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January 11, 2019

Ms. Janet Yale
Chair
The Broadcasting and Telecommunications Legislative Review Panel
c/o Innovation, Science and Economic Development Canada
235 Queen Street, 1st Floor
Ottawa, ON K1A 0H5

Dear Ms. Yale:

Re: Review of the Canadian Communications Legislative Framework – Submission of TELUS Communications Inc.

1. TELUS Communications Inc. ("TELUS") is pleased to provide its submission to the Broadcasting and Telecommunications Legislative Review Panel (the "Panel") in response to the issues raised in the Panel's call for comments issued on September 25, 2018.

2. We trust that this submission will be of assistance to the Panel in formulating its recommendations to the Government of Canada.

3. TELUS wishes to express its appreciation to the Panel for the opportunity to provide these comments.

Yours truly,

{*Original signed by Johanne Senécal*}

Johanne Senécal
Senior Vice-President
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cc. James Nicholson, Executive Director, Broadcasting and Telecommunications Legislative Review Panel Secretariat

Attachments

Broadcasting and Telecommunications Legislative Review Panel

Review of the Canadian Communications Legislative Framework

Submission of TELUS Communications Inc.

January 11, 2019

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1.0 Introduction and Executive Summary

1. TELUS welcomes the opportunity to submit these comments to the Panel and commends the federal government for launching this joint review of Canada's communications legislation. This review is timely. Much has changed since the *Telecommunications Act* and *Broadcasting Act* were enacted in 1993 and 1991, respectively. Both of these statutes, as well as the *Radiocommunication Act*, require important revisions if Canadians are to continue to benefit from world-leading communications and programming services.

2. Today's telecommunications sector has undergone a transition from an era characterized by monopoly supply to one where competition is prevalent, and the broadcasting landscape has been revolutionized by the presence of new, unregulated platforms and services that did not exist at the time Canada's communications statutes were enacted. In the face of these changes, legislative and regulatory inertia are not viable options.

3. The types of communications and programming services provided, the types of facilities over which they are provided, and the structure of the media and communications industries are all substantially different than they were in the early 1990s. The digital economy is fast overtaking other sectors of the economy in importance. Ultra-fast advanced broadband networks such as 5G will act as a stimulus for disruption in modern digital economies, while serving as a platform for innovation, and will drive digital development in industries such as health care, transportation, agriculture, manufacturing, automation, and smart cities. As a result, 5G networks and beyond will become a central technological pillar in the realization of the federal government's Innovation Agenda.

1.1. Recommendations for legislative reform

4. In the coming years, technology disruption is predicted to be of a scale so great that it is described as a fourth industrial revolution. To meet the challenges of this new reality and harness its opportunities, TELUS makes the following proposals in relation to each of the themes set out by the Broadcasting and Telecommunications Legislative Review Panel.

Recommendations relating to reducing barriers to access by all Canadians to advanced telecommunications networks

5. In respect of its recommendations regarding telecommunications, TELUS has proposed eleven guiding principles, which are attached as Appendix 1 to TELUS' submission, and are referred to throughout this submission. Under the *Theme A: Reducing barriers to access by all Canadians to advanced telecommunications networks*, TELUS proposes:

- Placing greater legislative emphasis on dynamic efficiency, competition, investment, and innovation, as the best means to address the issue of affordability. Communications services are already demonstrably affordable and sector-specific measures are not required to address affordability.
- Removing substantive Canadian ownership and control requirements in the *Telecommunications Act*, or in the alternative, liberalization of the current regime to allow for up to 49% foreign direct investment.
- Amending the *Telecommunications Act* to ensure that public access rights for carriers apply to the construction of "transmission facilities" instead of "transmission lines" to enable faster deployment of network infrastructure.
- Changing the *Radiocommunication Act* to accelerate the deployment of wireless network facilities by eliminating some site approval requirements, and providing for access to supporting structures owned and operated by third parties, as well as procedures governing the access to those structures.

Recommendations relating to supporting creation, production and discoverability of Canadian content

6. Under *Theme B: Supporting creation, production and discoverability of Canadian content*, TELUS notes that the global digital market place for programming content has fundamentally disrupted the traditional Canadian broadcasting system as a result, its foundational pillars are crumbling. First, the "walled-garden" in which consumers have no choice but to obtain programming through the regulated system is now a thing of the past; consumers are moving to alternatives outside the regulated system. Second, the distinct Canadian program rights market which has allowed Canadian media companies to build

business models based on reselling foreign content (rather than relying on their own home grown productions) is eroding. The good news is that the global digital environment is ripe with opportunities for the Canadian content creation and production market. A truly new broadcasting legislative framework is needed to maximize these opportunities proffered by the new global digital environment and take into account the challenges it presents.

7. TELUS submits that re-imagining the legislative framework for Canada's broadcasting system should:

- Re-define the "Canadian broadcasting system" in the *Broadcasting Act* to acknowledge the presence of a "foreign element", which should be added to the private and public elements of the Canadian broadcasting system. This acknowledgement is an important first step towards removing the asymmetry in the broadcasting regulatory framework which is putting Canadian participants in the broadcasting system at a disadvantage.
- Overhaul the objectives of the *Broadcasting Act* in a way that clearly distinguishes between the roles of the private and public elements of the Canadian broadcasting system.
    - The private element's objectives should be streamlined to primarily focus on the creation and production of home grown programming for the purposes of commercial success, domestically and globally. The objectives applicable to the private element of the broadcasting system should be reasonable and attainable without the current guaranteed internal revenue streams. The contribution regime to support private broadcasting is no longer sustainable in a global market and given the high degree of vertical integration in the Canadian media market, it merely leads to some content aggregators being required to fund the business models of their competitors.
    - The public element's objectives can be more extensive to address a variety of social and cultural goals but should be prioritized for greater clarity.
- Update the definitions in the *Broadcasting Act* to better reflect the reality of today's global digital multi-media content environment, in which there are "programming services" which exercise exclusive rights over the distribution of programming in

the Canadian market, and "content aggregators" which merely aggregate and curate programming offerings for consumers without exercising any exclusive rights. These new definitions address concerns relating to artificial distinctions created by the existing definitions which are increasingly unwieldly.

