislation and regulation must be highly targeted to support facilities-based investment by new competitors. Facilities-based competition is critical to the establishment of healthy and sustainable wireless competition, the rollout of 5G services and the advancement of Canada's digital economy. Accordingly, jurisdiction over access to support structures must be clearly granted to the CRTC and any calls for mandated resale or Mobile Video Network Operator (**MVNO**) regime must be rejected.

6. The current broadcasting regulatory model must also be recalibrated and lightened in a very specific manner: Canadian BDUs require regulatory flexibility, certainty and meaningful symmetry with OTT services, and significant relief from the high direct and indirect costs of regulation, in order to fulfill their most important contributions to the system.

7. If, as the Panel has stated, the outcome of this process is to ensure that "innovation is the watchword of a new environment"[3], then it is appropriate to be mindful that regulation "that cannot keep pace with the activities it seeks to regulate may result in innovation chill [due to the] direct costs associated with regulatory compliance, as well as the indirect costs created by regulatory uncertainty."[4] Accordingly, any proposed legislative

[3] Broadcasting and Telecommunications Legislative Review Panel, "Review of the Canadian Communications Legislative Framework" (24 Sep 2018), online: http://www.ic.gc.ca/eic/site/110.nsf/eng/00003.html

[4] George N. Addy, *Digital Disruption: How Should Canadian Regulators Respond?* (Apr 2018), online: Davies Ward Phillips & Vineberg LLP https://www.dwpv.com/en/Insights/Publications/2018/Digital-Disruption.

changes should be aimed at existing regulatory dysfunctionalities or vagaries. We must avoid the temptation of trying to control or manage the evolution of Canada's communications and broadcasting environments, or forfeit sustainable long-term outcomes in favour of perceived short-term fixes for issues that are arising in Canada's rapidly evolving broadcasting and telecommunications systems. Such an approach risks stifling innovation, investment, public participation and the emergence of innovative new models for the production and exhibition of Canadian content. Similarly, applying backward-looking or legacy legislative and regulatory approaches to the dynamic digital environment will be counter-productive and regressive. Accordingly, any reactive "quick fix" approach to address specific demands (such as a tax on TSPs) would be misguided. Legislative change, if any, must stand the test of time over years and possibly decades.

8. With that context in mind, Shaw appreciates the opportunity to make the following recommendations, in response to the four broad themes introduced by the Panel. Consistent with the Panel's desire to structure meaningful dialogue, Shaw has focused on the issues that are most relevant to our customers and we have attempted to provide constructive solutions to these issues.

- In Part I of Shaw's submission, in response to the theme of "reducing barriers to access by all Canadians to advanced telecommunications networks", Shaw recommends the following:
    - enshrine a focus on investment and the creation of facilities-based infrastructure, as competitive telecommunications networks drive further competition and the attendant benefits of choice, affordability and innovation;
    - to ensure that Canadians have broad, expeditious and affordable access to new networks (in particular, 5G) and the innovative new services delivered by these networks, confirm CRTC jurisdiction, and thus a national approach, with respect to access to the structures of utilities and other third parties, regardless of whether they are otherwise regulated at the provincial level of government, as well as to public properties and infrastructure owned by municipalities or other public authorities; and
    - empower the CRTC to resolve any and all disputes related to the aforementioned access.
- In Part II of Shaw's submission, in response to the theme of "supporting creation, production and discoverability of Canadian content", Shaw submits that the Panel:
    - remedy the current asymmetry between regulated players and OTT services by:
        - reducing the significant regulatory and financial burden of licensees;

- recognizing that the primary BDU "contribution" is building and provisioning a robust broadcast distribution network and related platform functionalities that can continue to prioritize Canadian services and programming for the benefit of customers;

- removing the 5% revenue contribution requirement by BDUs and other financial obligations, including Part I and Part II fees, which diminish the financial viability of the broadcasting distribution system, impede investment and, ultimately, undermine the competitiveness of BDU services;

- refraining from proposing any legislative amendments that would result in a tax on TSPs (including internet services providers (**ISPs**) and wireless services providers (**WSPs**)) to support Canadian programming (hereinafter referred to as an "**ISP Tax**");

- recommending that foreign OTTs that market services in Canada collect and remit sales tax, all or part of which would be allocated to directly subsidize Canadian content – if the Government determines there is a continuing need to subsidize Canadian content;

- clarifying that "digital media broadcasting" platforms/undertakings (including those owned and operated by non-Canadians) are an integral part of the Canadian broadcasting system – the recognition of which will provide support for appropriate, non-discriminatory regulatory requirements, such as adherence to discoverability requirements for Canadian programming; and

- recommending the removal of limitations on foreign investment in broadcasting undertakings;

  - clarify that over-the-air (**OTA**) broadcast stations are not entitled to retransmission consent or a "second revenue" stream; and

  - ensure that any amendments to the *Broadcasting Act* include the requirement that programmers who are authorized to negotiate their distribution provide services on commercially reasonable terms that do not unduly limit customer choice.

- In Part III of Shaw's submission, in response to the theme of "improving the rights of the digital consumer", Shaw submits that:

  - under no circumstances should the Panel consider steps that would increase the digital divide, such as an ISP Tax;

- section 27(2) of the *Telecommunications Act* should be maintained as the appropriate mechanism for ensuring the continued existence of an open internet in Canada, while avoiding the prescription of rigid net neutrality rules that would undermine innovation and the efficiency of Canada's digital networks; and

- efforts must be undertaken to combat digital piracy, which is the cause of significant harm to Canadians.

- In Part IV of Shaw's submission, in response to the theme of "renewing the institutional framework for the communications sector", Shaw supports:

  - separate legislative regimes for broadcasting and telecommunications; and,

  - maintaining the authority of the Department of Innovation, Science and Economic Development (**ISED**) over spectrum-related issues, including allocation.

9. To provide additional context and support for our key recommendations, we also attach:

   - Appendix A – the expert report prepared by The Brattle Group[5] (the "**Brattle Report**"), which addresses: the loss to the Canadian economy resulting from BDUs' existing 5% mandatory contribution; the potential losses that would result from the imposition of an ISP Tax; and economic distortions that would occur as a result of potential regulations designed to promote non-facilities-based competition from resellers;

   - Appendix B – the economic theory and empirical evidence of Dr. Eric Emch,[6] which demonstrates the importance of facilities-based competition policy strategies in promoting higher quality networks and lower retail prices, as well as the emergence of more dynamic wholesale markets; and

   - Appendix C – the legal opinion of former Supreme Court of Canada Justice Michel Bastarache[7] (the "**Bastarache Opinion**"), confirming the jurisdictional validity of recommendations made herein for the introduction of a national framework

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[5] The Brattle Group, "Analysis of BDU Contributions, ISP Taxes and Regulations in the Canadian Broadcasting & Telecommunications Industries: Economic Efficiency, Investment and Innovation" (11 Jan 2019), prepared for Shaw Communications Inc. [the **Brattle Report**].

[6] Appendix B includes 3 separate reports prepared by Dr. Emch for Shaw Communications Inc., which assesses wholesale roaming policy in Canada: (i)"The interaction of competition, regulation, access, and investment" (8 Sep 2017) [**Emch Report (Sep 2017)**]; (ii) "Response to initial interventions in Telecom Notice of Consultation CRTC 2017-259" (27 Oct 2017) [**Emch Report (Oct 2017)**]; and (iii)"Response to supplemental intervention of Ice Wireless in Telecom Notice of Consultation CRTC 2017-259" (3 Nov 2017) [**Emch Report (Nov 2017)**]..

[7] Michel Bastarache Q.C., "Legal Opinion re Proposed Amendments to the Telecommunications Act" (10 Jan 2019), prepared for Shaw Communications Inc., Rogers Communications Canada Inc., Canadian Communication Systems Alliance [the **Bastarache Opinion**].

governing access to third-party infrastructure and property for the build-out of new telecommunications networks.

10. Shaw strongly believes that the recommendations that follow would not only effectively address the challenges facing Canada's broadcasting and telecommunications systems but will indeed strengthen those systems and maximize their ability to satisfy public interest objectives under the *Broadcasting Act* and *Telecommunications Act* in the future.

I. ENSURE MAXIMUM ACCESS BY ALL CANADIANS TO ADVANCED TELECOMMUNICATIONS NETWORKS

A. Competition and Facilities-Based Investment

11. In fulfillment of the objectives of both the *Broadcasting Act* and the *Telecommunications Act*, Shaw is continuously making aggressive investments to:

- build a world-class converged network;
- bring sustainable facilities-based wireless competition to Canada;[8]
- increase connectivity;
- launch products and services that enhance value and bring leading-edge innovations to Canadians; and
- ensure our offerings are affordable and widely accessible.

12. Shaw has embraced the opportunity to engage in facilities-based competition in both broadcasting distribution and telecommunications. Almost 20 years ago, Shaw acquired Star Choice (now Shaw Direct) and built the direct-to-home (**DTH**) satellite business into a viable competitor that helped drive cable's digital conversion, offered competitive choice in broadcasting distribution services, and extended the reach of the full Canadian broadcasting system to previously unserved and underserved areas throughout Canada. Shaw Cable is continuing to bring a best-in-class video experience and world-leading technology to the Canadian market through strategic partnerships and new platforms (BlueSky TV).

13. With respect to telecommunications, we launched our internet service in 1996 and our digital Home Phone service in 2005. Using our existing cable network as a foundation, Shaw invested continually to build capacity and augment speed. Beginning in 2012, the Shaw Go Wi-Fi network extended the availability of our broadcasting and

[8] In the first half 2019, Freedom will launch in ten new markets across the country (Victoria, Nanaimo, Red Deer, Lethbridge, Medicine Hat, Brockville, Belleville, Cobourg, Pembroke and Cornwall), expanding our reach to nearly a million potential new customers.

telecommunications services and helped our customers reduce their cellular data consumption. Today, Shaw customers who use Shaw Go WiFi save an average of 6GB of cellular data each month through the support of our WiFi network. Most recently, we acquired Freedom Mobile (then known as Wind Mobile) in 2016. To date, we have invested over $2.5B in building and improving Freedom's wireless network to support differentiated, affordable, innovative, competitive wireless services that challenge the dominance of the Big 3 in the wireless market.

14. Through Freedom, Shaw's entry into the wireless market has had a positive impact on competition. For example, while incumbents raised data overage rates to $100/GB, we launched our "Big Gig" options to address data affordability challenges for Canadians. Notably, during the key December selling period last year, our lead plan of $60/10GB was matched exactly by all of the Big 3 incumbents, but only in the markets served by Freedom (BC/AB/MAN) and only temporarily.

15. The ongoing investments that are needed to fuel Freedom's competitive momentum would be undermined by legislative or regulatory changes that fundamentally alter Canada's support for a facilities-based model. Accordingly, we caution the Panel about making any recommendations that would have such an effect.

16. The benefits of facilities-based competition have been highlighted by the Commission, the Competition Bureau, and the Government on numerous occasions in the past nearly three decades.[9] For example, with respect to the wireless market, the Commission recently summarized its view that "facilities-based competition is the best means of ensuring that Canadians receive high-quality, affordable mobile wireless services provided over leading-edge wireless networks."[10] The Minister of ISED has also recently affirmed his support for facilities-based competition,[11] consistent with the spirit of his Mandate Letter, in which the Prime Minister directed the Minister to:

> Increase high-speed broadband coverage and work to support competition, choice and availability of services" while fostering "a strong investment

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[9] See, e.g., Telecom Decision CRTC 92-12 – *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues*; Telecom Decision CRTC 97-8 – *Local competition*; Telecom Decision CRTC 2002-34 – *Regulatory framework for second price cap period*; Telecom Regulatory Policy 2015-326 – *Review of wholesale wireline services and associated policies*; Competition Bureau, Submission in Telecom Notice of Consultation CRTC 2013-551, *Review of wholesale services and associated policies*; Order in Council P.C. 2007-71; ISED, Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (November 2007).

[10] Telecom Decision CRTC 2018-97 – *Reconsideration of Telecom Decision 2017-56 regarding final terms and conditions for wholesale mobile wireless roaming service* (22 Mar 2018), para. 67.

[11] In his speech before the 2017 Canadian Telecom Summit (5 Jun 2017), the Minister of ISED stated that he would ask the CRTC "to maintain a strong investment environment that supports facilities-based competition." See: https://www.canada.ca/en/innovation-science-economic-development/news/2017/06/2017_canadian_telecomsummit.html.

environment for telecommunications services to keep Canada at the leading edge of the digital economy.[12]

17. In particular, facilities-based competition has resulted in improved pricing discipline and consumer choice. As highlighted by the Competition Bureau, prices are lower in markets with a strong, regional competitor that can bring pricing discipline and an alternative to the wireless incumbents.[13]

18. The foregoing demonstrates that the appropriate approach is to target regulation to reduce barriers to facilities-based competition, thereby supporting ongoing network investment. New facilities-based competitors have responded by investing in their networks to provide the strong, sustainable competition in the market that is needed to deliver enhanced choice, affordability and innovation to Canadians.

