



13 February 2018

Claude Doucet  
Secretary General  
CRTC  
Ottawa, ON K1A 0N2

Dear Secretary General,

**Re: *Call for comments on the Governor in Council's request for a report on future programming distribution models, Broadcasting Notice of Consultation CRTC 2017-359 (Ottawa, Ottawa, 12 October 2017), <http://www.crtc.gc.ca/eng/archive/2017/2017-359.htm>***

The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013 to undertake research and policy analysis about communications, including telecommunications. The Forum supports a strong Canadian communications system that serves the public interest.

The following is the Forum's Phase 2 submission with respect to Broadcasting Notice of Consultation CRTC 2017-359; the Forum filed a detailed submission in Phase 1 ("Walking out the clock: Canadians do not need more reports; they need meaningful government action to serve the public interest in communications – now").

## **I. Continuous change**

- 1** As a preliminary comment, the Forum notes that 'change' has for decades been used by the CRTC and others to justify deregulation. In the Forum's view, however, much of the evidence in this proceeding supports the conclusion that Canada's broadcasting system is now being changed fundamentally due to the unlicensed entry of new media broadcasting services.
- 2** It would be bad enough if Canadian new media programming services had the capacity to support Parliament's broadcasting policy for Canada – but evaded this duty by convincing the CRTC to exempt them from regulation.
- 3** But what is now worse is that non-Canadian new media programming services remain exempted from regulation – while competing head to head with Canadian programming services operating within the CRTC's regulatory requirements. Whether the Forum supports or opposes with Canadian licensed broadcasters' past decisions with respect to their implementation of

- Parliament's broadcasting policy for Canada, the simple fact is the the New Media Exemption Order gives foreign online broadcasting services free-rider status: they benefit from access to Canadian audiences and advertisers, without any responsibility to the Canadian broadcasting system, or to Parliament.
- 4 In fact, new media broadcasting services have been exempted from the requirements of Part II of the *Broadcasting Act* since 1999, on the grounds that these services' compliance with such requirements would not "contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1)."<sup>1</sup> This is simply no longer the case.
- 5 Permitting foreign programming services to operate openly in Canada without restraint, while requiring Canadian programming services to follow Canadian law is nothing less than breathtaking double standard. This double standard risks the dismantling of Canada's broadcasting system. Rather than eliminating regulation for all, however, because a few are for unknown reasons permitted to evade the law as they wish, the Forum believes that the CRTC should acknowledge the necessity for a review of its New Media Exemption Order, with a view to implementing a regulatory regime for new media broadcasting services.

#### **CRTC Q1: The impact of New Media**

**Q1. How is the growth in online audio and video consumption changing the business models of program creators and distributors? What are the new models?**

#### **CRTC Q2: Impact of new models on revenue sources**

**Q2. Content is generally monetized through advertising, subscription and/or transaction revenues. How are new business models shaping the evolution of these revenue sources?**

#### **CRTC Q3: Impact of global rights**

**Q3. Many new business models are global. How will the growth of a global content rights market affect business models?**

- 6 The evidence from Phase I of this proceeding is that Canada's cultural sector is adapting to the online world, in particular by adopting the practices of the older analog world: they are pursuing audiences and revenues from advertising, subscriptions and program sales. We note as well that some have recommended partnerships and joint ventures as new ways to generate the revenues for new programming (eg, Shaw Rocket Fund, ¶21). BCE recommended funding and regulation to

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<sup>1</sup> *Broadcasting Act*, s. 9(4).

... support a more partnership driven model that results in original Canadian programming that has broader international appeal. Creating programming in partnerships will allow Canadian productions to have larger programming budgets and better production values while spreading financial risks across multiple parties.

(BCE, Phase I, ¶19).