- Restrict the licensing powers of the Canadian Radio-television and Telecommunications Commission ("CRTC") under the *Broadcasting Act* to "programming services", which would continue to be subject to foreign ownership restrictions. Foreign programming services would be required to be authorized to operate in the Canadian market and such authorization would be subject to certain conditions requiring some form of contribution to the objectives of the Act. The licensing/authorization powers should be further subject to a requirement to exempt from licensing those programming services which do not meet a threshold of subscribers.
- Eliminate any licensing requirements for "content aggregators" as they do not exercise the same degree of influence over programming decisions (the main concern in respect of the maintenance of cultural sovereignty) and therefore should not be subject to licensing, nor any foreign ownership restrictions. A permissive and incentive-based approach should be taken in regard to content aggregators whereby certain privileges (such as access to the retransmission regime under the *Copyright Act*, and access to the CRTC's dispute resolution services to ensure commercially reasonable terms of distribution of licensed programming services) could be accessed in exchange for taking on certain obligations such as distribution of the public broadcasters, implementing discoverability and promotional measures in relation to Canadian content, or contributing to the creation and production of Canadian content.
- Grant new powers for the CRTC to address the negative incentives arising from vertical integration. Vertically integrated Canadian communications companies have incentives to defeat some of the broadcasting policy objectives in order to maximize the profitability of their more lucrative network operations side. These incentives could negatively affect innovation and competition in the broadcasting

sector and the attainment of the Canadian broadcasting policy objectives. A renewed *Broadcasting Act* must provide for powers for the CRTC to make regulations and to impose licensing conditions on vertically integrated entities in order to address these concerns.

8. Finally, TELUS cautions against heeding calls to shift cultural obligations to telecommunications providers. The solution to declining contribution monies as a result of global competition should not be to shift this obligation to other communications providers, such as ISPs. Instead, Canadian broadcasting policy should promote exporting of content as a revenue stream.

Recommendations relating to improving the rights of the digital consumer

9. Under *Theme C: Improving the rights of the digital consumer*, TELUS proposes:

- No legislative changes are required pertaining to consumer protection and rights, or the related matter of accessibility, in the *Telecommunications Ac*t. The CRTC already has authority over these matters as is amply demonstrated by its activities over the past number of years.
- No legislative changes are required to address privacy under the *Telecommunications Act.* The CRTC already has authority over privacy, and most privacy matters are best addressed through laws of general application.
- No legislative changes are required regarding net neutrality principles as the existing provisions of the *Telecommunications Act* provide the CRTC with sufficient tools.
- A new limitation of liability should be added to the *Telecommunications Act* such that carriers have no liability for the content they carry.
- Supporting the need to address the proliferation of false or misleading information in order to ensure an informed citizenry which is essential to the democratic process but recognizing that much of what is needed falls outside the purview of the *Broadcasting Act*.

- Supporting digital literacy enhancement (as a role of governments). Digital literacy remains the single greatest opportunity to increase participation in the digital economy. While the issue is outside of the scope of the CRTC, various other federal government departments, as do other levels of government, have a role to play in increasing digital literacy.

Recommendations relating to renewing the institutional framework of the communications sector

10. Under *Theme D: Renewing the institutional framework of the communications sector,* TELUS recommends numerous changes to the institutional framework which are necessary to calibrate the regulatory system to modern conditions. In particular, TELUS makes the following recommendations pertaining to the Governor in Council and the Department of Innovation, Science and Economic Development ("ISED"):

- Repealing the Governor in Council's power to vary, rescind or refer back CRTC decisions.
- Transferring the responsibility for spectrum regulation from the Minister of Industry and the Governor in Council to the CRTC and codifying the principles of independent regulation and governance of the communications statutes, in particular in the *Radiocommunication Act*.
- Regardless of which agency regulates spectrum, establishing that overall spectrum policy be set in a manner that is transparent and provides for public input.
- Including a form of radio authorization for flexible commercial use of the spectrum having exclusive usage rights and being tradable in the secondary market and being subject to bankruptcy and insolvency laws, and permitting the sub-lease of spectrum usage rights to third parties.
- Establishing through the *Radiocommunication Act* reasonable and measurable timelines for spectrum auctions in line with other international spectrum jurisdictions.
- Requiring the spectrum regulator to maintain a registry of apparatus, spectrum and class licences and devices to be made publicly available on the regulator's website.

11. TELUS makes the following recommendations pertaining to the CRTC:

- Streamlining the existing objectives in section 7 of the *Telecommunications Act* to emphasize i) reliance on competition and market forces; ii) efficient, effective and proportionate regulation, when required; iii) importance of investment and innovation. TELUS further recommends the addition of a clause reaffirming the exclusive federal authority over telecommunications.
- Modifying the *Telecommunications Act* such that services are by default forborne from rate regulation and eliminating sections 24 and 24.1 of the Act, to be replaced with more specific powers.
- Minimizing asymmetric regulation. Regulation, when required, must be imposed symmetrically to the extent possible, including removing historical asymmetries borne disproportionately by incumbent local telephone carriers and symmetrical treatment of new digital players. Among other changes, provisions relating to unjust discrimination should apply to all telecommunications service providers, including resellers, rather than just carriers.
- Modifying subsection 27(2) of the *Telecommunications Act* to ensure it applies to all telecommunications service providers, rather than just carriers.
- Establishing an arm's length tribunal to carry out certain adjudicative functions, including applications to review and vary CRTC decisions and hearings to determine whether to impose large administrative monetary penalties.
- Modifying the general administrative monetary penalty regime in the *Telecommunications Act* such that penalties are assessed only through a notice of violation process, that higher-level penalties engage a right to an oral hearing, clarifying that a course of conduct counts as a single violation, and ensuring the consistency of penalty regimes across the communications sector.
- Modifying the appeal provisions to provide that appeals of CRTC decisions are heard as if the CRTC decision were a decision of the federal court.
- Revising investigative powers to be consistent with those exercised by the CRTC under Canada's anti-spam legislation.

- Enhancing the effectiveness of the CRTC by making several institutional changes, including reducing the number of Commissioners, providing budget for expert staff, the establishment of a new Office of Economics and Analytics, publication of a code of consolidated CRTC regulatory rules, and reforming the existing CRTC costs award process.

12. And finally, TELUS also makes this recommendation pertaining to the institutional framework for the communications sector:

- Combining the *Telecommunications Act* and the *Radiocommunication Act* into a single unified Act sharing clear concise economic objectives and requiring market-based approaches to regulation as required in the current Policy Direction.

1.2. What can and should be addressed prior to full legislative reform

13. While TELUS has noted that this legislative review is timely, it recognizes that such legislative reform takes significant time. Some reforms to the communications regulatory framework need more immediate attention and do not require legislative change to implement.