19. Moreover, investments in facilities-based services result in the expansion and improvement of converged networks and platforms that support both the Canadian telecommunications and broadcasting sectors. In Shaw's case, the ongoing success of our cable and satellite broadcast distribution and relay operations remains critical to our success as a leading telecommunications competitor and in particular to our build-out of network facilities for the provision of telecommunications services. Investments in converged networks have been a key driver of competition, customer choice and innovation in both telecommunications and broadcasting: between 2008-2018, Shaw made over $11 billion in capital investments to support the development of our wireline, satellite and wireless networks. In Fiscal 2018 alone, Shaw's capital investments amounted to $1.367 billion.

20. As the Panel notes in the Call for Comments, "Canadian telecommunications carriers that have evolved from yesterday's telephone and cable TV companies currently operate sophisticated digital network facilities" which must be "continuously updated and expanded to ensure that all Canadians have access to advanced services."[14] Shaw strongly agrees, and accordingly urges the Panel to refrain from making any recommendations focusing on "market engineering" (e.g. resale-based models). Such an approach would be based on an erroneous view that engineering market outcomes helps to realize certain *Telecommunications Act* objectives. To the contrary, this approach would undermine the ongoing building and enhancement of strong and secure competitive networks which serve the needs of Canadians as citizens, consumers and businesses, and which support national sovereignty and security at a time when cybersecurity is a growing concern.

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[12] Minister of ISED Mandate Letter (12 Nov 2015), online: http://pm.gc.ca/eng//minister-innovation-science-and-economic-development-mandate-letter.

[13] Competition Bureau, *Position Statement regarding Bell's acquisition of MTS* (15 Feb 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html

[14] Broadcasting and Telecommunications Legislative Review Panel, "Review of the Canadian Communications Legislative Framework" (24 Sep 2018), online: http://www.ic.gc.ca/eic/site/110.nsf/eng/00003.html.

Refrain from Mandating an MVNO Regime for the Wireless Market

21. The introduction of a mandated MVNO regime in a wireless market that does not yet have sustainable facilities-based competition would disproportionately harm new facilities-based competitors and jeopardize sustainable competition in the market. These competitors are already struggling to overcome significant barriers to competition, including disadvantageous spectrum positions and ongoing challenges in obtaining reasonable access to towers and sites for radio antennae installations, and other barriers to investment and competition. A mandated MVNO regime would promote entry that bypasses the cost and risk of facilities deployment and would thereby weaken (by increasing the risks and decreasing the costs of facilities deployment) the only players capable of dismantling the incumbents' dominance and preserve the deficient level of mobile competition in Canada today.

22. More broadly, mandated MVNO would drive a cycle of reduced investment in wireless infrastructure, particularly for deployments outside of large cities. It would, additionally, incentivize dependence on regulation, taking us further away from the healthy market forces that can empower consumers with the opportunity for the real choice that they deserve. The ultimate result would be a static, unresponsive wireless environment that fails to meet the needs of Canadians and the Canadian economy. Such a scenario is contrary to the public interest in sustainable competition and network-building in support of the new economy.

23. By contrast, the competitive mobile wireless markets in both the United States and the United Kingdom, where consumers currently have access to at least four facilities-based wireless carriers, have been characterized by falling prices, increased quality and diversity in services and high levels of investment.[15] Furthermore, in a mature market with robust, facilities-based competition, service-based competition will emerge naturally in accordance with the needs of the marketplace without the need for regulatory intervention.[16]

24. The CRTC's determinations in Telecom Regulatory Policy CRTC 2015-177[17] and Telecom Decision CRTC 2018-97[18] were consistent with Shaw's views as to the negative impacts that MVNO service would have on the public interest. Specifically, the CRTC expressly recognized that the combined market share of the wireless incumbent firms, either by revenue or subscribers, remained largely unchanged at 90%, that the barriers to entry in the retail market are "very high,"[19] and that the barriers to entry in the national market for GSM-based wholesale roaming remain high.[20] Weighing these factors against the nature of the investment risks faced by new facilities-based competitors, the

[15] Emch Report (Sep 2017), paras. 62-70 (US experience); paras. 79-83 (UK experience).
[16] Emch Report (Sep 2017), para. 9.
[17] *Regulatory framework for wholesale mobile wireless services* (5 May 2015) [**TRP 2015-177**].
[18] *Reconsideration of Telecom Decision 2017-56 regarding final terms and conditions for wholesale mobile wireless roaming service* (22 Mar 2018).
[19] TRP 2015-177, paras. 35-36.
[20] TRP 2015-177, paras. 72-73.

Commission expressly determined that mandating wholesale MVNO access would significantly undermine investments in wireless network infrastructure by wireless carriers and by new entrant wireless carriers in particular.[21] Nothing has changed on these points since this determination was made.

25. In the proceeding that led to Telecom Decision CRTC 2018-97, Shaw presented economic analysis and empirical evidence from Canada and other jurisdictions that introducing mandated MVNO would have a disproportionately large negative impact on facilities-based new wireless competitors. Among that evidence, the most salient, for the purposes of the Panel, are the white papers of Dr. Eric Emch, which Shaw attaches as Appendix B.

26. Dr. Emch analysed the effects of mandated resale access covering 58 network operators across 21 countries and concluded, clearly, that mandated resale regulation leads to lower investment.[22] Dr. Emch also assessed Freedom's Illustrative Market Expansion Analysis appended to Shaw's Initial Intervention.[23] His economic modelling demonstrates that the economics of regulation and interconnection support a focus on facilities-based competition. In summary, Dr. Emch concluded that a mandated MVNO regime would:

- reduce the payoff of facilities-based carrier investment and expansion;[24]
- encourage firms to choose the resale model since they can avoid the downside sunk cost risks associated with investing;[25]
- enable non-facilities-based providers to offer a similar product without the significant cost and risk associated with network build-out;[26]
- push the industry towards particular reseller models favoured by government regulation rather than underlying market forces; [27]
- effectively allow MVNO operators to offer services on a national basis with no deployment obligations or corresponding investment risk, thereby giving them an undue advantage over new facilities-based wireless competitors and potentially depriving the latter of sufficient financial resources to invest in and improve their networks;[28] and

[21] TRP 2015-177, paras. 120 to 124.
[22] Emch Report (Sep 2017), para. 33.
[23] Emch Report (Sep 2017), paras. 5, 39-43; and Emch Report (Oct 2017), paras. 22-27.
[24] Emch Report (Sep 2017), para. 23.
[25] Emch Report (Sep 2017), para.40.
[26] Emch Report (Sep 2017), Section IV.
[27] Emch Report (Sep 2017), Section II.
[28] Emch Report (Sep 2017), Section VI.A.

- make otherwise attractive investment prospects for new facilities-based competitors unattractive and decreasing the resources available for costly network investments, particularly outside of dense urban areas. [29]

27. In Canada, we are at a highly sensitive and critical juncture. The barriers for new facilities-based competitors in the retail market remain daunting.[30] There are ongoing challenges in gaining timely access at reasonable rates to antenna tower and site sharing arrangements from the wireless incumbents. These challenges compound the acute shortage and lack of diversity in new competitors' spectrum holdings. If we disrupt the ability of facilities-based competitors to establish a strong presence in the wireless market by artificially supporting MVNO operators, we will abandon the chance we have to address the Government's concerns regarding affordability and adoption over the long term. This negative impact will be most pronounced outside of the core urban areas of Canada where the business case for network expansion is most tenuous.

28. Accordingly, strong and sustainable facilities-based competition remains the appropriate end-goal and has resulted in a broad range of benefits, including falling service prices. This is validated by reference to the competitive evolution in both the US[31] and UK markets.[32]

Enshrining a Focus on Competitive Telecommunications Networks

29. In order to ensure that the necessary scale of investment and dedication of financial resources continues, the revised *Telecommunications Act* must enshrine a focus on investment in – and the creation of – competitive telecommunications networks. Without strong, sustainable facilities-based competition, the industry will not be able to meet consumer expectations for network capacity and innovation, address the Government's concerns regarding affordability and adoption over the long term, or maximize Canada's engagement in the digital economy.

30. In order to provide further context to the Panel, we attach (Appendix A) the expert report of The Brattle Group, which addresses the economic efficiency impact of proposed

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[29] Emch Report (Sep 2017), para. 42.

[30] TRP 2015-177, paras. 36-38.

[31] The U.S. Federal Communications Commission (**FCC**) has indeed noted that facilities-based competition in the U.S. "has played an essential role in the mobile wireless industry – leading to lower prices and higher quality for American consumers, and producing innovation and investment in wireless networks, devices and services." (See FCC, *Annual Report and Analysis of Competitive Market Conditions with respect to Mobile Wireless, including Commercial mobile Wireless, 19th Report,* (23 Sep 2016), para. 135.). The U.S. mobile wireless market is currently served by at least four, strong, facilities-based wireless carriers that provide over 99% of the population with LTE coverage and is characterised by relatively high capital intensity, declining ARPU and relatively low unit costs (*i.e.* more value for money). See: Jeffrey Eisenach (NERA Economic Consulting), "Review of Wholesale Mobile Wireless Services, Expert Report of Jeffrey A. Eisenach, PH.D" (15 May 2014), prepared for TELUS Communications Company in the proceeding initiated by TNC CRTC 2014-76, Figure 9.

[32] Similar to the U.S., competition among facilities-based carriers in the UK has led to falling prices and increased quality and diversity in mobile services. It is estimated that in the last decade, the price of a typical bundle of mobile services has more than halved in the UK. See Emch Report (Sep 2017), paras. 74-79.

regulations in the telecommunications sector, such as regulations designed to promote non-facilities-based competition from resellers. In view of the increasing substitution between wireline and wireless networks, ongoing resale regulation in the wireline broadband market will also have a distortive impact on the *wireless* broadband market. The Brattle Report notes:

> Strong platform competition between wireline and wireless broadband networks necessarily means that wireless broadband markets will be impacted and affected by regulations, including wireline regulations. For example, if wireline broadband resale regulations cause market distortions, then they could also distort the network convergence of wireline and wireless broadband.[33]

31. This economic theory is firmly supported by the data: while resellers have enjoyed growth in the overall share of access-related revenues in the last few years, there has not been a commensurate growth in their level of investment in facilities. The Brattle Report observes:

> Facilities-based providers together accounted for 99.6% of telecommunications investments made in wireline plant and equipment during the period 2012 through 2016, while resellers accounted for only 0.4% … In fact, the compound annual growth rate in telecommunication investment during this period was 4.1% for Incumbent TSPs, 12.1% for Cable-Based Carriers and Other Facilities-Based Service Providers, but -8.5% for resellers – that is, annual investment by resellers was, on average, declining between 2012 and 2016…[34]

32. Indeed, in 2016, facilities-based wireline service providers spent over $9 billion in capital expenditures through annual investments in plant and equipment. Capital expenditures made by facilities-based wireline providers such as Shaw increased 19.8% over the previous year, with a total CAGR of 12% since 2012.[35] This amounts to roughly 40 cents on every dollar of revenue being reinvested by facilities-based providers into wireline networks over the past three years.[36]

33. Accordingly, Shaw strongly believes that the public interest will be served by continuing to encourage investment in facilities-based services, rather than by compromising the benefits thereof for perceived short-term gains that will actually undermine Canada's broader economic and national security objectives.

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[33] Brattle Report, para. 104.
[34] Brattle Report, paras. 36.
[35] CRTC, "Communications Monitoring Report 2017, online: https://crtc.gc.ca/eng/publications/reports/policymonitoring/2017/cmr5.htm#s52 **[CMR 2017]** at Table 5.0.5 (Telecommunications investments made in plant and equipment, by type of provider of telecommunications service ($ billions)).
[36] CMR 2017 at Figure 5.0.5 (Telecommunications capital expenditures as a percentage of revenues, by type of TSP).

RECOMMENDATION 1
Add the following policy objective to section 7 of the *Telecommunications Act*: **<u>to support sustainable facilities-based investment and competition</u>**
Reject any demands to amend the *Telecommunications Act* to favour non-facilities-based providers or resale models.