- 7 Insofar as joint-venture, ‘exportable’ programming is concerned, it is important to note that this idea is practically perennial. The CRTC has been encouraging Canadian broadcasters to engage in co-produced programming for more than thirty years. In 1984 the CRTC it encouraged Canadians to work with non-Canadians, by permitting programming produced jointly by Canadians and non-Canadians to qualify as Canadian programming.<sup>2</sup> By 1986 the CRTC noticed that “extensive use ... of this provision” had not been made,<sup>3</sup> and invited public comment. After reviewing its approach to defining Canadian programming in 1998,<sup>4</sup> the CRTC in 2000 granted certain Canadian-foreign co-productions a 150% programming credit.<sup>5</sup> In other words, Canada’s broadcasters have been encouraged to work with non-Canadian partners for many years.
- 8 The CRTC has also encouraged Canadian broadcasters to sell their programming abroad for at least twenty years. In 1998 the CRTC explicitly told broadcasters that

As the Canadian broadcasting system prepares for a more competitive global environment, it will be necessary to marshal resources from all elements of the Canadian broadcasting system to produce more high-

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<sup>2</sup> *RECOGNITION FOR CANADIAN PROGRAMS*, Public Notice CRTC 84-94 (Ottawa, 15 April 1984), <https://crtc.gc.ca/eng/archive/1984/PB84-94.htm>:

Co-ventures are defined as international co-productions not included under the treaties administered by the CFDC. They include all ventures with co-producers of any foreign country that does not have a film or television production treaty with Canada, and ventures with co-producers of any treaty country, where such ventures are not specifically covered by any treaty. The key function in these co-ventures is that of the producer.

Such co-ventures will qualify for special recognition and will be given 100% Canadian program credit when broadcast or otherwise distributed by an licensee of the CRTC, even though some of the producer functions are performed by non-Canadians, where co-venture agreements and other documentation substantiate that the Canadian production company:

- has no less than an equal measure of decision-making responsibility with other co-venture partners on all creative elements of the production, and
- is responsible for the administration of not less than the Canadian element of the production budget.

<sup>3</sup> *RECOGNITION FOR CANADIAN PROGRAMS PRODUCTION PACKAGES*, Public Notice CRTC 1986-179 (Ottawa, 23 July 1986), <https://crtc.gc.ca/eng/archive/1986/PB86-179.htm>.

<sup>4</sup> *RECOGNITION FOR CANADIAN PROGRAMS - CALL FOR COMMENTS*, Public Notice CRTC 1998-59 (Ottawa, 19 June 1998), <https://crtc.gc.ca/eng/archive/1998/PB98-59.HTM>.

<sup>5</sup> *Certification for Canadian Programs - A revised approach*, Public Notice CRTC 2000-42 (Ottawa, 17 March 2000), <https://crtc.gc.ca/eng/archive/2000/PB2000-42.htm>, at ¶13.

quality programming that attracts Canadian audiences and is exportable to world markets. ...<sup>6</sup>

9 The Forum supports the sale of Canadian programming abroad, not only because this programming merits worldwide audiences, but also as a necessary and important part of Canadian broadcasters' business. Co-productions and joint ventures may be one way to address the growing problem of global rights. As BCE noted, Canadian broadcasters "...are unable to acquire Canadian rights because a global OTT player has already acquired worldwide rights. ..." (BCE Phase I submission, ¶12).

10 Even if Canadian companies work with non-Canadians to produce programming and evade the global-rights issue, co-productions may not consistently serve Canada's interests. As the Writers Guild of Canada noted, 'global' is often a synonym for 'American'. The Forum is also aware of a recent study pointing out that "[w]ith over fifty official coproduction treaties, Canada has become the world leader in IJVs." The study went on to say, however, that

[t]his has not been without opportunity costs on a cultural level. Until recently, Canadian producers and their coproduction partners tended to erase culturally specific markers and follow the grammar of American network formulas and genres. These type of generic or "industry" productions were commonly seen as the hallmarks of the culturally homogenizing impact of capital interests in the quest to access one of the most restrictive television import markets: American broadcast networks and basic cable channels.<sup>7</sup>

11 WGC also noted that

... despite the entry of Netflix into Canada in 2010, and its growing popularity since then, the large, English-language corporate groups have spent no more in Canadian programming expenditures (CPE) in the three-year period from 2013 to 2015 than they were obligated to spend by regulation. Clearly, increased competition from OTTs is not prodding Canadian private broadcasters to spend more on Canadian programming, and indeed both Bell and Corus argued in the recent group licence renewal proceeding for a reduction in their Canadian programming obligations. "

(WGC, Phase I, ¶87)

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<sup>6</sup> *Canadian Television Policy Review - Call for Comments*, (Ottawa, 6 May 1998), Public Notice CRTC 1998-44, <https://crtc.gc.ca/eng/archive/1998/PB98-44.htm>, at ¶70.