14. For example, to address the exodus of Canadians subscribers from the regulated broadcasting system in favour of foreign alternatives, Government should provide a direction to the CRTC to take immediate measures to reduce the regulatory burden on content aggregators and allow them to better compete with foreign content aggregation services. Such measures might include reducing the number of services required to be provided as part of a basic package to all subscribers, and/or eliminating Part II fees which merely constitute a "tax" on licensed broadcasting services and do not ultimately benefit the Canadian broadcasting system as the monies are simply transferred to the government's general revenue account.

15. Additionally, to actively support investment in, and the deployment of advanced communication networks, ISED should act to ensure the timely release of spectrum and design spectrum auctions to support efficient outcomes. The CRTC should promptly

resolve access disputes, on specified timelines, consistent with the federal rights of access established in the *Telecommunications Act.* Both the CRTC and ISED should take steps, respectively, to limit wholesale obligations for competitive network infrastructure – particularly where such obligations are at odds with market facts and norms in peer jurisdictions (including: *ex ante* tariffing for wholesale domestic roaming, dual authority over roaming, roaming rights for incumbent wireless operators, and mandated access to competitive FTTP networks).

16. Exclusive federal authority over communications should be guarded and supported by the federal government, as it underpins every goal the government has for Digital Canada. To this end, the CRTC should actively and expressly protect exclusive federal authority over communications against municipal and provincial encroachments, including the purported application of "consumer protection" legislation to the offering and provision of telecommunications services. Exclusive federal authority can be additionally supported by the active and early intervention of the Attorney General of Canada in constitutional disputes.

2.0 Theme A – Reducing Barriers to Access By All Canadians to Advanced Telecommunications Networks

2.1. Introduction

17. The first broad theme that the Broadcasting and Telecommunications Legislative Review Panel has identified for discussion is reducing barriers to access by all Canadians to advanced telecommunications networks. Under this theme, TELUS makes a number recommendations to reduce barriers relating to the deployment of infrastructure for both landline and wireless networks. Amongst these recommendations are broadening the scope of public access rights in the *Telecommunications Act* beyond "transmission lines" to encompass "transmission facilities," which would include both wireline and wireless infrastructure and equipment. TELUS also proposes amendments to the *Radiocommunication Act* to eliminate impediments and regulatory barriers which hinder the deployment of infrastructure necessary to support new 5G services. In addition, TELUS makes other recommendations to facilitate the more timely deployment of new networks that will be vital to Canada's future success, including in those areas where high-speed broadband access services are currently unavailable or require upgrading to meet the CRTC's new universal service objectives for broadband service.

18. In addition to recommendations for reducing barriers to the timely deployment of infrastructure, TELUS makes recommendations to reduce barriers to foreign investment. TELUS recommends removing Canadian ownership and control requirements under the *Telecommunications Act*. Removal of these provisions will facilitate greater access to capital required for investing in new high-speed fibre and 5G networks that will fuel innovation in the Canadian economy.

19. Also under this theme, the Broadcasting and Telecommunications Legislative Review Panel seeks input on the issue of affordability as it pertains to access by Canadians to advanced telecommunications services. As the Review Panel states, universal access to high-quality and affordable telecommunications services has never been more important. However, the CRTC already has sufficient tools under the *Telecommunications Act* for the funding of broadband services in areas where it would otherwise not be economic to serve

by the private sector. Besides the CRTC's broadband funding regime, federal, provincial and municipal authorities are also supporting broadband network expansion efforts with various broadband funding programs.[1]

20. TELUS provides evidence that Canadian prices for telecommunications compare favourably on an international basis when properly analysed, despite the unique challenges facing Canadian telecommunications service providers including a large geographic area, relatively low population density, and relatively higher wireless handset costs for network providers due to lower volumes, exchange rates, and other factors.[2] Affordability is an issue of broad social concern, and to the extent that affordability remains a barrier with respect to access to telecommunications services, it is an issue best dealt with by various levels of government by means of taxation policy, social assistance or other policy measures, and not through sector-specific legislative measures.

21. With regard to affordability and access to high quality telecommunications services, TELUS discusses the importance of the economic concepts of static versus dynamic efficiency. The focus of static efficiency is on market power and prices whereas the focus of dynamic efficiency is on innovation and investment over the longer term. TELUS recommends placing greater emphasis on dynamic efficiency as the best means to address the important public policy issue of affordability. A short-term focus on price without considering the importance of innovation and investment over the longer term may be counter-productive. In short, emphasizing innovation and investment as public policy objectives will facilitate high-quality and affordable services for everyone.[3]

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1 For example, the Federal Government is funding broadband projects through the Department of Innovation, Science and Economic Development (e.g., Connect to Innovate program), Infrastructure Canada, and other federal departments. Various provincial governments have broadband funding regimes, including the government of Quebec's Quebec branché program.

2 TELUS elaborates further upon this matter in Section 2.4.3.

3 In its call for comments, the Broadcasting and Telecommunications Legislative Review Panel identified the issues of safety, security and net neutrality in its discussion of Theme A (Broadcasting and Telecommunications Legislative Review Panel, Responding to the New Environment: A Call for Comments, Review of the Canadian Communications Legislative Framework, September 24, 2018). TELUS discusses these issues and the issue of digital literacy under Theme C: Improving the rights of the digital consumer.

2.2. Government Policy Should Prioritize Competition and Investment

22. The provision of telecommunications services in Canada has evolved in the years since the *Telecommunications Act* was enacted. The types of services provided, the types of facilities over which they are provided, and the structure of the industry have all evolved substantially since the early 1990s. Retail internet services have been introduced, and become integral to the lives of Canadians. Cable companies developed and delivered telephony services over their distribution plant, and telephone companies developed broadcasting distribution services over their networks. Mobile wireless services have gone from novelty to ubiquitous, from telephone service to mobile broadband internet and smart phones.

23. During this period of technological change, the regulated monopolies which characterized the previous era were displaced by competition. Regulators permitted competition, and Canadian telecommunications services are now provided under conditions of mature competition via multiple competing networks. The regulatory tools for the past era of monopoly supply should be discarded in favour of tools designed to facilitate the dynamic efficiency required for the current age. Tomorrow's goals cannot be achieved with yesterday's tools. Although the *Telecommunications Act* has been amended a number of times since it was enacted (a summary of the major amendments in Appendix 2 to TELUS' submission), many of the more recent changes address granular policy matters and would have benefited from a more holistic assessment of their importance in the legislative scheme, and considered consequential amendments.