RECOMMENDATION 2
Add the following to the regulatory policy in subsection 5(2) of the *Broadcasting Act*: **(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that** **<u>supports network investment by distribution undertakings</u>**

B. Access to Passive Infrastructure and Municipal Property

34. The Terms of Reference recognize, with respect to passive infrastructure, that "inefficient access can dramatically increase the cost of deployment [of telecommunications infrastructure] or prevent it altogether", and that responsibilities over such access are – given that they are shared – "presenting challenges for efficient and effective deployment."[37]

35. Shaw strongly agrees. We cannot overstate the critical public interest in the development and deployment of 5G networks to support the increased mobile communications necessary to facilitate the digital economy (from Internet of Things, to self-driving cars, to enhanced financial transaction models). Accordingly, it is imperative for a national body to have jurisdiction to oversee network developments and to manage all issues of access to property and infrastructure related to telecommunications attachment.

36. The absence of CRTC jurisdiction to facilitate the access of telecommunications services to the support structures of provincially-regulated utilities (and third-parties who are not telecommunications service providers), and to mandate reasonable terms of access to properties and infrastructure of municipalities and other public bodies, has had a significant, negative impact on the expansion of telecommunications networks throughout Canada. These impediments have:

[37] ISED, Terms of Reference, 1. Universal Access and Deployment

- increased transaction costs (which ultimately are borne by consumers) and enabled disparate terms of access as between telecommunications competitors;

- enabled a range of different rates for and terms of access across the country, based on different rate-setting methodologies employed;

- created local and regional disparities in the provisioning of telecommunications networks to Canadians; and

- impeded the establishment of a stable access environment for 5G deployments, which is critical to Canada's full participation in the next significant wave of the digital economy.

37. Left unaddressed, they will have a serious negative impact on Canada's economy going forward. The problem of inefficiencies, inequities and inconsistencies is augmented by the fact that municipalities and provincial regulators do not (nor should they be expected to) make access decisions that consider the policy objectives embodied in the *Telecommunications Act*. Their responsibilities are discharged according to other laws and policies.

38. Shaw strongly believes that the recommended amendments, proposed below, are constitutional for the following reasons:

    - Parliament has sole legislative power over telecommunications; and

    - any provincial measures that address the same subject matter would be inoperative pursuant to the federal paramountcy doctrine, or inapplicable pursuant to the doctrine of interjurisdictional immunity.

39. The Bastarache Opinion, received by Shaw and other carriers considers and supports the jurisdictional validity of the requested amendments in connection with municipal and other public property and infrastructure. Accordingly, we urge the Panel to issue a final report recommending such amendments, in support of the public interest in achieving a robust national telecommunications infrastructure that efficiently supports the growth of Canada's digital economy.

Access to Passive Infrastructure Owned by Electrical Utilities

40. Access by telecommunications carriers to the infrastructure of electrical power utilities, such as poles and conduits, has long been critical to ensuring that Canadians receive effective and efficient telecommunication services. The ability to secure access, on fair and reasonable terms, in a manner that is consistent with the realization of policy objectives under Canada's *Telecommunications Act*, has been negatively impacted by a 2003 decision of the Supreme Court of Canada.[38] Specifically, the Court in *Barrie* held,

[38] *Barrie Public Utilities v. Canadian Cable Television Assn.* [2003] 1 SCR 476 [***Barrie***].

on appeal, that s.43(5) of *Telecommunications Act* did not confer upon the CRTC the jurisdiction to order access and determine the rate for use of electrical utility poles for the purposes of attachment of telecommunications facilities. The regulatory vacuum that was created by this judicial ruling has been filled by provincial utility boards, which now adjudicate issues, including rates, related to telecommunication attachments to utility poles.

41. The patchwork of rates, rate-setting methodologies, and terms of access for utilities infrastructure across provincial boundaries have not been determined in accordance with the objectives of the *Telecommunications Act* with a view to facilitating national economic development. Indeed, the terms of access vary not only from province to province, but from municipality to municipality: rates and other terms of access payable by one carrier may therefore vary on the basis of its location or the scope of its network. This "patchwork quilt" of regulation precludes the CRTC from ensuring efficient network and service roll-out, universal access and robust competition.[39] Indeed, there is no central oversight of a matter of vital importance to the national public interest, namely, Canada's realization of an efficient and effective telecommunications system.

Access to Municipal and Other Public Property

42. A second and similar access-related impediment experienced by carriers relates to the issue of access to municipal and other property. Section 43(2) of the *Telecommunications Act* provides that a carrier may enter on and break up a highway or other public place to construct, maintain and operate its "transmission lines", and remain there for as long as required for that purpose. Through various proceedings, the CRTC has established clear principles relating to deployment of carriers' wireline facilities in, on and over public rights-of-way and the relationship between carriers and municipalities that govern that deployment.

43. However, the inclusion of wireless facilities within the term "transmission lines", which is undefined in the *Telecommunications Act* has never been formally confirmed. Given the evolution of telecommunications facilities and services, and the imminent deployment of 5G technology, certainty around the inclusion of wireless facilities as part of transmission lines is essential.

44. A related issue is that carriers require access not only to public rights-of-way and public places, but also access to public infrastructure such as street lights, buildings, public transport shelters and other public assets. Although subsection 43(2) grants carriers access to "other public places," it could be asserted that such term does not capture public infrastructure, although carriers would take the position that it is so captured.

45. Furthermore, the process to access such public infrastructure should follow the same principles that the Commission has outlined for public rights-of-way, specifically: municipalities may only recover their causal costs associated with the carriers'

[39] *Bell Canada et.al. v. The City of Calgary*, 2018 ABQB 865.

installation; the collection of rents or occupancy fees are not permitted; and carriers may be entitled to reimbursement for relocation of their facilities by the municipality.

46. Finally, given the significant equipment deployment requirements related to 5G, it is vital that the approval processes for access to public infrastructure be fast, efficient, and low-cost. For example, any fees charged by municipalities for reviewing deployments of telecommunication facilities on/in public infrastructure be strictly limited to the recovery of the municipalities' costs; that municipalities and other public authorities issue decisions on applications to attach telecommunications infrastructure to existing public infrastructure within 60 days and applications to build new small cell poles within 90 days; and bar municipalities and other public authorities from introducing rules that have the effect of prohibiting the deployment of telecommunication facilities.

47. Given the fundamental importance of access issues to the future of Canada's digital economy, Shaw proposes the following amendments to sections 43 and 44 of the *Telecommunications Act* to address matters of infrastructure and public property access. Specific language for those recommended amendments to sections 43 and 44 of the *Telecommunications Act* are set out in the Bastarache Opinion.

RECOMMENDATION 3
In accordance with the proposed revised wording of sections 43 and 44 of the *Telecommunications Act* set out in the Bastarache Opinion (pages 6-8): • **Confirm the right of facilities-based telecommunications providers to access and use the support structures of electrical utilities;** • **Confirm the right of facilities-based telecommunications providers to access and use the support structures owned by a municipality or other public authority;** • **Clarify that these access and use rights apply to any public property that is capable of being used as a support for telecommunications facilities, such as streetlights, buildings, public transit shelters and other physical public assets;** • **Clarify that these access and use rights extend to both wireline and wireless telecommunications service providers; and** • **Confer on the CRTC the express authority to determine the terms of such access and use and the rates applicable thereto.**

48. Shaw's proposals for amendments to the *Telecommunications Act* to implement these Recommendations would address the CRTC Chairperson's recent comments about the CRTC's limited powers to intervene in matters associated with access under the current

legislative framework.[40] We urge the Panel to recommend that the *Telecommunications Act* be modified to support the emergence of strong, sustainable facilities-based networks that drive telecommunications competition and Canada's full participation in the digital economy, and to do so by introducing the proposed amendments.

II. SUPPORTING CREATION, PRODUCTION AND DISCOVERABILITY OF CANADIAN CONTENT

A. The Regulatory Framework Must Serve a Broadcasting System that is No Longer "Closed"

49. Canada's legacy broadcasting regulatory framework successfully advanced the *Broadcasting Act's* cultural objectives in an environment of a "closed" broadcasting system. However, external forces affecting content formation and distribution on a global basis have challenged this system. New digital platforms have emerged in competition with broadcasters and BDUs, having capitalized on a business model which was initially dependent on access to relatively inexpensive library (or posted) content, as well as distribution facilitated by third-party networks with global reach (i.e. the internet). Further, some platforms are financed by advertising and some by subscriptions.[41]

50. This highly scalable economic model has resulted in a virtually unlimited supply of high-quality programming. Indeed, a significant amount of this programming is – now that OTT business models have been established and garnered significant market share – comprised of new, high-quality scripted content that competes directly with content that was previously offered predominantly by broadcasters and movie studios.

51. OTT platforms have enjoyed, from their inception, an absence of regulatory requirements and financial burdens in Canada (including the collection and remittance of sales tax in the case of non-Canadian platforms), while their competitors from the "legacy" broadcasting industry remain highly regulated. In short, the regulatory system continues to govern BDUs (and other traditional broadcasting undertakings) as if a "walled-garden" environment exists, even though these boundaries have clearly collapsed.

52. Yet, at the same time, the current content funding regime demands little in terms of accountability from those who benefit primarily from it (i.e. Canadian independent producers). Although producers are not regulated under the *Broadcasting Act* – the only reference to them being made in the context of the objective that the system should "include a significant contribution from the Canadian independent production sector"[42]

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[40] See Testimony of CRTC Chair Ian Scott to the Senate Committee on Transport & Communications (30 Oct 2018), online: https://www.canada.ca/en/radio-television-telecommunications/news/2018/10/ian-scott-to-the-senate-standing-committee-on-transport-and-communications.html.

[41] While a transaction-based economic model is the basis for some of these new platforms (such as iTunes), these have not, in and of themselves, significantly disrupted the broadcasting business.

[42] *Broadcasting Act*, s.3(1)(*i*)(vi).

– representatives of the Canadian independent production community continue to argue vociferously to retain their existing entitlements.

53. Thus, paradoxically, while licensed broadcasting undertakings are subject to burdensome obligations and costs based on a "regulatory bargain" that no longer enjoys the value of a closed market, support for Canada's creative sector remains in place. Moreover, Canadian creators (writers, directors, actors and producers) have benefitted from extensive opportunities in new global markets for their creative inputs.[43] Indeed, while Canadian BDUs have experienced direct financial harm from OTT entry and cord-cutting, these same developments have presented producers with a multitude of new windows, platforms and markets for their content. Indeed, the CMPA's own research confirms that its member producers are enjoying the financial benefits of the digital world. For example, foreign financing has increased from $176 million in 2012/2103 to $381 million in 2016/2017.[44]

54. Notwithstanding these developments, the Canadian creative community continues to seek *new levies* from the Canadian communications sector (notably, ISPs).[45]

55. Canadian television production received over $12.8 billion in financing between 2012/2103 - 2016-2017, a significant component of which is provided through public funding including tax credits and the CMF.[46] At the same time, the number of Canadian entertainment shows currently eligible to receive public funds[47] that rank in the top 40 watched by Canadians in prime time has averaged only 3 per year:[48] Unfortunately, Canadians continue to watch little of the content that is brought into the system through Canada's elaborate funding architecture.

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[43] Canadian Media Producers Association (**CMPA**), Department of Canadian Heritage, Telefilm Canada, Association québécoise de la production médiatique (AQPM) and Nordicity, *Profile 2017 – Economic Report on the Screen-Based Media Production Industry in Canada* [**Profile 2017**] online: https://cmpa.ca/wp-content/uploads/2018/12/Profile-2017-.pdf, page 7:

> The content explosion is a global phenomenon, bringing opportunities to Canadian creative talent, crews, producers, and distributors. The evidence? More than $3.7 billion in foreign location and service (FLS) production in Canada – the highest level this country has seen [Footnote: In nominal or real-dollar terms]. Every province involved in FLS production saw an increase over last year: British Columbia (46% increase), Ontario (23% increase), Quebec (43% increase), Manitoba (67% increase), Alberta (59% increase), Nova Scotia and the Territories (more than 200% increase). The draw for foreign producers and studios was once the favourable currency exchange rate. Now, they come to Canada mainly for the competitive incentives, skilled crews, award-winning creative talent, state-of-the-art technical facilities, and exceptional locations.

[44] Profile 2017, page 51.

[45] See, for example, the submissions of the CMPA filed in Broadcasting Notice of Consultation CRTC 2017-359-2, at para. 52: "Legislative change is needed so the Commission is able to require contributions to Canadian programming from ISPs and WSPs."

[46] Profile 2017, page 51.

[47] Non-news, non-sports programs.

[48] There is little indication that these expenditures have resulted in significant gains for the viewership of Canadian films and at least in English Canada, the viewership of Canadian television shows. Nor have these measures resulted in a significant increase in exports: see Richard Stursberg, *Cultural Policy in a Digital Age*, (2016) online: https://techlaw.uottawa.ca/sites/techlaw.uottawa.ca/files/culturalpolicyforthedigitalage.pdf, page 10.