<sup>7</sup> Serra Tinic, "Where in the World Is Orphan Black?: Change and Continuity in Global TV Production and Distribution", *Media Industries*, Vol 1. Iss. 3 (2015), <https://quod.lib.umich.edu/m/mij/15031809.0001.310?view=text;rgn=main>.

- 12 Our concern, therefore, is that Canadian broadcasters should not be encouraged to enter into joint ventures with non-Canadian programming services, if this simply means that Canadian broadcasters are weak adjuncts to American broadcasters. Taxpayer funding for such programming should therefore be limited to programming that Canadian programming services produce, and which is demonstrably Canadian (whether by virtue of predominant employment of Canadians, or by Canadian themes).
- 13 The Forum has described some of the history related to program export policies in the preceding paragraphs to point out first, that the necessity for Canadians to work with non-Canadians is scarcely novel. Our second point is that to the extent that the program-export policies since the mid-1980s did not achieve their intended objects, the policies and their implementation should be studied to determine why (so as not to repeat failed policies). Finally, and third, regardless of the reasons for which previous program-export policies failed, new program-export policies are as likely to fail going forward unless the implementation of the policies is monitored and enforced, and the results made public. New program-export policies may otherwise be less successful, or perhaps only as successful as their predecessors.
- 14 Insofar as ‘new’ business models for online programming are concerned, and as noted at the outset of this section, the Forum’s primary and growing concern is the continued existence of the CRTC’s New Media Exemption Order, and the Commission’s failure to monitor changes in the broadcasting environment which justify the review and revocation of this Order. Although the CRTC has collected and published data about new media broadcasting, it has not (to our knowledge) required new media broadcasters operating in whole or in part in Canada to submit annual statistical and financial reports.
- 15 By declining to monitor the growth of new media broadcasting since it first exempted new media from broadcast regulation in 1999,<sup>8</sup> the CRTC has in our view abdicated its responsibility under the *Broadcasting Act* to ensure that all broadcasters, whether operating in whole or in part in Canada,<sup>9</sup> work towards the implementation of Parliament’s broadcasting policy for the country. Why, for example, after concluding in 2014 that “Netflix appears to be an increasingly popular service that **operates in Canada**”,<sup>10</sup> and that a “complete understanding of Netflix’s presence in Canada and its experiences in delivering content would be useful”,<sup>11</sup> did the CRTC not require Netflix

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<sup>8</sup> *Report on New Media*, Broadcasting Public Notice CRTC 1999-84 and Telecom PN CRTC 99-14 (Ottawa, 17 May 1999).

<sup>9</sup> *Broadcasting Act*, s. 4(2).

<sup>10</sup> CRTC, *Broadcasting Commission Letter Addressed to Corie Wright (Netflix)*, (Ottawa, 29 September 2014), <https://crtc.gc.ca/eng/archive/2014/lb140929.htm>.

<sup>11</sup> *Ibid.*, bold font added.

and other online broadcasters operating in Canada to at least submit basic programming and other information about their activities on an annual basis?

- 16 We acknowledge that on 2 February 2018 the CRTC asked nineteen programming services for information about their online activities<sup>12</sup> to “help the Commission better understand the size and scope of the online audio and video market in Canada and its

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<sup>12</sup> 018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Facebook - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Spotify - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Apple - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Amazon - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Google - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Netflix - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Momentum Media Networks - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Pelmorex - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to APTN - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to CBC - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Québecor - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Rogers Cable - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Rogers Media - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Stingray Digital Group - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Sirius XM - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to DHX Television - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Shaw - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Corus - Subject: Request for information from audio and video online programming services available in Canada; 2018-02-02 - Procedural Letter - Notice of Consultation CRTC 2017-359 - Description: Letter addressed to Bell - Subject: Request for information from audio and video online programming services available in Canada.

contribution to Canada and Canadians”, as part of the evidence it will consider in reporting to the Canadian Heritage Minister about this proceeding.