24. Throughout this submission, TELUS recommends changes that will make the legislation more effective at promoting deployment of facilities and the facilities-based competition that drives innovation and investment. In particular, TELUS recommends that the policy objectives in the legislation be amended to emphasize competition, innovation and investment and the timely deployment of infrastructure as key Canadian public policy objectives for the telecommunications services industry. These ideas are expanded on below in Section 5.1. TELUS makes additional recommendations regarding changes to

access policy and the institutional and technical amendments necessary to ensure the predictability needed to attract and justify investment.

25. Private investment in facilities has ensured that the vast majority of Canadians have access to high quality networks. Recent data from the CRTC show that the telecommunications industry has a capital intensity[4] of 40%. This is a higher capital intensity than all other industries in Canada except utilities and far higher than the average capital intensity of Canadian industry at 6.6%.[5] TELUS' capital expenditures have been around $3 billion per year for the last three years as it builds out its fibre-to-the-home facilities and prepares to deploy a 5G wireless network. These investments carry a significant amount of risk for even the largest of telecommunications services providers like TELUS.

26. Capital investment by Canadian carriers has also greatly exceeded capital spending in other jurisdictions, including Europe, over the last 10 years. Data from the OECD's recent estimates of total communications sector capital spending in each country for 2011-15, divided by the total communications paths – telephone lines, cable television subscriptions, and wireless (cellular) connections – in each country makes it clear that Canadian carriers have been spending far more than their counterparts in Europe.[6] For example, between 2011 and 2015, Canadian carriers spent almost US$180 per communications path. The EU-14 jurisdictions spent an average of approximately $70 per communications path[7] -- less than half that spent by Canadian companies – as Europe pursued service-based competition models.

27. Looking to the future, new technologies such as 5G networks and low earth orbit satellites can be expected to provide broadband access to even more Canadians, facilitated by investment by the private sector. Any changes to the legislative framework as a result of

4 Capital intensity refers to the ratio of capital expenditures relative to revenues.
5 Communications Monitoring Report 2018, CRTC, December 20, 2018, pp. 12-13.
6 Expert Report of Dr. Robert W. Crandall, p. 17, in Appendix 3.
7 *Ibid*, p. 18.

the review of the current communications legislative framework should not distort the market or disincent such investments in new networks and new technologies.

28. In areas where private investment alone is not economically feasible, the current legislative framework provides for a system of subsidies. The CRTC is using this framework, established under subsection 46.5 of the *Telecommunications Act,* to focus its subsidies away from local telephone service and on to broadband. TELUS recommends that this aspect of the legislation remain in place. Other sources of subsidies include federal government programs such as the Department of Innovation, Science and Economic Development's Connect to Innovate program and provincial funding as noted above. These subsidies will be used to deliver broadband to rural, remote and Indigenous communities at affordable prices.

29. Given the risk associated with network investments, legislative and regulatory frameworks should focus on creating incentives for such investments to be made. While there are no guarantees of a return on investment, nor should there be in respect of forborne services, companies that make such investments must have the *opportunity* to make a reasonable rate of return. This means that competition between facilities-based providers should determine the market price of access to the network, whether retail or wholesale. Mandated wholesale access at low regulated rates, for example, reduces the incentive for all providers to make investments that are beneficial to Canadians.

30. The communications industry legislative framework should enable and encourage investment. Limited, clear and coherent policy objectives would focus the regulator's activities on encouraging investment and prevent the uncertainty caused by frequent government intervention. Timely and principled decisions by regulators would also enable faster deployment of new networks and deliver innovations to Canadians sooner.

31. TELUS makes several concrete recommendations in this submission to achieve these goals. In particular, TELUS recommends changes to the telecommunications policy objectives in Section 5.1 to ensure a focus on investment. Moreover, TELUS makes several recommendations regarding access policy and antenna siting to enable more timely

network deployment in Section 2.6, and numerous specific recommendations to promote more principled and timely regulator decisions throughout Section 5.0, addressing theme D.

2.3. Promoting Facilities-Based Competition Drives Investment and Innovation

32. In Canada, the legislative and regulatory framework has for the most part promoted platform competition among telecommunications companies, cable systems, satellite companies, and wireless carriers. Platform competition continues to drive the positive outcomes seen by Canadians, including world-leading wireline and wireless networks in terms of attainable speed, LTE networks that cover 99% of the Canadian population[8] and investments being made in fibre-to-the-home and 5G technologies.

33. In contrast, other jurisdictions that focus on service competition and promote policies like mandatory unbundling of facilities at regulated rates see less investment, fewer innovative technologies and poor consumer outcomes. For example, many European countries have pursued service competition policies by choosing to rely heavily on providing entrants with low-cost regulated wholesale access to incumbents' networks. The result has been major underinvestment in European countries' networks, with poor outcomes for consumers.[9]

34. Canadian households have far wider access to broadband services with download speeds of 30 Mbps or 100 Mbps than most European countries. For example, while 83 percent of Canadians have access to speeds of 100 Mbps or more in 2016,[10] only 34 percent of French households, 19 percent of Italian households, and 24 percent of United Kingdom households had access to such speeds at that time. Even Sweden, with its municipally-subsidized fibre networks, has extended 100 Mbps coverage to just 69 percent of its households.[11] Moreover, the CRTC recently concluded that the Canadian wireline

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8 TELUS 2017 Annual Report, p. 53. 88.2% of Canadians can access faster LTE-A networks as well.

9 Expert Report of Dr. Robert W. Crandall, p. 18, in Appendix 3.

10 CRTC, Communications Monitoring Report 2017, Figure 5.3.16. This figure increased to 84% according to Communications Monitoring Report 2018 (see Figure 5.17, Broadband service availability by speed (% of households).

11 European Commission, Broadband Access in the EU, Data as of January 2016 (2017), Online: https://ec.europa.eu/digital-single-market/en/news/broadband-access-eu-data-january-2016.

broadband network infrastructure is now capable of supporting download and upload speeds of up to 1 Gbps without requiring significant additional investment.[12]

35. Given the success seen in Canada and other jurisdictions that support facilities-based competition and the failure of different approaches in other parts of the world, the legislative framework should continue to support facilities-based competition.