56. The foregoing paradigm is no longer sustainable: regulatory reform must prioritize the development of a Canadian content sector that is focused on customers and viewers. A new broadcasting and cultural policy toolkit should focus on the creation and production of Canadian content that is relevant, distinctive, attractive and meaningful with domestic as well as international audiences. Moreover, it should do so without undermining its own domestic broadcasting and telecommunications industry, and without imposing new costs on Canadian consumers by mandating the payment of indirect subsidies by the private sector in support of Canadian content production. Accordingly, we agree with the suggestion that Canada's broadcasting policy must evolve from "protecting Canadian culture" to "promoting and supporting Canadian culture"; and from "subsidizing Canadian content" to "investing in Canadian talent and incentivizing risk-taking."[49]

57. At a minimum, any ongoing funding approach should not be at the continued expense of BDUs who are facing significant market challenges and, in order to remain competitive, must focus on making extensive investments and innovations in their networks. Nor should such measures come at the expense of telecommunications providers or their customers.

58. If the Government concludes that ongoing subsidy of the production sector is appropriate, an approach that features direct government funding of the CMF, rather than the current hybrid system of government funding and industry contributions (notably, the 5% BDU levy), would be a fairer and more effective way to fund the cultural sector than the current public/private model. Indeed, Shaw notes that a direct subsidy approach is supported by international economic organizations that argue that to level the playing field between BDUs and new media, the government could consider subsidizing Canadian content directly through general taxation rather than through levies on constituents of the broadcasting sector and their customers.[50] Such an approach would avoid undermining the essential role that BDUs play in discharging their responsibilities and serving the public interest pursuant to the *Broadcasting Act*.[51]

B. Modernizing the Contribution Regime by Removing Regulatory Asymmetry

59. The Call for Comments asks "how the legislative and regulatory framework may be modified to ensure that all players, including online players that do business in Canada, play a role in the creation, production, and distribution of Canadian content." In response to this question, it is foreseeable that many stakeholders will seek to extend the current

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[49] Department of Canadian Heritage, "Consultation Paper: Canadian Content in a Digital World - Focusing the Conversation", online: https://www.canadiancontentconsultations.ca/Consultation-Paper at page 4.

[50] See Luu, C. (2016), "Strengthening competition in network sectors and the internal market in Canada", OECD Economics Department Working Papers, No. 1322, OECD Publishing, Paris, at p. 23 – http://dx.doi.org/10.1787/5jlswbxnfdxs-en, as cited in Telus' submissions in Broadcasting Notice of Consultation CRTC 2017-359-1, para. 23.

[51] In fact, Shaw notes that the Government has already mitigated the impact of falling BDU contributions due to cord cutting through its commitment to increase its contribution to the CMF.

system of internal cross-subsidies in further support of Canadian programming to include OTT services and platforms, ISPs and WSPs.[52] In Shaw's view, an approach based on sectoral cross-subsidy – and particularly one that impacts Canada's broadcasting distribution services and telecommunications providers – is untenable in today's digital environment.

60. The status quo is no longer effective or relevant. More than a decade ago, the Telecommunications Policy Review Panel observed that legacy approaches to regulation threaten to undermine the prospects for digital competitiveness:

> Cable telecommunications BDUs play a central role in the provision of advanced broadband telecommunications services in Canada.... In the long run, Canada may lose more by restrictive regulation of cable telecommunications networks to advance a declining form of broadcast content delivery than it could gain by embracing the full potential of new cable-based IP platforms.[53]

61. For its part, the CRTC recently observed that current rapid cycles of disruption and innovation in the new distribution landscape have challenged assumptions behind government measures that support a vibrant market here in Canada."[54] Shaw concurs and urges the Panel to shift its lens away from any question of how to preserve old subsidies, or pursue new ones from stakeholder groups. Moreover, the Terms of Reference are clear that while the current review provides an opportunity to consider whether there are new ways that Canadian content creation, distribution, and discovery can be supported in the new digital communications environment, the Government expressly stated that it "is not interested in an approach that increases the cost of services to Canadians."[55]

62. Between 2008-2018, Shaw Cable and Shaw Direct's regulatory costs, as licensed BDUs, have exceeded $1.8 billion dollars, of which over 70% was comprised of Shaw's 5% Canadian programming contributions.[56] However, during this same period, OTT platforms have established a dominant foothold in Canada while enjoying effective regulatory "forbearance" from requirements such as licensing, packaging or programming obligations[57] that govern existing players under the current CRTC regulatory framework.

63. In April 2018, Netflix's total subscriber count in Canada was estimated to be between 6.1-6.7 million – between 54%-60% of the total subscribers within Canada's regulated

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[52] See, for example, the submissions of the CMPA in BNC CRTC 2017-359-1, para. 22.

[53] Government of Canada, Telecommunications Policy Panel – Final Report (2006), Afterword, 11-18.

[54] CRTC, "Consultation on the future of program distribution in Canada, Reference Document", online: https://crtc.gc.ca/eng/television/program/s15r.htm, at "Digital brings benefits and challenges".

[55] ISED, Terms of Reference, 10. Support for Canadian Content and Creative Industries.

[56] The balance was comprised of CRTC Part 1 & Part 2 Fees and wholesale payments to 9(1)(*h*) services.

[57] Moreover, OTTs realize much lower customer acquisition and retention costs (such as in-home installation or technician visits). Further, as noted on the record of the "New Distribution Models" CRTC proceeding, the technological and operating costs of operating an OTT service are significantly lower than traditional platforms, with the cost of hosting and delivery of content direct-to-consumers, on a global basis, now costing less than the cost of one satellite uplink fee on the broadcasting system. See Telus submission in BNC 2017-359-2, para. 52.

system.[58] In view of the dramatic growth of OTT platforms in Canada, the maintenance of a regulatory regime targeting BDUs threatens to further undermine the competitiveness, legitimacy and appeal of the Canadian broadcasting system and all of its stakeholders. This will in turn have broader, deleterious impacts on Canada's successful engagement in the digital economy.

64. The increasingly asymmetric environment is forcing BDUs to assume disproportionate financial and regulatory burdens (including significant costs associated with legacy obligations on BDUs, such as the fulfillment of detailed and cumbersome packaging requirements). These obligations have constrained the ability of BDUs to invest and innovate in response to the highly competitive environment. Moreover, Shaw's BDU revenues have been eroding since 2011, in large part due to the failure of the regulatory framework to adapt to the entry of OTT competition. At the same time, Netflix and other OTT services have enjoyed a "free ride" on Canadian ISPs' networks, with no network infrastructure development or maintenance, and no regulatory obligations.

65. Regardless of any rationale invoked in support of the 5% levy on BDU revenues for the production and exhibition of Canadian content that existed in the past, the financial burden imposed on BDUs and our customers is no longer tenable or in the public interest. This financial obligation impairs our ability to deliver programming at affordable rates. Moreover, it undermines our most important cultural contribution to the broadcasting system – the provision of efficient, state-of-the-art networks and associated innovations in the increasingly competitive distribution sector. These networks are critical to ensuring comprehensive choice in programming and priority carriage for Canadian programming services.

66. Furthermore, by reducing monies available for investment in efficient, reliable, and widely accessible converged networks and services, the 5% levy also had a negative impact on the foundation on which Canada's broader digital economy is based.

67. The Brattle Report addresses the economic efficiency implications of existing and proposed taxation programs in the broadcasting sector. In particular, the Report finds that:

> ...the annual deadweight loss to the Canadian economy resulting from existing mandatory BDU contribution regime is on the order of $167 million per year under the baseline case. This implies a deadweight loss of approximately 38¢ for every $1 of revenue contributions elicited by the regime ... the deadweight loss estimates under our alternative assumptions about the elasticity of demand range up to $334 million of annual losses in total welfare.[59]

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[58] Emily Jackson, "Netflix doing booming business in Canada, industry research reports suggest" (Apr 2018), online: Financial Post, https://business.financialpost.com/telecom/media/netflix-doing-booming-business-in-canada-industry-research-reports-suggest.

[59] Brattle Report, para.77.

68. The disparity and unfairness in the current regulatory framework undermines choice, innovation and efficiency of the Canadian broadcasting system – all of which are priorities identified in the broadcasting and regulatory policy set out in the *Broadcasting Act*. Shaw is endeavouring to take on competitive challenges not by seeking subsidies or supports, but rather by focusing on operational efficiency and substantial investment and innovation in our BDU networks and operations. However, Canadian-based players such as Shaw require regulatory fairness, flexibility and an appreciation of the significant and appropriate contributions that BDUs make to the Canadian broadcasting system. The 5% levy as well as the other financial and regulatory burdens, are inconsistent with the *Broadcasting Act*'s section 3 objectives for BDUs and the section 5(2) objectives for flexible regulation.

RECOMMENDATION 4
Add the following to the regulatory policy in subsection 5(2) of the *Broadcasting Act*: **(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that** **ensures that Canadian owned-and-controlled broadcasting undertakings are not subject to asymmetrical regulation or any other disadvantages relative to non-Canadian broadcasting undertakings operating in Canada**

C. The Mandatory BDU Contribution Regime is Not Grounded in the *Broadcasting Act*'s Objectives

69. When the Commission imposed contribution requirements on BDUs, it cited paragraph 3(1)(*e*) of the *Broadcasting Act,* noting that its "jurisdiction to require each element of the broadcasting system to contribute to Canadian programming is clear, and that the nature, extent and mechanism of that contribution is entirely within its discretion."[60] Shaw submits that the conclusion that BDUs are an "element" of the broadcasting system conflicts with a coherent reading of the scheme of section 3 as a whole. Paragraph 3(1)(*b*) of the Act provides that the Canadian broadcasting system comprises three elements: public, private and community. BDUs are not an "element" of the Canadian broadcasting system. Therefore, continued reliance on BDU mandatory financial contribution requirements are not an "appropriate manner" by which BDUs should be mandated to contribute to the creation and presentation of Canadian programming.[61]

[60] Public Notice CRTC 1993-74 – *Structural Public Hearing* (Ottawa, 3 Jun 1993), VI. Funding of Canadian Television Programming.
[61] As currently reflected in the broadcasting policy in paragraph 3(1)(e) of the *Broadcasting Act.*

70. Shaw submits that it is more appropriate to look to the provisions of the statutory broadcasting policy that expressly refer to the intended contributions of BDUs, in particular those found in paragraph 3(1)(*t*) of the Act. These statutory provisions appropriately relate to carriage and delivery – and not to the funding – of Canadian programming. Pursuant to subparagraphs 3(1)(*t*)(i), BDUs are directed to: "give priority carriage of Canadian programming services and ... the carriage of local Canadian stations"; provide "efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost"; "provide reasonable terms for the carriage, packaging and retailing" of programming services; and originate local programming where appropriate. These statutory obligations benefit not only Canadian creators and broadcasters but also Canadian consumers.

71. To correct both a historic misuse of the word "element" as it applies to BDUs and to preclude a further mischaracterization by describing ISPs or WSPs as "elements", the language of the Act should be clarified by reproducing the specific language in paragraph 3(1)(*b*) in the context of the contribution in paragraph 3(1)(*e*).

RECOMMENDATION 5
Amend 3(1)(*e*) of the *Broadcasting Act* to read: **(e) <u>the public, private and community elements</u> of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;**

72. The above amendment would make clear that the specific objectives that relate to distribution undertakings are found in paragraph 3(1)(*t*).

73. Further, to recognize that the most important contribution made by BDUs to the delivery of Canadian content is the billions of dollars that are invested in the network, the following amendment should be introduced:

RECOMMENDATION 6
Amend paragraph 3(1)(*t*) of the *Broadcasting Act* by adding a new subsection (i): **(t) distribution undertakings** **<u>(i) should be recognized as making a contribution to the delivery of Canadian programming through their network investment,</u>**

74. At the same time, Shaw would be adamantly opposed to any attempts to amend the Act to specifically introduce into legislation a mandatory financial contribution applicable to BDUs, or to empower the CRTC further to do so. Any such regressive proposals would exacerbate asymmetry with OTTs, harm consumers and undermine the ability of BDUs

– and the system, as a whole – to remain competitive and relevant in today's digital environment. This legislative review process should position the system for success in the future – not enshrine legacy tools from the past.