17 It is perplexing, however, that this request was made months after the beginning of the 2017-359 proceeding and after the deadline for comments in Phase I. The CRTC should have posted these questions to new media broadcasters at the outset of the 2017-359 proceeding, to permit interveners to comment on the information (assuming it were made available on an aggregated basis). The fact that the 2017-359 proceeding will result in a report, rather than a decision or order that could be challenged before the courts, does not in our view obviate the necessity for fair process.

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, pursuant to section 15 of the *Broadcasting Act*, requests that the Canadian Radio-television and Telecommunications Commission make a report as soon as feasible, but no later than June 1, 2018, on the following matters:

- (a) the distribution model or models of programming that are likely to exist in the future;
- (b) how and through whom Canadians will access that programming;
- (c) the extent to which these models will ensure a vibrant domestic market that is capable of supporting the continued creation, production and distribution of Canadian programming, in both official languages, including original entertainment and information programming.

PC Number: 2017-1195

18 We are also perplexed by the data now being sought by the CRTC. Where Cabinet’s Order in Council (PC Number: 2017-1195 of 22 September 2017) referred to programming nine times, and referenced programming in each of the three matters on which the CRTC is to report, the CRTC did not ask the nineteen new media services for any programming data: its questions focus instead on financial and subscriber data.

19 As a result, if programming services answer the CRTC’s questions, the CRTC (but not the public) may learn something about these services’ financial performance and subscription levels – but nothing about the programming they are providing to Canadians. In our view, this means that Canadians have lost an opportunity to learn more about the level of original Canadian and non-Canadian programming being made available online to Canadian and other audiences.

20 Irrespective of the results of the CRTC’s requests to new media services, the weight of evidence points supports the CRTC’s reconsideration of its New Media Exemption Order. In 2016, for example, the CRTC estimated that 41% of Canadians subscribe to Netflix.<sup>13</sup> Whether this figure referred to individual Canadians or to Canadian households, the estimated annual revenues that flow from just one new programming service - \$1.6 billion per year or more if it describes individual Canadians, or \$623 million or more if

<sup>13</sup> CRTC, *Communications Monitoring Report, 2016*, at 296 (Figure 4.3.6 Percentage of Canadians who subscribe to Netflix, by region).

describing households (see Table 1) – establish that some new media broadcasters operating in whole or in part in Canada, are well able to and should contribute towards implementing Canada’s broadcasting policy.

**Table 1 Estimated annual revenue from subscriptions to Netflix**

	Individuals (2015)	Households (2016)
Population	35,852,000	14100000
41% of the population	14,699,320	5,781,000
Monthly Netflix subscription	\$ 8.99	\$ 8.99
Annual Netflix subscription	\$ 107.88	\$ 107.88
Annual Netflix revenues	\$ 1,585,762,642	\$ 623,654,280

2015 data: <http://www.statcan.gc.ca/pub/11-627-m/11-627-m2015003-eng.htm>  
2016 data: <http://www.statcan.gc.ca/daily-quotidien/170802/dq170802a-eng.htm>

## II. New legislation

### CRTC Q6: Future content providers

**Q6. From whom will Canadians access programming in the future? For instance, will Canadians look to traditional or online providers? Global or domestic providers? Content aggregators or multiple distributors?**

### CRTC Q7: Characteristics of vibrant content creation and distribution

**Q7. What are the characteristics of a vibrant domestic content creation and distribution market?**

### CRTC Q8: Support for domestic content and distribution

**Q8. Will new business models support a vibrant domestic content and distribution market? If so, which ones and why? If not, what content or distribution services would be missing?**