36. The legislative and regulatory framework will need to shift its focus from ensuring static efficiency to ensuring dynamic efficiency in order to ensure that the latest networks are available to as many Canadians as possible. Static efficiency is focused primarily on market power and regulating the price of services.[13] It generally ignores innovation and focuses on replication of services competition[14] to drive down consumer prices in the short term. However, in the longer term this may lead to under-investment in telecommunications facilities and, ultimately, worsen consumer outcomes. An example of this can be seen in Europe, where access to high-speed (100Mbps+) broadband lags significantly behind Canada due to an emphasis on service competition with a focus on lower prices.

37. On the other hand, dynamic efficiency views the optimal investment and innovation as its main objective.[15] Dynamic efficiency is critical in infrastructure that drives economic growth, including telecommunications. It recognizes that true competition comes not from "shops of the same type" but from competition which commands a cost, quality or other advantage over existing firms.[16] The consensus among economists is that dynamic efficiency is more effective than static efficiency at creating positive outcomes for consumers.[17]

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12 *The path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496, para 79.

13 Bauer, Johannes M.; Bohlin, Erik (2008): From static to dynamic regulation: Recent developments in US telecommunications policy, Intereconomics, ISSN 0020-5346, Springer, Heidelberg, Vol. 43, Iss. 1, pp. 38-50.

14 Weisman, Dennis L. (2010): A "principled" approach to the design of telecommunications policy, Journal of Competition Law & Economics 6(4), pp. 927-956.

15 *Ibid*, p. 934.

16 *Ibid*, p. 935.

17 Kahn, Alfred E., *Whom the Gods would destroy, or how not to deregulate*, AEI-Brookings Joint Center for Regulatory Studies, 2001.

38. A policy and regulatory framework that is set up to reward lower cost or better quality competitors will work to increase network speed and quality while lowering the price of services for all Canadians. This has been shown to be true in practice: in the past 25 years, speeds have gone from 56kbps to 1Gbps and the price per megabit of data has gone down very significantly. In fact, the price of a megabit of data dropped by 33% between 2010 and 2013 alone.[18]

39. On the other hand, if the policy and regulatory framework focuses only on price, while it may be that consumers would see lower prices in the short term (although even that is not a given), there may also be a gradual degradation in service because there would be no incentive to invest in maintaining and expanding telecommunications networks. This can be seen across Europe, where decades of policies that discouraged investment have now forced European Union to face the prospect of spending 21 billion euros of public money on improving telecommunications networks.[19] This is effectively a use of public funds to subsidize the true cost of private broadband internet – a need for public money having been caused by policies aimed at keeping short term prices low.

40. A focus on dynamic efficiency will ensure optimal investment in technology and make prices lower for everyone. Policies that support investment in the construction and deployment of competing facilities achieve this goal. This requires the CRTC to step away from yesterday's regulatory tools (such tariffed wholesale access) in favour of measures that facilitate investment in and the construction and deployment of competing networks. The recommendations TELUS makes throughout this submission will realign the legislative framework with dynamic efficiency. Consistent with TELUS' guiding principle 11, the new telecommunications policy objectives recommended in Section 5.1 are designed for this purpose. Similarly, the recommendations that services be by default "forborne" and that section 24 of the *Telecommunications Act* be amended in Section 5.3

[18] Report of Dr. Robert W. Crandall, p. 12, in Appendix 3.

[19] European Commission, *Commission Staff Document: A Digital Single Market Strategy for Europe - Analysis and Evidence*, June 5, 2015, p. 85.

are intended to entrench the central role of market forces in the policy framework for telecommunications.

2.4. Canadian Telecommunications Services Are Affordable and Compare Favourably to Other Jurisdictions

41. The Broadcasting and Telecommunications Legislative Review Panel has requested comments on the affordability challenge for low-income Canadians. However, it is apparent that Canada's reliance on platform competition has delivered superior benefits to Canadian consumers, including price, when comparing Canadian prices to those in other jurisdictions. Notwithstanding this fact, affordable telecommunications remain a challenge for some Canadians. This challenge is best addressed by broader social policy measures rather than through sector-specific telecommunications policy measures. The legislative framework should prioritize investment and competition, which will in turn ensure that prices are affordable for the vast majority of Canadians.

2.4.1. *International Comparison of Wireline Prices*

42. Dr. Robert W. Crandall recently undertook a comparison of wireline internet access prices as part of TELUS' response to the Competition Bureau's current Market Study in Broadband Services. TELUS includes Dr. Crandall's report as a part of its submission to the Broadcasting and Telecommunications Legislative Review Panel in Appendix 3 to TELUS' submission. Dr. Crandall concludes that "the best data available allow one to conclude that Canadian consumers face wireline broadband prices that are slightly lower than those in similar countries throughout the world despite Canada's obvious topographical disadvantages."[20] Moreover, Canadian prices are declining when considering the price Mbps download speed.[21]

43. The repeated claims from some quarters that Canadian prices are "too high" are simply untrue. Measuring Canadian prices to relevant international comparators shows that

[20] Report of Dr. Robert W. Crandall, pp. 13-14, in Appendix 3.
[21] Report of Dr. Robert W. Crandall, p. 14, in Appendix 3.

Canadian are able to subscribe to high-speed wireline Internet services at very reasonable prices.[22]

2.4.2. *International Comparison Wireless Prices*

44. Canadians wireless services prices also compare favourably on an international basis. Dr. Christian Dippon of NERA Economic Consulting recently conducted a price comparison of communications services in Canada and select foreign jurisdictions.[23] TELUS includes a link to Dr. Dippon's report as a part of its submission to the Broadcasting and Telecommunications Legislative Review Panel in Appendix 4 to TELUS' submission.

45. Dr. Dippon determined that mobile wireless telephony prices in Canada are lower than international benchmarks once all relevant factors are taken into account. Comparing the forecasts at the country level demonstrates that of the 246 Canadian mobile telephony plans that Dr. Dippon studied, 197 plans, or 80 percent, have prices that are *below* the forecast international benchmark prices.[24]

46. As is the case with wireline services, claims that Canadian wireless prices are high when compared to the prices in other countries do not withstand scrutiny. When assessed using valid methodology, prices for Canadian wireless services compare favourably with those in other jurisdictions.

2.4.3. *The Cost of Providing Services in Canada Is High*

47. Even though prices of telecommunications services in Canada, once correctly measured, are not higher than in other jurisdictions, the cost of providing those services is far higher. This is due to numerous factors explained below. While some of those factors, such as population density and topology, are beyond the control of the regulatory system, other

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22 Report of Dr. Robert W. Crandall, p. 15. in Appendix 3.

23 Dr. Christian M. Dippon, *An Accurate Price Comparison of Communications Services in Canada and Select Foreign Jurisdictions*, NERA Economic Consulting, October 19, 2018, see in Appendix 4.