D. An ISP Tax Should Be Rejected

75. As the Panel is aware, various stakeholders have proposed that ISPs and WSPs be mandated to make contributions toward Canadian programming.[62] The CRTC's *Harnessing Change* Report went further and proposed an "integrated fund" that would be "more broadly 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 audio and/or video content".[63]

76. There are two fundamental flaws with this purported approach to ostensibly rebalance the content funding mechanism. First, this recommended approach completely disregards the obvious negative economic impact on competition, consumers and innovation that would result from a new tax on telecom providers. Second, the proposed approach conceptually flies in the face of decades of well-considered, legal, statutory and regulatory underpinning relating to the treatment of broadcasters versus telecommunications providers.

An ISP Tax Would Be Detrimental to Canada's Competitiveness in the Digital Economy

77. While the *Harnessing Change* Report's proposed revenue-neutral approach on its surface appears to be an "easy fix" to the funding issue, it fails to address the significant second-order distortive economic effects such an approach would have on the telecommunications sector. Thus, the Report's argument that such a funding strategy could occur "without the need for new costs to consumers"[64] is not probative or helpful. Shaw finds this omission particularly surprising in view of the previous acknowledgement by the Commission of the importance of internet access as a driver of productivity and competitiveness in the digital age and for Canadians to participate in the digital economy, thereby underscoring its importance to Canada's economic, social, democratic, and cultural fabric.[65]

78. The imposition of an ISP Tax would be inconsistent with the Government's Terms of Reference in the Joint Legislative Review, which expressly state that measures should

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[62] Hereinafter ISPs and WSPs are referred to generically as "ISPs".
[63] CRTC, "Harnessing Change: The Future of Programming Distribution in Canada" (31 May 2018) [**Harnessing Change Report**] at Conclusions and Potential Options, online: https://crtc.gc.ca/eng/publications/s15/pol1.htm#pr2.
[64] Harnessing Change Report, Conclusions and Potential Options, Restructured funding strategy, online: https://crtc.gc.ca/eng/publications/s15/pol1.htm#p2.
[65] Telecom Regulatory Policy CRTC 2016-496 – *Modern telecommunications services - The Path Forward for Canada's Digital Economy* (Ottawa, 21 Dec 2016) [**TRP 2016-496**], para. 21.

not be introduced that would: increase the costs of connectivity to Canadians; undermine access to high-quality affordable broadband internet across Canada; or divert resources away from building the strength and capacity of our networks. In that regard, the imposition of an ISP Tax would clearly increase reliance on wireline or wireless internet service to subsidize Canadian programming, which in turn would have serious and detrimental effects – direct and indirect – on Canada's competitiveness and long-term growth in the digital economy.

79. An ISP Tax would result in numerous significant negative outcomes – it would:

- divert investment in network development, which would harm Canadians, make Canada less competitive and undermine not only the successful realization of our broadcasting policy, but Canada's broader economic and societal interests as well;
- make internet and mobile services less affordable (with the greatest impact on low-income Canadians), exacerbating Canada's digital divide, which would be disproportionately felt in rural and remote areas;
- conflict with Canada's "Inclusive Innovation Agenda", which is striving to foster "a thriving middle class and … new economic, social and environmental opportunities" by supporting and advancing:[66]
    - maximum engagement in the digital economy;
    - maximum adoption of digital technologies;
    - affordability of the internet; and
    - competitiveness of Canada's ICT sector.

80. The above outcomes would conflict with the policy objectives set out in subsections 7(b) and (c) of the *Telecommunications Act*, namely:

- to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; and
- to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications.

81. The Policy Direction, which guides the CRTC's implementation of the *Telecommunications Act*'s policy objectives, requires regulatory measures to be

[66] Government of Canada, ISED, *Positioning Canada to Lead: An Inclusive Innovation Agenda*, online: https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00009.html; and *An Inclusive Innovation Agenda: The State of Play*, online: https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00009.html, p.27-30.

"efficient and proportionate to their purpose, and minimally interfere with market forces."[67] By contrast, an ISP Tax would:

- be overbroad, by applying to all individual and commercial internet users for uses that are unrelated to the consumption of audio-visual content;
- likely act in a non-neutral fashion by impacting the decisions of individuals to acquire internet services; and
- uphold a subsidy model that has been a disincentive to innovation, investment and sustainability in the Canadian cultural creation sector.

82. The Brattle Report examines the impact of the proposed ISP Tax. Its primary finding is that levy or tax schemes focused on a certain sector or activity are associated with significant economic efficiency losses (referred to by economists as "**deadweight loss**") resulting from the lower total consumer and producer welfare ("**social welfare loss**") that is generated as a result of their market distorting effects. In the case of an ISP Tax, the Brattle Report demonstrates that it would lower the utilization of the existing, currently deployed networks and provide a disincentive for network providers to invest in improvements to their networks, which in turn are key to dynamic competition in Canada and beneficial to the Canadian economy. The impacts are explained in the Brattle Report:

> ... the annual deadweight loss to the Canadian economy resulting from the 1% ISP Tax, based on 2016 revenues, is approximately $180 million per year under our baseline scenario. This implies a deadweight loss of approximately 54¢ for every $1 of taxes ... the deadweight loss estimates associated with the proposed 1% ISP Tax under our alternative assumptions range up to approximately $295 million of annual losses in total welfare. [68]

83. The Brattle Report demonstrates that an ISP Tax would be associated with an incremental loss in social surplus due to further deadweight loss even under a "revenue neutral" tax scheme.[69] In other words, even if an ISP Tax was implemented alongside a commensurate reduction in BDUs' contribution rate, the Brattle Report demonstrates that such a levy would result in losses of $54.4 million/year more than the existing losses under BDUs' 5% contribution alone.[70] Moreover, there is no assurance that once the door is opened, that any such tax would remain in fact "revenue neutral".

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[67] *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, PC 2006-1534, 14 December 2006, s.1(a)(ii).
[68] Brattle Report, para. 83.
[69] Brattle Report, paras. 87-88.
[70] Brattle Report, paras. 87-88.

An ISP Tax Would Offend the Fundamental Regulatory Distinction Between Broadcasting and Telecommunications

84. An ISP Tax in support of content creation goals would ignore the historical underpinnings with respect to the appropriate regulatory treatment of broadcasting versus telecommunications services. It would introduce a significant historical "discontinuity" into the respective regulatory framework governing broadcasting and telecommunications. Decades of economic and regulatory law principles have clearly distinguished the role and obligations of "content" providers (creators/programmers) and "carriage" (telecommunications common carriers, TSPs). Regulators and courts worldwide have acknowledged that an ISP's role is not one that implicates "content" or "editorial" decisions.

85. In Canada, both the Federal Court of Appeal and the Supreme Court of Canada have found that an ISP does not engage with the policy objectives of the *Broadcasting Act* "when it is merely providing the mode of transmission" and when it "provides internet access to end-users".[71] It is significant to cite the following passage of the Supreme Court of Canada:

> When providing access to the Internet [ISPs] take no part in the selection, origination, or packaging of content. We agree with Noël J.A. that the term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the Broadcasting Act's policy objectives.[72]

86. A similar approach can be found under European law in which internet access providers are considered "mere conduits" and subject to the same regulatory environment applicable to telecoms operators. "Layer 1 operators" may not generally take action to implicate audiovisual policy rules, unless subject to court orders to block certain content, including audiovisual content, when other remedies have failed.[73]

87. Moreover, requiring ISPs to make content-specific payments would also derogate from the principle that regulators have imposed (correctly) on ISPs, namely that they should respect "network neutrality" in performing their sole role as the provider of the "mode of transmission"[74] to content providers. In this capacity, an ISP is agnostic as to the underlying content on its networks. Thus, an ISP is not engaged with the *Broadcasting Act*'s objectives – "such as the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse."[75] Nor is

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[71] *Reference re Broadcasting Act*, 2012 SCC 4, para. 5.
[72] *Reference re Broadcasting Act*, 2012 SCC 4, para. 5.
[73] See: Winston Maxwell, David Abecassis, Michael Kende, "White Paper: TV Regulation in a Digital Age" (2018), online: Hogan Lovells (Paris) LLP, http://www.analysysmason.com/contentassets/e5b5da956e3347c09dbc5f11f0f0e820/final-version-11836_eun_google-nl-2018_nl_e.pdf.
[74] *Canadian Radio-television and Telecommunications Commission (Re)*, 2010 FCA 178, para. 21 citing *Electric Despatch Co. of Toronto v Bell Telephone Co. of Canada* (1891), 20 SCR 83.
[75] *Reference re Broadcasting Act*, paras. 4-5.

an ISP the entity that is said to transmit or communicate the information, given that it does not have any measure of control over the programming.[76] This clear conceptual distinction means that it is appropriate that ISPs remain regulated under telecommunications legislation and not be saddled with content/cultural obligations that are grounded under completely distinct regulatory and legislative principles.

88. Legislative amendments that would compel or empower the CRTC to impose content levies on ISPs would derogate from the telecommunications regulator's fundamental role to uphold (rather than violate) net neutrality. This principle insists upon regulators and providers remaining agnostic regarding content carried on networks. This principle should not be undermined by any proposed legislative changes so as to blur or eliminate the long-standing demarcation between "content" and "carriage".[77]

89. Effectively, proponents of the ISP Tax have conflated the functional role of ISPs and OTT services that rely on the facilities of ISPs. An online audio-visual content provider such as Netflix would clearly fall under the *Broadcasting Act*'s definition of "broadcasting,"[78] by performing the functions of a broadcasting undertaking in the selection, origination, or packaging of content.[79] However, the fact that video content provided by OTT services is transported on ISP facilities, and may account for a high volume of ISP traffic on such facilities, does not in turn sweep the latter into the realm of content regulation.

90. This distortive characterization of the role of ISPs was repeated in the *Harnessing Change* Report, which asserts without any context that the vast majority of the demand for telecommunications services and the growth in ISP revenues is driven by video and audio content.[80] Shaw submits that a much wider lens is needed to accurately describe the role of an ISP, namely as that of a common carrier. User generated content, online banking and commerce, email, research, gaming, and social networking accounts for the vast majority of traffic carried on an ISP. Proponents of an ISP Tax therefore distort the role of ISPs by narrowly focusing on the availability of long-form traditional television content through OTT services.

91. Further, it is also misleading to state that internet providers' growth is "thanks to demand for broadband and growth in online video consumption" and, therefore, such revenues

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[76] *Reference re Broadcasting Act*, para. 6, citing *Electric Despatch Co. of Toronto v Bell Telephone Co. of Canada* (1891), 20 SCR 83 and *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45.

[77] See: Peter Menzies, "Viewpoint – CRTC wants to tax Internet users to subsidize content creators", (13 Nov 2018) online: NetNewsledger.com http://www.netnewsledger.com/2018/11/13/viewpoint-crtc-wants-to-tax-internet-users-to-subsidize-content-creators/.

[78] Although all such entities are exempt from regulation pursuant to Broadcasting Order CRTC 2012-409 – *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, (26 Jul 2012).

[79] *Reference re Broadcasting Act*, 2012 SCC 4, para. 5.

[80] Harnessing Change Report, Conclusions and Potential Options, Restructured funding strategy, online: https://crtc.gc.ca/eng/publications/s15/pol1.htm#p2.

have "compensated" for cord-cutting and other challenges to the BDU model.[81] To the contrary, the volume of high-bandwidth OTT streaming traffic has driven a continual need for costly network investments and upgrades in order to meet user demand. OTTs make no contribution to these network infrastructure investments/upgrades while at the same time enjoying a massive financial benefit from access to these facilities.[82] Our ongoing investment, development and build-out of robust networks should therefore be viewed as ISPs' contribution to Canada's social and economic fabric, consistent with the objectives of the *Telecommunications Act*.[83]

92. In summary, an ISP Tax allocated to subsidize Canadian content creation should be rejected. It would: constitute a disproportionate measure that cannot be justified in view of the anticipated long-term costs, which include decreasing the accessibility and affordability of communications services, undermining investment by ISPs and harming Canada's economic competitiveness in the digital economy; and, be contrary to long-established and appropriate legislative and regulatory principles governing the treatment of telecommunications entities that merely provide the mode of transmission and have no control over content.

RECOMMENDATION 7
Refrain from amending either the *Broadcasting Act* or the *Telecommunications Act* in a manner that would empower or compel the regulation of internet service providers or wireless service providers as broadcasting undertakings.
Refrain from amending either the *Broadcasting Act* or the *Telecommunications Act* in a manner that would empower or compel the CRTC to collect revenues from internet service providers or wireless service providers in support of Canadian content.
Refrain from recommendations to merge the *Broadcasting Act* with the *Telecommunications Act* into a single Act and confirm that the objectives under the *Broadcasting Act* and the *Telecommunications Act* must remain separate and distinct.