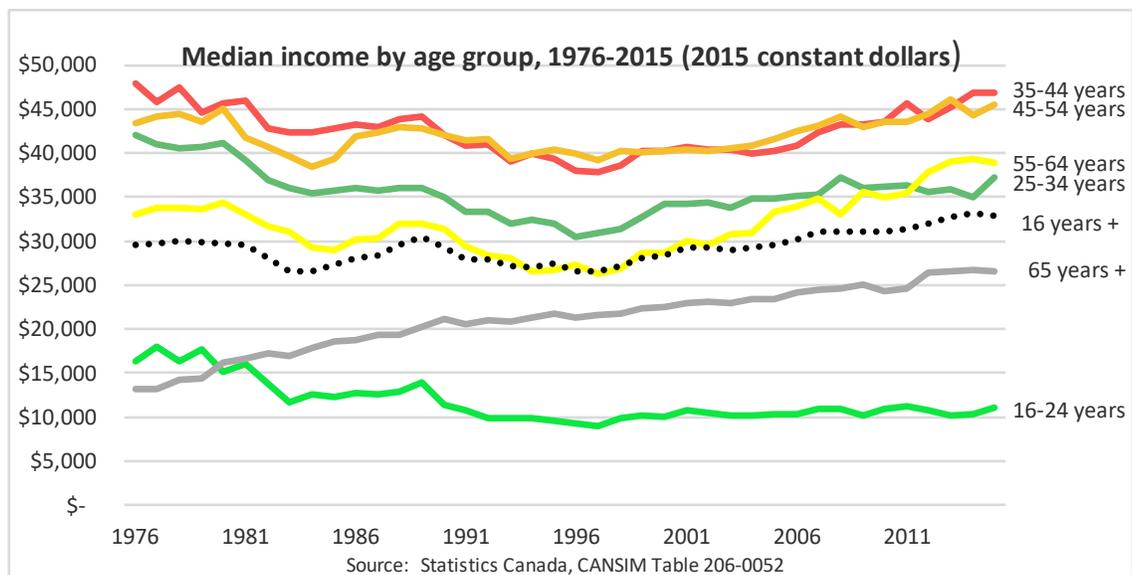
### CRTC Q9: New legislative measures

**Q9. What are the legislative, public policy or regulatory measures currently in place that will facilitate or hinder a vibrant domestic market? What needs to stay in place? What needs to change?**

21 Having made a number of detailed recommendations with respect to legislative changes in its Phase I submission, the Forum wishes to add its support to the idea that, going forward, consideration be given to a freely available, all-Canadian, audio-visual programming service for all Canadians. The idea of a lifeline all-Canadian programming service has been discussed and dismissed for several decades.

- 22 Our reason for raising the suggestion of a free, lifeline programming service for all Canadians, is that the 21<sup>st</sup> century differs fundamentally from the 20<sup>th</sup> and all previous centuries insofar as Canadian youth are concerned – easy access to audio-visual content.
- 23 Every past generation in Canada relied on print or licensed broadcast content as a central means of inculcating and acquiring social and cultural values.
- 24 Digital technology has introduced a tectonic shift in Canadian broadcasting. One of the main effects is to make television broadcasting less accessible, due to cost: the widespread use of digital transmission means that free over-the-air television is effectively a relic of the past. While still widely available, radio broadcasting may follow suit, as online music platforms strengthen.
- 25 The challenge for Canada’s social fabric is that accessing audio-visual programming online in almost all cases requires payment, if only to access the Internet. While income has grown in real terms since the mid-1990s for many Canadians, median real income for Canadians between 16 and 24 years of age has stayed flat (see Figure 1) – meaning that young Canadians’ access to electronic audio-visual content to the degree that such access costs them money.

**Figure 1: Median income by age group, in 2015 constant dollars, 1976-2015**



- 26 If audio-visual programming is to continue to maintain – if not strengthen – Canada’s social and political fabric, Parliament should broaden its current view of the necessity of a national public broadcaster (as provided for in section 3(1)(l)), to ensure widespread



availability of audio-visual programming across all platforms. This programming must, however, include news, to ensure a stable foundation for Canadian democracy.

- 27 Some precedents exist: public libraries, for instance, grant anyone access to the knowledge and creativity of the world, and the National Film Board makes its programming freely available online.<sup>14</sup> In addition to the many calls for the CRTC and the Federal government to support Canadian broadcasters, therefore, the Forum also urges the Commission and Parliament to establish that in Canada, domestic (Canadian) audio-visual programming must be available to all of its residents. Given the duty of privately owned companies to serve their owners' interests, Parliament should begin to consider how Canada's national public broadcaster (the CBC) could be reconfigured to meet all Canadians' needs for Canadian audio-visual programming in the future.

Sincerely yours,

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<sup>14</sup> <https://www.nfb.ca/explore-all-films/>.