24 *Ibid*, p. 33.

costs have been driven up government intervention. As explained below, certain policies have the effect of increasing prices.

48. As part of his analysis of wireline broadband prices, Dr. Robert W. Crandall looked at the cost of providing services in Canada compared to other developed countries. He concluded that a fundamental difference between Canada and most other developed countries is Canada's low population density. Providing fixed-wire or wireless broadband services requires carriers to deploy expensive networks comprised of copper wires, coaxial cable, fiber-optic cables, or a combination of these transmission media, and wireless towers. These networks must be deployed over pole lines, through underground ducts, or by interconnected wireless transmission facilities. For these technologies, the cost of serving customers rises substantially as the population density of the covered area declines.[25]

49. Dr. Crandall notes that Canada's average population density is far below that of the United States and even farther below the population densities found in Europe, Japan, and Korea. Even in urban areas Canada is less densely populated than most other developed countries.[26]

50. Canada has lower urban population concentration than all but 12 of the 34 most developed countries in the world, and its concentration is far below the urban concentration in countries such as the United Kingdom, Japan, and Korea. Canada's rural areas also have much lower population density than the rural areas in the United States and the larger European countries. Thus, even in rural areas, Canada has a cost disadvantage relative to other major developed countries. Given the economics of network deployment, this low population concentration means that it simply costs more to serve broadband subscribers in Canada than in most other developed countries.[27]

51. In addition to Canada's challenging geography, topology and population density, Canadians telecommunications carriers have little leverage when negotiating with large

25 Report of Dr. Robert W. Crandall, p. 6, in Appendix 3.
26 *Ibid*, p. 7.
27 *Ibid*.

global handset and device manufacturers ("OEMs"). As a result, OEMs are able to dictate prices and certain terms to TELUS and other Canadian wireless carriers. Most importantly, some devices now cost TELUS more than $1,000 per unit, and as a result of Canadians' continued expectation of receiving the latest flagship devices with significant subsidies and low upfront prices, the cost for carriers continues to increase.

52. Prior regulatory intervention has also driven up costs for customers. The Wireless Code, first enacted in 2013, provides a good example. By effectively limiting contract terms to two years by preventing the charging of a cancellation fee after 24 months, telecommunications carriers were forced to amortize the full cost of the device over a two years[28] instead of the three years that was customary before the Wireless Code came into effect. That led to higher up-front device prices and higher monthly fees for customers as carriers took steps to ensure that they did not lose money on subsidizing devices. Although the Wireless Code was expected to be a consumer-friendly piece of regulation, it resulted in increased prices for Canadians.

53. Another aspect leading to price increases for consumers have been the set asides in spectrum auctions by which major wireless carriers have been prohibited from bidding on certain spectrum blocks. This created artificial scarcity of a critical resource and raised the cost of the acquired spectrum for companies like TELUS. Partially as a result of the set-asides, spectrum in Canada is significantly more expensive than in other jurisdictions.[29] For example, the average price of AWS spectrum in the 2008 auction in Canada was C$1.55 per MHz-pop, whereas the same spectrum cost in the United States cost an average of US$0.54 per MHz-pop.[30] Part of the reason for the disparity in spectrum cost is that companies bidding on spectrum that was set aside for them also bid on unrestricted blocks of spectrum, driving up prices for companies like TELUS that would only bid on the unrestricted blocks. Competitive measures led to significantly higher prices paid at auction

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28 *The Wireless Code*, Telecom Regulatory Policy 2013-271 at para 220. The Wireless Code was updated in Telecom Regulatory Policy 2017-200, but the 24 month cap on contract terms remained.

29 *Investment in Spectrum*, p 14 of the *Telecommunications Overview* section of the 2018 CMR, reporting "investments in spectrum" of over $8 billion in spectrum from 2013-2016.

30 Robert Bok and Michael Lee, *AWS Auction Finally Ends - $4.25B Is A Big Tally*, CIBC World Markets, July 21, 2008.

in 700 MHz (2014) due to a spectrum cap and in AWS-3 (2015) due to a set aside. Major Canadian wireless carriers paid an average of C$2.99 per MHz-pop for restricted 700 MHz spectrum,[31] while US carriers paid an average of US$1.29 per MHz-pop. Higher spectrum costs in turn led to higher prices for consumers as Canadian wireless carriers sought to recoup their investment.

54. In summary, the increased costs arising from unfavourable population density, challenging geography, lack of bargaining power with global OEMs, more expensive spectrum and costly regulatory intervention contribute to the price of telecommunications services that Canadians face.

2.4.4. *Price Is Not a Standalone Barrier to Broadband Adoption*

55. Price is merely one of many factors, and not the most important one, deterring some people from subscribing to broadband service. Three recent studies have shown that age, education, and income are the primary factors that limit broadband adoption.[32, 33, 34] However, the main reason offered by non-users of the Internet is a lack of interest or no need for the service, which is the reason given by "66.5% of Internet non-users in 2012."[35] In this study conducted by Statistics Canada and Industry Canada (now Innovation, Science and Economic Development Canada), only 7.7% of non-users indicated that the cost of service or equipment was the main reason for not using the Internet. In this same study, the authors present the results of a multivariate statistical analysis and conclude that "education and age are the most discriminating factors in determining an individual's use of the Internet."[36,37]

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31 Spectrum that was set aside was auctioned for C$0.81/MHz-pop.

32 Karine Landry and Anik Lacroix, "The Evolution of Digital Divides in Canada," *2014 TPRC Conference Paper*, August 15, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418462.

33 Kathryn Zickuhr, "Who's not online and why," *Pew Research Center*, September 25, 2013, http://www.pewinternet.org/2013/09/25/whos-not-online-and-why/.

34 "Equipement et Branchement Internet des Foyers Québécois," C*efrio*, NETendances, Vol. 5, No. 2, 2014, http://www.cefrio.qc.ca/media/uploader/NETendances2013_V4N2_Equipement_branchement.pdf

35 Landry and Lacroix, *op. cit.*, p. 12.

36 Landry and Lacroix, *op. cit.*, p. 14.

37 According to Zickuhr, *op. cit.*, 34% of Americans surveyed stated that relevance (not interested, waste of time, too busy, don't need or want) was the principal reason that they did not subscribe to an Internet service.