[81] See: Emily Jackson, "It's not a tax': CRTC chair defends proposal for internet providers to contribute to Canadian content, (1 Nov 2018), online: Financial Post, https://business.financialpost.com/telecom/its-not-a-tax-crtc-chair-defends-proposal-for-internet-providers-to-contribute-to-canadian-content .

[82] As of August 2018, OTT streaming accounted for 54% of the total annual internet consumption volume on Shaw's network. During Peak Hours (9:00-11:00 PM) Netflix accounted for 35% of Shaw internet traffic while YouTube accounted for 16% of Shaw internet traffic.

[83] "The network is our contribution", statement of Pam Dinsmore, Vice-President, Regulatory, Rogers Communications Inc. panel discussion at IIC Conference Ottawa, October 31, 2018. To illustrate the capital requirements and necessary investment for Shaw to offer ultra-fast internet to the majority of our footprint, we note that investments of billions of dollars and over 2 million engineering hours have been expended to build Shaw's FibrePlus network, a 100% fibre backbone that spans more than 860,000 kilometers, allowing Shaw to offer our highest speeds to over 99% of our footprint, more customers than any other Western Canadian provider. Maintaining the speed and capacity of our broadband network also demands continuous deployments of capital-intensive upgrades such as DOCSIS 3.1.

E. How Should OTT Services Contribute to the Creation of Canadian programming?

93. In the 2017 CRTC proceeding to consider new distribution models, many parties advocated for the imposition of a so-called "Netflix Tax", a revenue-based equivalent to BDUs' Canadian contribution requirements.[84] In Shaw's view, there are more appropriate and effective means than an OTT Tax to ensure that Canadian and foreign OTT services contribute to the creation and presentation of Canadian programming in the online world.

94. Shaw submits that the imposition of legacy regulatory models onto OTT platforms would not be in the best interest of consumers or the overall Canadian broadcasting system. A regulatory framework that depends on foreign OTT services to achieve the cultural objectives of Canada's domestic broadcasting system will likely lead to issues of enforcement as well as inconsistent and unsatisfactory results. Shaw notes that Netflix has vociferously opposed ceding to CRTC regulation and oversight based on its statements made before the CRTC in previous proceedings.[85] At the same time, however, Shaw reasserts our view that regulatory symmetry demands that neither OTTs nor BDUs make a mandatory contribution to Canadian content production.

95. Rigid regulatory tools, such as mandated direct contributions to Canadian public-private partnerships like the CMF, were designed to achieve the *Broadcasting Act's* objectives when Canada's broadcasting system was "closed" and when, for the most part, available services and distributors were owned and operated by Canadians. In the new world of unlimited choice and global competition among Canadian and foreign entities, Shaw believes the *Broadcasting Act's* objectives will be best achieved through a more flexible, market-driven approach.

96. A more appropriate non-financial "contribution" by non-Canadian broadcasters could provide for reasonable "discoverability" requirements, such as "search" or recommendation functions that generate results that include a proportion of Canadian content. Introducing such a requirement on all OTTs (Canadian and non-Canadian) would be consistent with the Canada-United States-Mexico Agreement (**CUSMA**) without reliance on the cultural exemption.

97. While Shaw believes that non-Canadian OTT platforms are already captured by, and subject to, the *Broadcasting Act*, this should be clarified by amending the Act to define OTTs and the Canadian broadcasting policy objectives that are assigned to them.

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[84] See, for example, submissions filed in BNC 2017-359-1 of Unifor, para. 41 and CBC/Radio-Canada, para. 5.

[85] See, Netflix submissions filed in BNC 2017-359-1 at Part VI – Importing broadcast-era rules to internet media will not achieve intended policy goals and will limit growth, competition, and creative freedom for new media models and creators.

RECOMMENDATION 8
Amend subsection 2(1) of the *Broadcasting Act* to add the following definition: ***internet-delivered programming undertaking*** **means an undertaking for the transmission of programs by means of the internet, which is not dependent on transmission by distribution undertakings**[86]
Amend subsection 3(1) of the *Broadcasting Act* to add the following objective: **internet-delivered programming undertakings:** **(i) should contribute to the creation, presentation and discoverability of Canadian programming, and** **(ii) should not be advantaged relative to other undertakings in their ability to be responsive to the evolving demands of the public**

F. A Digital Sales Tax is a Viable Solution

98. Under Canadian law, foreign online services like Netflix are not required to collect and remit sales tax."[87] This is inequitable given the fact that Canadian ISPs, BDUs and online content providers are all subject to the requirement to contribute to Canada's general tax revenue through sales taxes and corporate income taxes. To the extent that the Government deems it necessary to find further support for the creation of Canadian programming, the digital sales tax revenue from foreign audiovisual services that have a direct customer relationship would provide a substantial new source of funds. Such an approach would also address concerns for fairness and symmetry in the system.

99. The revenues contributed to the "general revenue account" of Government following the implementation of the obligation of foreign OTT services operating in Canada to collect and remit general sales tax/harmonized sales tax (GST/HST) is projected to add $100

[86] A corresponding amendment to the definition of "broadcasting undertaking" would be required to add "internet-delivered programming undertaking" as follows (addition underlined):

> *broadcasting undertaking* includes a distribution undertaking, a programming undertaking, internet-delivered programming undertaking, and a network;

[87] Corie Wright, Director, Global Public Policy at Netflix, "What Netflix's half a billion CAD investment in Canada is really about" (10 Oct 2017) https://media.netflix.com/en/company-blog/what-netflixs-half-a-billion-cad-investment-in-Canada-is-really-about.

million to consolidated tax revenue, annually.[88] Over the five year period (2016-2020), the cumulative total potential government revenues would have exceeded $500 million.[89]

100. While Shaw recognizes that digital sales tax is an area that is ultimately within the ambit of the Department of Finance rather than the Department of Heritage, it merits inclusion and serious consideration in the current cultural policy discussion given the competitive advantage that current tax treatment affords non-Canadian OTT services. Shaw also notes that the impetus to adopt such measures internationally is gaining significant momentum.[90]

101. While there are undoubtedly some challenges that would need to be resolved for the implementation of a Canadian sales tax on foreign digital goods and services,[91] other jurisdictions started to reform their tax systems to reflect commercial realities in the digital age. For example, on July 1, 2017, Australia implemented GST on foreign digital goods and services[92] for all non-Australian businesses that generate more than $75,000 in sales to Australian consumers annually.[93] The measure is expected to generate a revenue gain of approximately $350 million over the forward estimate period (July 1, 2017 - December 31, 2019).[94] Moreover, in July 2018, Quebec passed a budget whereby foreign OTT services must collect GST from consumers in that province starting January 1, 2019.[95]

102. Furthermore, as explained in the Brattle Report:

> Value-added taxes ("VATs"), often called goods and services taxes, are an example of a uniform consumption tax … in a uniform tax environment, the relative price of all goods and services increases by the same amount so relative prices remain

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[88] Financial Post, Emily Jackson, "Sweetheart deal?: Netflix campaigns to 'set record straight' after fairness questioned" (10 Oct 2017), online: http://business.financialpost.com/telecom/did-netflix-get-a-sweetheart-deal-taxes-fairness-questioned-as-ottawa-woos-digital-service-in-a-broadcast-world .

[89] Communications Management Inc., Discussion Paper: "Netflix in Canada – Binge-Watching! Tax Issues! Regulatory Uncertainty!" (5 April 2018), page 11.

[90] See for example: 'Digital services tax' targets big US tech groups, FT.com (https://www.ft.com/content/a8c36a90-dba5-11e8-9f04-38d397e6661c).

[91] As described by Department of Finance official before the Standing Committee on Canadian Heritage last year: "The challenges related to the proper collection of sales tax on digital supplies by foreign-based vendors are not unique to Canada. It's a difficult issue for all jurisdictions with a sales tax. In this regard, the issue was examined as part of the recent initiative of the G20 and the Organisation for Economic Co-operation and Development to address what is known as "base erosion and profit shifting", or BEPS." Source: Standing Committee on Canadian Heritage, No. 041, 1st Session, 42nd Parliament, 1 Dec 2016, at 1100-1105, Mr. Sean Keenan Director, Sales Tax Division, Tax Policy Branch, Department of Finance, online: http://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-41/evidence

[92] Australian Government, Australian Taxation Office, "GST – applying to digital products and other services imported by consumers", online: https://www.ato.gov.au/General/New-legislation/In-detail/Indirect-taxes/GST/GST--applying-to-digital-products-and-services-imported-by-consumers/

[93] https://www.ato.gov.au/Business/International-tax-for-business/GST-on-imported-services-and-digital-products/.

[94] Australian Government, "Budget 2015-2016 – Budget Paper No. 2" (12 May 2015), online: http://www.budget.gov.au/2015-16/content/bp2/download/BP2_consolidated.pdf, p.20.

[95] Global News, "Quebecers have to start paying a Netflix tax — here's why the rest of Canada doesn't", (6 Apr 2018), online: https://globalnews.ca/news/4127601/netflix-sales-tax-quebec-canada/.

unchanged and the efficiency losses to the economy from consumers and producers changing their behavior is in turn minimized. [96]

Nonuniform taxes also exacerbate the impact of taxes, as deadweight losses increase more than proportionally to any given tax increases. As a result, using a uniform commodity tax to support the production of Canadian programming content would be less distortionary than the proposed ISP Tax (and indeed welfare improving compared to the existing mandatory BDU contribution regime). In principle, Canada's GST/HST could be used to implement such a policy.[97]

RECOMMENDATION 9
Require internet-delivered programming undertakings to collect and remit sales tax in Canada.
Rely on this significant additional and growing source of revenue to support the Canada Media Fund entirely through the Consolidated Revenue Fund.

RECOMMENDATION 10
Reduce and eventually eliminate broadcasting distribution undertakings' mandatory contribution of revenues to support Canadian programming.

G. Canada's Broadcast Transmission and Retransmission Regime Must Be Upheld

103. As the Panel is aware, over the last decade there have been several attempts by owners of OTA television broadcasters to impose a U.S.-style "retransmission consent" regime. The ostensible rationale for such a second revenue stream is to address the financial viability of local stations. Shaw is adamantly opposed to any second revenue stream proposal that would impose new costs on subscribers to the Canadian broadcasting system, reduce customer access to television services which they currently receive (and have received for decades), and further weaken the appeal of the system and its ability to meet the policy objectives of the *Broadcasting Act*.

104. Shaw agrees that local programming is a critical component of the Canadian broadcasting system and that innovative solutions are needed to sustain its provision to Canadians.

[96] Brattle Report, para. 89.
[97] Brattle Report, para. 90.

That said, any "second revenue stream" model[98] is not the appropriate measure to address this issue, given a number of highly problematic direct and indirect consequences.

105. For the 11 million households that subscribe to BDU services, such proposals would result in new and increased costs and the possibility of service disruptions. BDUs would be required to negotiate and pay potentially substantial new fees to distribute local services that have hitherto carried no distribution costs as free OTA services, which costs would be passed through to customers.

106. In any case, OTA broadcasters already enjoy significant regulatory advantages, including the use of public spectrum, priority carriage for local OTA signals on the basic service of all BDUs, simultaneous substitution, and temporary measures to redress impacted viewers in areas where regulatory allowances have permitted the shutdown of certain transmitters (notably, however, in a limited manner that has not undermined the retransmission regime).

107. Accordingly, we respectfully submit that any calls for additional measures in support of Canadian broadcasters that would negatively impact the revenues of BDUs would undermine the broader public interest and should be rejected.

108. Aside from the foreseeable impact on ordinary Canadians and the broadcasting system, BDUs that do not have integrated broadcast businesses would also be competitively disadvantaged, while integrated players such as Bell and Rogers may be able to justify the negative impact on their BDU undertakings by virtue of short-term benefits to their broadcasting undertakings, as well as broader competitive impacts on the integrated broadcast distribution/telecommunications companies with which they compete.

109. Moreover, the proposal for second revenue-stream models (including retransmission consent) would not only restrict the scope of distant television viewing choices which Canadians have had for almost 50 years, it would have a direct impact on relative prices between regulated and unregulated choices, making the Canadian broadcasting system less competitive by increasing the price of BDUs' subscriptions. This would create an additional incentive for viewers to avoid, leave or reduce engagement in the Canadian regulated broadcasting system, and engender significant negative feedback from Canadian television viewers.