56. As can be seen in these and other studies, the price of broadband service is not a major standalone deterrent but is typically combined with other factors, such as the cost of the necessary technology to support the broadband service (*i.e.*, computers), and the ability to access the data another way (*i.e.*, smartphones). While there are deterrents to adoption, price is only one of many factors, and far from the most important one, discouraging some Canadians from subscribing to broadband services. As noted in other sections of this submission, the most important factor in adoption of broadband services is digital literacy.

2.4.5. *Affordability for Lower-Income Canadians Should Be Addressed as a Matter of Broader Social Policy*

57. While Canada's wireline and wireless networks are affordable relative to other countries, low income Canadians may still be unable to afford access. As a result, they risk being left behind in the digital economy. Low-income Canadians may have trouble paying for food, rent, clothing, and Internet access. If low incomes require some income augmentation to make the purchase of all goods and services, including broadband Internet, more manageable, this suggests a solution that goes beyond the capability of sector-specific regulation. TELUS' proposed principle 6 pertains to this issue: social regulation and technical regulation, where required, should be applied symmetrically and should be applied through laws of general application, as distinct from sector-specific regulation, whenever possible.

58. Issues of income and affordability are best dealt with by other government departments, for example, through GST rebates or through tax policies of the Department of Finance. Issues of affordability cannot be solved with the limited tools at the disposal of a sector-specific regulator. It is unfortunate, though nonetheless true, that the magnitude of this problem is such that lowering any telecommunications price by a few dollars a month will do little to address systemic, economy-wide problems of income distribution. The problem

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Only 19% stated that price (too expensive, don't have a computer) was the main factor. Another subgroup of users who use the Internet but not from their residence indicated that the main deterrent to household adoption is the total price (the combination of a lack of computer, the ability to access data another way and the price of the service). None of these studies separates the price of the broadband service itself from the cost of computers and equipment necessary to access the Internet, rendering it even more difficult to conclude that the price of broadband service itself is a major deterrent to using the Internet.

of poverty is larger than the price of any single good or service. Rather than sector-specific solutions to this problem, direct government funding from general tax revenues should be used to pursue the objective of allowing low income Canadians to subscriber to broadband. Tax-based subsidies are not only preferable because they are the least distortionary in terms of market outcomes and incentives to innovate but also, as noted by the Consumer Groups in previous policy reviews, "(t)ax-based subsidies are preferable to service/subscriber-based subsidies insofar as they are more progressive, *i.e.*, less burdensome on low income households."[38] Tax-based subsidies are the only ones that can successfully target low income Canadians where such subsidies are needed the most.

59. Notably, the CRTC agreed with this conclusion and has acknowledged that affordability issues need to be addressed in a broader social context by other federal government departments and other levels of government.[39]

2.5. Legislation Should Promote Investment By Providing Greater Flexibility for Foreign Investment

60. A further legislative change that can be made to remove barriers to access to advanced telecommunications services is to promote investment by the removal of substantive Canadian ownership and control requirements and removal of these requirements as a Canadian telecommunications policy objective. In the alternative, TELUS proposes the liberalization of the current regime to allow for up to 49% direct investment.

61. Canadian telecommunications ownership and control is a specified Canadian telecommunications policy objective (*Telecommunications Act*, section 7(d)). The existing regime is embodied in the section 16 of the *Telecommunications Act* and in the *Canadian Ownership and Control Regulations* made pursuant to section 22 of the

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38 Telecom Policy Review Panel, Comments of the Consumer Groups (Public Interest Advocacy Centre, the Canadian Internet Policy and Public Interest Clinic, the Consumers Association of Canada, and the National Anti-Poverty Organization), 2005, https://cippic.ca/sites/default/files/CG_TPR_final_rev.pdf, paragraph 257.

39 Modern telecommunications services – The path forward for Canada's digital economy, Telecom Regulatory Policy CRTC 2016-496, para 204; CRTC Submission to the Government of Canada's Innovation Agenda.

Telecommunications Act. The current regime requires that, subject to certain exceptions,[40] Canadian carriers, in order to be eligible to operate as telecommunications common carriers, must meet the following requirements: in the case of a corporation, not less than 80% of the members of the board of directors are individual Canadians; Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80% of the entity's voting interests; and the entity is not otherwise controlled by persons that are not Canadians.

62. The current Canadian ownership and control regime is no longer justified. In its current form this objective was intended to be a cornerstone requirement of the Government of Canada's ministerial licensing regime for Canadian carriers at the time of the introduction of draft *Telecommunications Act* legislation in the early 1990s. The objective remained in the legislation as passed in 1993 despite the fact that the proposed ministerial licensing regime itself was abandoned.

63. The substantive requirements in section 16 of the *Telecommunications Act* now effectively apply to only a handful of the largest telecommunications entities (e.g., BCE, Rogers and TELUS). The current requirements limit access to foreign capital on the part of these three entities. There are no such limitations for other telecommunications service providers. Limiting access to foreign capital is a potential handicap to companies subject to the regime which is required to invest in new and innovative networks and services.

64. The rationale for the current regime is further called into question by 2014 amendments to section 16 of the *Telecommunications Act* which permitted Canadian carriers to operate if they have annual revenues from the provision of telecommunications services in Canada that represent less than 10% of the total annual revenues, as determined by the CRTC, from the provision of telecommunications services in Canada.[41] The 2014 amendment permits

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40 Pursuant to sections 16(2) and 16(6), exceptions are provided for: Canadian carriers whose annual revenues from the provision of telecommunications services in Canada represent less than 10% of the total annual revenues, as determined by the CRTC, from the provision of telecommunications services in Canada; international submarine cables, earth stations that provide telecommunications services by means of satellites and satellites.

41 *Telecommunications Act*, section 16(2)(c).

foreign companies of any size to enter the Canadian telecommunications services marketplace without any restrictions, while the three major Canadian telecommunications providers remain subject to asymmetric Canadian ownership requirements.

65. The Canadian ownerships and control regime entails expensive compliance costs for those subject to it, including maintaining detailed share registry records, ongoing reporting requirements and other activities, whose costs now outweigh the benefits. The regime has been so hollowed out by *ad hoc* exception that it cannot credibly be characterized as a policy objective for the sector.

66. TELUS further notes that the legislative requirements at the time were effectively side-stepped by the Government of Canada in the Globalive case. Despite being found to not meet the Canadian ownership and control requirements at the time by the CRTC,[42] the Government of Canada nevertheless proceeded to overturn the CRTC's determination by Order in Council,[43] effectively undermining the rational for its own regime.