110. Finally, Shaw notes that the CUSMA preserves Canada's existing retransmission regime, despite demands by US stakeholders during negotiations, for the introduction of retransmission consent for the benefit of US broadcasters. Such a concession would have resulted in a significant annual outflow of resources from the Canadian broadcasting system to US television stations and networks. Any policy change granting Canadian

[98] Facilitated, for example, pursuant to: the introduction of signal rights and changes to the retransmission regime under the *Copyright Act*; any measure introduced into the *Broadcasting Act* mandating or leading to retransmission consent in connection with the distribution by BDUs of television services; any measure authorizing or supporting the introduction of a specialty model for local programming, with or without carriage entitlements or orders.

conventional broadcasters the ability to exercise control over the retransmission of their services would likely cause US broadcasters seeking retransmission consent rights in Canada to take any available action to address what they would consider to be discriminatory treatment.

111. Accordingly, Shaw urges the Panel to avoid recommending any regulatory proposals – including the introduction of new signal fees and/or distribution rights or entitlements – that could drive significant changes to signal distribution and the cost and accessibility of television services, and negatively impact Canadian television viewers.

112. Over-the-air carriage without compensation has always been the "regulatory bargain" for licensing and use of public spectrum and neither BDUs nor their customers can bear additional burdens in order to subsidize the Canadian content (including news) that is broadcasters' fundamental obligation to the system. Indeed, measures to bolster support for local news have already recently been introduced by the Commission[99] and by the Government.[100] A more viable approach to strengthening the Canadian broadcasting industry would include, for example, steps to enable broadcasters to enhance their investment in – and economic return from – the programming that they exhibit, consistent with the flexibility enjoyed by their broadcast and OTT competitors, rather than taxing Canadians further.

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[99] Broadcasting Regulatory Policy CRTC 2016-224 – *Policy framework for local and community television* (15 Jun 2016); CRTC, News Release: "CRTC improves support for local news" (15 Jun 2016):

> through a rebalancing of resources, the large private broadcasters will now have the necessary flexibility to keep local stations open and fund the production of local news programming. This represents up to $67 million that could be available for local news. In addition, the CRTC is creating the Independent Local News Fund to give independent stations access to approximately $23 million dollars in resources to produce high-quality local news programming.

[100] Government of Canada, *Fall Economic Statement 2018* (21 Nov 2018), page 40;

> the 2018 Fall Economic Statement announces the Government's intention to propose three new initiatives to support Canadian journalism: allowing non-profit news organizations to receive charitable donations and issue official donation receipts, introducing a new refundable tax credit to support original news content creation, including local news, and introducing a new temporary non-refundable tax credit to support subscriptions to Canadian digital news media

RECOMMENDATION 11
Reject any demands for recommendations to amend the *Broadcasting Act* in a manner that would introduce or enable the introduction of retransmission consent rights or any second revenue stream for OTA broadcasters.
Reject any demands for recommendations to amend the *Copyright Act* to change the retransmission consent regime, including by introducing broadcaster signal rights.
Reject any demands for recommendations in favour of new subsidies for the Corporation, private OTA networks and television stations, or local news that rely on a payment or a contribution from broadcasting distribution undertakings and their customers.

H. Private Broadcasters (Other Than OTAs) Must Offer Their Services on Reasonable Commercial Terms

113. There is a significant asymmetry between the treatment of BDUs and programming undertakings that should be remedied in the upcoming legislative review. In the current legislation, BDUs are required to "provide reasonable terms for the carriage, packaging and retailing" of programming services. No equivalent obligation exists for programming services.

114. The impact of this asymmetrical treatment is becoming more apparent. In an environment characterized by declining BDU profitability[101] and accelerating subscriber losses[102], there has paradoxically been a steady increase in affiliation payments.[103] BDUs have effectively been asked to shelter and make-whole broadcasters. With increasing cord-cutting, cord-shaving and cord-nevers, these trends are unsustainable.

115. Moreover, programming undertakings have demonstrated a reluctance to abide by the *Wholesale Code*. In fact, one major programmer has attempted to overturn the Code before the Courts. Although the Federal Court of Appeal recently overturned one tool – the use of 9(1)(h) powers as a means to enforce the *Wholesale Code* – licensees are still required to adhere to its terms by way of condition of licence. Notwithstanding this fact,

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[101] CMR 2017, page 196:

> The EBITDA margin of cable service providers declined from 27.1% in 2012 to 21.9% in 2016. DTH service providers performed better as their EBITDA margin generally grew over the period, starting at 30.1% in 2012, reaching a peak of 33.4% in 2013, declining to 27.7% in 2015 and stabilizing at 31.2% in 2016. While IPTV service providers reported major growth in revenues and subscribers from 2012 to 2016, they reported negative EBITDA margins throughout the period (from -43% in 2012 to -17.9% in 2016).

[102] CMR 2017, page 196: Cable, IPTV and satellite companies garnered 11.1 million subscribers in 2016, a 1.1% (124,841 subscribers) decline from 2015. Even though the IPTV sector has shown very strong growth, total BDU subscribers have been declining by approximately 1% each year since 2013.

[103] CMR 2017, page 207: "Payments to Canadian affiliates have increased annually by 3.4% since 2012."

regulatory uncertainty should be resolved by imposing upon programming undertakings an obligation to provide programming on reasonable terms. This is necessary to foster both choice and affordability for Canadian consumers.

RECOMMENDATION 12

Amend section 3(1)(*s*) of the *Broadcasting Act*, by making a necessary distinction between private networks and other programming undertakings and including the following objectives for programming undertakings:

(s) programming undertakings should,

(i) to an extent consistent with the financial and other resources available to them, contribute significantly to the creation and presentation of Canadian programming,

(ii) be responsive to the evolving demands of the public, and

(iii) where programming services are supplied to broadcasting undertakings pursuant to contractual arrangements, provide terms for the carriage, packaging and retailing of those programming services that are reasonable and that do not unduly limit consumer choice.

I. Removing the Foreign Ownership Requirements for Broadcasting Undertakings is Warranted

116. The Terms of Reference state that "the Government is not interested in a proposal that reduces Canadian ownership of broadcasting."[104] While Shaw respects the Government's point of view as expressed, we nevertheless believe that the Panel can and should examine the potential benefits of liberalized foreign ownership for the benefit of our broadcasting system.

117. Removing foreign ownership restrictions in broadcasting, such that all broadcasting undertakings are on a level playing-field with global, non-Canadian OTTs, is a critical component of regulatory symmetry. To suggest that non-Canadian OTTs do not already make up part of our broadcasting system is unrealistic. Canadian Broadcasting Policy set out in section 3 of the *Broadcasting Act* does not preclude non-Canadian ownership of individual broadcasting entities, given that it specifies only that the "system" must be effectively owned and controlled by Canadians.[105] Moreover, the Act's definition of

[104] ISED, Terms of Reference, 2.Competition, Innovation, and Affordability.
[105] *Broadcasting Act*, s.3(1)(a).

"broadcasting"[106] is, appropriately, technologically neutral. This definition has supported the CRTC's regulation of "new media" broadcasters pursuant to what is now known as the DMEO,[107] which – unlike undertakings exempted pursuant to other CRTC exemption orders or licensed by the CRTC – does not subject OTTs to any foreign ownership limits.

118. Furthermore, global OTTs are already well-established in the Canadian market and compete with Canadian broadcasters and BDUs for viewers and subscribers. It is estimated that Netflix alone has more than six million subscribers in Canada[108] – more than any Canadian cable or satellite BDU. Moreover, the Government of Canada has entered into an agreement with Netflix (the "**Netflix Agreement**") pursuant to which Netflix has committed to funding $500M in Canadian production over five years,[109] and it has been recently rumoured to be building a new production studio in Toronto.[110] As such, the Government has already effectively conceded, through that agreement, that it is not only Canadian owned and controlled undertakings that can be relied upon to finance, produce and broadcast Canadian content.[111] For its part, Amazon Prime Video, offered stand-alone and as a value-added part of Amazon Prime, is also increasingly used by Canadians, with Canadian Amazon Prime subscribership growing (as of 2017) 80% year-over-year in Canada.[112] At the same time, BDU subscriptions and revenues continue to fall and recent research indicates increasing levels of cord-shaving, cord-cutting and cord-nevers.[113]

119. For Canadian broadcasters and BDUs to compete effectively with large, non-Canadian OTTs, in continued fulfillment of the Broadcasting Policy set out in the *Broadcasting Act*, they require equivalent access to capital, expertise and technology, all of which would be made possible through foreign investment. Indeed, providing unrestricted access to foreign investment would:

    - increase broadcasters' and BDUs' access to capital, technology and expertise to spur innovation and support network investment to remain competitive with emerging technologies, thereby continuing to both attract consumers to the

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[106] *Broadcasting Act*, 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, but does not include any such transmission of programs that is made solely for performance or display in a public place;

[107] Broadcasting Order CRTC 2012-409 – *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, (26 Jul 2012).

[108] See: https://business.financialpost.com/telecom/media/netflix-doing-booming-business-in-canada-industry-research-reports-suggest.

[109] See: https://www.thestar.com/news/canada/2017/09/28/500-million-netflix-deal-anchors-canadas-culture-plan.html.

[110] See: https://www.cbc.ca/news/business/netflix-toronto-production-hub-mayor-john-tory-says-1.4971883.

[111] See: https://business.financialpost.com/technology/netflix-tossed-into-quebec-maelstrom-after-inking-500-million-deal-with-trudeau.

[112] See: https://www.ctvnews.ca/business/amazon-says-prime-signups-in-canada-grew-80-per-cent-year-over-year-1.3482435.

[113] See: https://thewirereport.ca/2019/01/07/44-5-of-under-30-households-dont-have-tv-report/.

Canadian broadcasting system and offer Canadians high-quality employment opportunities;

- facilitate new partnerships that will strengthen the Canadian broadcasting system without undermining any cultural objectives; and

- address the lack of symmetry between Canadian media companies and 100% foreign-owned OTTs who have more subscribers than any Canadian cable or satellite distributor.

120. As noted, the Netflix Agreement suggests that the Government has accepted that non-Canadian broadcasting undertakings can be relied upon to finance, produce and exhibit Canadian content. With respect to BDUs, who play no role in the creation of content beyond the provision of community channels, removing foreign ownership restrictions would also have no impact on the "Canadian-ness" of their offerings: their current requirements with respect to the presentation of Canadian programming on their services are technical[114] and can be measured objectively and quantitatively. Measures to secure appropriate prioritization of Canadian programming can be clearly defined and their correct execution is a measurable activity to which the nationality of investors is irrelevant. For all of the foregoing reasons, Shaw urges the Panel to investigate and recommend the removal of foreign ownership restrictions in broadcasting as a matter that is in the interest of preserving the strength of the Canadian broadcasting system.

RECOMMENDATION 13
Recommend the revocation of the *Direction to the CRTC (Ineligibility of Non-Canadians)*, SOR/97-192.

III. IMPROVING THE RIGHTS OF THE DIGITAL CONSUMER

A. Do Not Increase the Digital Divide

121. As described in detail in the above sections, the most important step that can be taken to protect the digital rights of consumers (including accessibility and affordability) is to deny any requests for an ISP Tax.

[114] For example: preponderance of Canadian programming; basic service composition; 9(1)(*h*) mandatory distribution; simultaneous substitution; 1:1 access rules. BDUs' only link to the production of programming is in the operation of a community channel. Considering the community channels are not mandatory, if there was a concern of undue foreign influence in the sphere of community television, the CRTC could prohibit foreign BDUs from operating such channels.

B. Net Neutrality is Already Appropriately Enshrined in the Legislation

122. The Terms of Reference also ask if the current legislative provisions are well-positioned to protect net neutrality principles in the future. Shaw submits that they are, for reasons set out below. Furthermore, we urge the Panel to take care to reject any introduction of "net neutrality principles" that are inflexible and absolutist. A debate that is reduced to a binary "for" or "against" discussion (as can easily emerge given the strong feelings around the issue) will result in outcomes that are not in the public interest. Instead, we urge the Panel to focus on the question of the appropriate rules to support greater innovation, investment and competition, while at the same time re-affirming the commitment to an open internet that is open to all lawful content and usage.

123. The current legislative basis that supports what is commonly understood as "net neutrality" and "open internet" is set out in existing provisions of the *Telecommunications Act*; those provisions are well-designed and appropriate to address Canada's public interest in an open internet and should be maintained. Telecommunications carriers may not:

- engage in any "unjust discrimination" or "undue preference" in relation to providing a telecommunications service or charging a rate for it;[115] and
- block or otherwise control or influence content on their networks, except with the approval of the CRTC.[116]

124. The CRTC has supplemented this section of the *Telecommunications Act* with four key decisions that together form the "net neutrality" regime in Canada,[117] the core principles of which include the following:

- while ISPs cannot block or influence content, if there are legitimate technical justifications, they may implement measures to manage traffic on their networks, subject to disclosure requirements and other limitations; and
- ISPs may not, generally, engage in differential pricing practices by which they charge different rates for different types of content.

125. Notably, these principles are very similar to those that were in place in the United States during the Obama Administration, although the Federal Communications Commission

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[115] *Telecommunications Act*, s.27(2).

[116] *Telecommunications Act*, s.36.

[117] Telecom Regulatory Policy CRTC 2017-104 – *Framework for assessing the differential pricing practices of Internet service providers* (20 Apr 2017); Telecom Decision CRTC 2017-105 – *Complaints against Quebecor Media Inc., Videotron Ltd., and Videotron G.P. alleging undue and unreasonable preference and disadvantage regarding the Unlimited Music program* (20 Apr 2017); Broadcasting and Telecom Decision CRTC 2015-26 – *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv* (29 Jan 2015); and Telecom Regulatory Policy CRTC 2009-657 – *Review of the Internet traffic management practices of Internet service providers* (21 Oct 2009).

under the current Administration has rolled them back significantly. Accordingly, Shaw believes that the preservation of these statutory principles will continue to be effective, reflective of an approach hitherto also embraced by Canada's largest trading partner, for continuing to promote an open internet while concurrently allowing for the reality that operating and evolving networks in an effective and efficient manner sometimes requires a degree of non-discriminatory network management. Ultimately, an open internet – to be of maximum value to Canadians – must empower consumers and content providers, drive innovation and be rich in choice and competition.

126. Some degree of prioritization/pre-emption will be essential in the 5G/Internet of Things environment, including, for example, for Public Service Broadband Network and ultra-low-latency health applications. Section 27(2) of the *Telecommunications Act*, and the ability to apply to the CRTC for findings of discrimination pursuant to that section, in addition to the risk of reputational damage from negative market reactions, are sufficient safeguards to ensure that network management does not compromise the existence of a well-functioning open internet. By contrast, a prescriptive and absolutist approach to "net neutrality" is not in the interest of maximizing the utilization and value of networks in Canada. It would negatively impact the incentive of TSPs to invest in networks, impede application development, and could reduce the utility of innovative applications and services with clear public benefit. To the extent that evolving uses and practices evidence a need to consider the appropriateness of particular practices in connection with network management as they arise, the CRTC – through its existing policy-making power and/or in connection with any decision-making process considering the applicability of s. 27(2) in a particular situation – is able to undertake such an exercise.

RECOMMENDATION 14
Preserve subsection 27(2) and section 36 of the *Telecommunications Act*. No legislative changes should be recommended to further enshrine net neutrality.

C. Targeting Online Piracy Will Protect Customers Without Offending Net Neutrality

127. Introducing measures that respond to online piracy is essential in the digital age, given that:

- online piracy is causing significant harm to Canadian rightsholders, broadcasters, and BDUs, posing a serious threat to the long-term viability of Canada's broadcasting system;
- new tools are needed to provide a comprehensive and coordinated response to combat piracy; and

- the unlawful distribution of content can – and should – be targeted without violating net neutrality or creating freedom of expression concerns.

128. Streaming piracy has now overtaken downloading as the primary means to access illegal content online, and subscription streaming piracy is becoming an increasingly sophisticated and lucrative industry. The availability of low-cost android boxes, combined with powerful/free Kodi software, and easy access to pirate apps/repositories, has led to the formation of a robust ecosystem and marketplace.

129. The direct and indirect impacts associated with the ever-expanding online piracy ecosystem include:

    - further incenting cord-cutting, cord-shaving and cord-nevers, which undermines the strength of the Canadian broadcasting system;

    - exposing consumers who use piracy sites and hardware to privacy and security risks, including hacking, identity theft, and malware; and

    - in Canada and the US, it is estimated that the piracy ecosystem generates $840 million (USD) per year in illegal revenues and costs BDUs, broadcasters, and copyright owners $4.2 billion (USD) per year.[118]

130. In a recent decision, the CRTC denied an application to introduce a site-blocking regime. Instead, the Commission suggested that copyright is at the heart of this issue and there are "other avenues to further examine the means of minimizing or addressing the impact of copyright piracy, including the parliamentary review of the *Copyright Act* and the expert panel review of the *Telecommunications Act* and the *Broadcasting Act*."[119]

131. The legal framework to address internet piracy is already largely in place under the *Copyright Act*. The *Copyright Modernization Act* clarified the application of Canadian copyright law to internet transmission, through the introduction of the following provisions to Canada's Act:

    - Subsection 2.4(1.1), which establishes that making a work available online for on-demand streaming infringes the right to communicate the work to the public by telecommunication. This means that a streaming service infringes copyright just by making programs available to the public without the consent of the rights owner, even if no actual transmissions have occurred; and

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[118] Sandvine, "2017 Global Internet Phenomena Report – Spotlight: Subscription Television Piracy" (Waterloo: Sandvine Incorporated ULC, 2017) online: https://www.sandvine.com/downloads/general/global-internet-phenomena/2017/global-internet-phenomena-spotlight-subscription-television-piracy.pdf

[119] Telecom Decision CRTC 2018-384 – *Asian Television Network International Limited, on behalf of the FairPlay Coalition – Application to disable online access to piracy websites* (2 Oct 2018).

- Subsection 27(2.3), an "enabler provision" targeting services that are intended to facilitate copyright infringement in consideration of the factors set out in subsection 27(2.4). A service that falls under this provision is not entitled to the benefit of the exceptions to copyright that apply to internet service providers and other intermediaries.

132. The Supreme Court has also confirmed that Canadian copyright laws apply to internet transmissions originating outside of Canada when directed to users within Canada.[120] Therefore, when an illegal streaming service located outside of Canada is transmitting pirated content to Canadians, it is infringing Canadian copyright law and Canadian courts have jurisdiction to deal with the infringement.

133. What is needed to give effect to this framework is a legislative clarification in the *Copyright Act* to enable applications for efficacious orders by the Federal Court to counter the availability of illegal streaming services in Canada.

134. Arguably, the current provisions[121] of Canada's *Copyright Act* already give our federal and provincial courts the necessary authority to grant interim and permanent injunctions ordering ISPs to block access to infringing websites and streaming services located both inside and outside Canada. However, as a function of section 36 of the *Telecommunications Act*, a Federal Court injunction ordering ISPs to block access to an illegal streaming service still requires CRTC approval before ISPs can comply with the court order. This creates the potential for conflict between the operation of the *Copyright Act*'s available legal remedies and the CRTC's role under the *Telecommunications Act*.

135. In Telecom Decision CRTC 2016-479,[122] the CRTC determined that section 36 prohibits ISPs from blocking access to specific websites without prior Commission approval, even in circumstances where the blocking would be required to comply with other legal or judicial requirements, including court orders.[123] The CRTC also found that approval should only be granted "where it would further the telecommunications policy objectives set out in section 7 of the Act"[124], objectives which refer primarily to the affordability and reliability of telecommunications services, the use of Canadian transmission facilities, reliance on market forces and protection of privacy.

136. It would be a significant impediment to the future economic growth of Canada's creative sector, as well as to the promotion and development of Canadian content and legitimate Canadian distribution platforms, if rightsholders were denied access to an effective tool to combat online piracy because the CRTC prevented ISPs from complying with court orders. It would also put Canadian ISPs in the untenable position of either being in breach

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[120] *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, [2004] 2 SCR 427.
[121] *Copyright Act*, ss. 2.4(1.1), 27(1), 27(2)(*b*), 27(2.3), 34(1), 39.1(1), and 41.24.
[122] Telecom Decision CRTC 2016-479 – *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act* (9 Dec 2016) [**TD 2016-479**].
[123] TD 2016-479, at para 7.
[124] TD 2016-479, at para 7.

of a court order or in breach of section 36 of the *Telecommunications Act*. While blocking access to illegal streaming services is just one possible response to online piracy, Shaw submits that is an important tool that should not be effectively disabled as a result of statutory overlap.

137. Accordingly, Shaw urges the Panel to recommend that the Government clarify, pursuant to changes to the *Copyright Act,* in the context of its ongoing review of that legislation, that:

    - the Federal Court has the authority to order ISPs to block access to infringing websites, or to de-index a URL for such a website from a search engine, and

    - the effectiveness of any such order is not subject to the approval of the CRTC pursuant to section 36 of the *Telecommunications Act.*

RECOMMENDATION 15
Urge the Government, pursuant to the ongoing legislative review of the *Copyright Act*, to help ensure the availability of efficient and effective tools to combat internet piracy by: • **adding a provision to the civil remedies, found in Part IV of the *Copyright Act*, clarifying the Federal Court's ability to order website blocking and URL removal by ISPs and search engines, and** • **clarifying that compliance with such orders requires no further approval by the CRTC pursuant to section 36 of the *Telecommunications Act.***

IV. RENEWING THE INSTITUTIONAL FRAMEWORK FOR THE COMMUNICATIONS SECTOR

A. Do Not Merge the *Telecommunications Act* and the *Broadcasting Act*

138. As described above, Shaw is strongly opposed to the creation of a merged "Communications Act" that would inappropriately blur the distinctions between telecommunications and content and create the potential for harmful and regressive policies such as an ISP tax.

139. Shaw submits that notwithstanding technological convergence, the policy objectives of the *Telecommunications Act* and *Broadcasting Act* remain legitimate and appropriate, and the distinct regulation of carriage and content remains necessary to achieve these ends. This dichotomy was succinctly set out in a recent C.D. Howe Institute study which noted the following:

> The *Telecommunications Act* was designed to regulate to achieve competitive market outcomes until competition emerges, allowing deregulation. The *Broadcasting Act* was designed so that regulation can ensure a non-market outcome: increased production of Canadian content. Combining the two acts therefore would not yield any obvious benefits. In the United States, the *Communications Act* covers broadcasting and telecommunications, but Title II of the Act deals with common carriers, Title III with radio and Title VI with cable communications. It is likely that a single piece of legislation in Canada would deal with telecommunications and broadcasting in separate sections.[125]

B. Spectrum Authority

140. Spectrum is a public good belonging to the Canadian people. The Government, and not an arm's-length administrative tribunal, should thus remain responsible for establishing processes and standards governing all spectrum-related matters, including the allocation of spectrum pursuant to national policy objectives.

141. ISED has extensive experience and technical expertise in designing and governing policies and auctions regarding the use of such spectrum and well-established channels of communication with staff from other government departments where communication and collaboration is warranted.

142. Spectrum licensing and usage must be sensitive and responsive to rapidly evolving technological change that require timely responses, as well as national-scale policy objectives, such as investment and competition in the 5G environment. The extensive experience and technical knowledge of ISED staff, supplemented by the staff of other departments within government with whom the Department regularly collaborates, make it best positioned to maintain a spectrum policy framework that is current and responsive to these considerations. While ISED may require additional resources, there is no public benefit in shifting responsibility to the CRTC.

143. Furthermore, the licensing and use of spectrum is highly influenced by international developments and commitments. Indeed, spectrum licensing engages international agreements to which Canada is a party (e.g. through the ITU) and requires ongoing diplomatic activity and negotiations which are most appropriately within the domain of government officials reporting directly to the responsible Minister.

144. Shaw submits that ISED's authority over spectrum is appropriate: spectrum licensing engages Canada's international agreements and diplomacy (though the ITU and other agreements) all of which should be carried out through a governmental department.

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[125] Lawson Hunter, Kenneth G. Engelhart, and Peter Miller, *Strengthening Canadian Television Content: Creation, Discovery and Export in a Digital World*, C.D. Howe Institute, Commentary No.498 (Dec 2017) at page 26, online: https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Final%20Commentary_498.pdf

Spectrum is a public good belonging to the Canadian people. The Government should be directly involved in valuing and determining the processes for licensing spectrum.

RECOMMENDATION 16
Deny any requests to transfer spectrum authority from ISED to the CRTC or any other regulatory authority.

CONCLUSION

145. Shaw's over-arching position is that the existing legislative frameworks for telecommunications and broadcasting are already flexible and do not require large-scale restructuring. What is needed, however, are targeted amendments to the *Telecommunications Act* and *Broadcasting Act* to ensure that: Canadian communication companies can respond to the technological change and global market developments in an agile manner; there is healthy and sustainable facilities-based competition, and impediments to these goals (for example, regulatory asymmetry or an absence of an efficient regulatory approach) are resolved. Shaw's proposals are restricted to specific changes to the legislative and resulting regulatory framework which we believe will achieve these ends and which are imperative to maximize Canadians' participation in the digital economy. We have also identified specific issues and policy approaches which would undermine these objectives and have urged the Panel to refrain from making recommendations that would give effect to such approaches.

146. Shaw appreciates the opportunity to provide its views and recommendations to the Panel. Shaw's recommendations are compiled for the Panel's consideration in Appendix D.