67. TELUS further notes that in the telecommunications sector, concerns over Canadian ownership and control have been effectively been superseded by national security concerns under the *Investment Canada Act.* For example, in 2013, the Government of Canada blocked the former Manitoba Telecom Services Inc (MTS) intention to sell is Allstream fibre optic network for $520 million to Accelero Capital Holdings, an entity controlled by Egyptian Naguib Sawiris, who ironically held the controlling interest in Globalive, whose entry into the Canadian market the Government had previously supported. The transaction was blocked for unspecified national security concern under the national security provisions of the *Investment Canada Act.*[44]

68. In light of the above, TELUS recommends that the Canadian ownership and control regime be removed. In the alternative, short of abolition of the current regime, further liberalization

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42 *Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, Telecom Decision CRTC 2009-678.

43 Order in Council P.C. 2009-2008.

44 https://www.newswire.ca/news-releases/government-of-canada-rejects-mts-sale-of-allstream-to-accelero-capital-holdings-513071121.html

is possible, without undermining whatever remaining rationale may exist for Canadian ownership and control requirements. The Canadian ownership and control regime for telecommunications services can be liberalized as in the Canadian airlines sector. Pursuant to recent amendments under the *Canadian Transportation Act*, direct foreign investment of up to 49% is now permitted in the airlines sector, with a control-in-fact regime still in place. Amending the *Telecommunications Act* to provide for the same regime in place for the airlines sector would go at least some way to achieve liberalization without compromising policy objectives and would encourage further investment and innovation in the telecommunications services sector.

2.6. The Telecommunications Act and Radiocommunication Act Should Be Amended to Facilitate the Deployment of Wireline and Wireless Networks

69. Faster deployment of network infrastructure can be promoted by amending *Telecommunications Act* public access rights to apply to the construction of "transmission facilities" instead of "transmission lines".

70. "Transmission line" is an undefined term in the current legislation. The above amendment will clarify the scope of the rights by referring to a defined term. Moreover, it will remove any doubt that wireless equipment is included.

71. In order to build the networks required for the services Canadians need and want, carriers require timely and predictable access to public lands and infrastructure. Section 43 of the *Telecommunications Act* today grants carriers the right to access highways and other public places for the purpose of constructing, maintaining and operating their networks. This provision and its predecessors have been crucial to the effective deployment of telecommunications services in Canada. While recognizing the interests of municipalities, these provisions have allowed carriers to build their networks without undue barriers imposed by municipalities and other local authorities. However, deployment has been frustrated by numerous disputes with various municipalities requiring litigation before the CRTC and the courts. TELUS proposes a minor change to this section to ensure it is technologically neutral, preventing potential confusion and consequent disputes with

municipalities, and overcoming the unique deployment challenges associated with 5G networks.

72. Section 43 access rights are expressly in relation to "transmission lines". Since this term is not defined in the *Telecommunications Act*, there may be questions about its meaning. The reference to "lines" may invite questions about whether Parliament intended these rights to be exclusive to wireline facilities. Since this provision was enacted, wireless services have taken on a central role in Canadian telecommunications. Importantly, wireless services are now substitutable with wireline services. Technologically neutral statutory access rights are necessary for carriers to deploy their networks, whether wireline or wireless (or, most commonly, a mix of both).

73. Accordingly, the *Telecommunications Act* should be amended to state that access rights are provided to carriers in respect of the construction, maintenance, and operation of transmission *facilities*, a term which is defined, and includes both wireline and wireless equipment. Although the current legislation should apply to all types of facilities, the foregoing recommendation will remove any doubt and proactively prevent future disputes.

74. With the coming of 5G technology, the type, size and location of next generation wireless equipment will evolve. These services will require the installation of many small antennae, located in close proximity to each other in dense areas. Timely and effective deployment of such equipment requires access not only to public highways but also to passive public infrastructure such as light standards, viaducts, and similar infrastructure owned by a variety of public authorities. The current legislative provision already subjects this infrastructure to access rights, which apply to highways *and other public places*. There is no need to amend the *Telecommunications Act* to address this type of access. However, with the change to clarify that wireless facilities are covered, the CRTC can more confidently assert its jurisdiction where a carrier cannot gain access on acceptable terms.[45]

[45] Certainly there will be occasions where safety and other considerations will demand that access rights be restricted. This can be achieved by subjecting the expanded access rights to existing language preventing the undue interference with public use and enjoyment of the public place.

75. The foregoing recommendation is consistent with those proposed in the 2006 final report of the Telecommunications Policy Review Panel, which recommended that "access rights should be defined to encompass the right to install, maintain, repair and operate all 'transmission facilities' as defined in the Act".[46] In the 12 years since the issuance of that report, the wisdom of those recommendations have been borne out in the experience of carriers and municipalities. The pace of technological change, as described above, have only made the changes more urgent.

76. Apart from the question of accessing public lands, TELUS also recommends several other legislative changes to the *Radiocommunication Act* to facilitate the deployment of wireless infrastructure. In particular, TELUS recommends:

- The amendment of the definition of "radio station" found in the *Radiocommunication Act* to read "**radio station** or **station** means a place in which radio apparatus including any associated antenna systems and any masts, towers and other antenna supporting structures."
- The inclusion of a requirement for a new radio authorization for purpose-built antenna supporting structures owned and operated by third parties.
- The inclusion of a power to prescribe the procedures governing the approval and making of applications for the siting of radio stations and purpose-built antenna supporting structures owned and operated by third parties including the form and manner, and prescribing the processing and disposition of those applications.
- The inclusion of a power to exempt specified spectrum licensees from the requirement to obtain approval for the siting of radio stations where the radio station meets the requirements of a standard issued by the regulator.

77. These changes can eliminate some impediments to the deployment of infrastructure necessary to support new 5G services, as explained further below.

[46] TPRP Final Report, Recommendation 5-4.

78. The siting of antenna structures falls entirely within the core of the exclusive federal authority over radiocommunication,[47] and local land use authorities may not impair this exclusive federal authority. However, under ISED procedures imposed via conditions to spectrum licences, licensees are obliged to contact local land use authorities to "determine the local consultation requirements and to discuss local preferences regarding antenna system siting and/or design."[48] While intended to be a reasonable opportunity for the consideration of legitimate local concerns these consultations and discussions all too frequently become mired in seemingly endless process and serve as platforms for opponents convinced of the alleged inadequacy of Health Canada's radio frequency exposure guidelines which are binding on licensees.[49] Notwithstanding compliance with these radio frequency exposure limits licensees are compelled to engage in repetitive processes and lengthy debate introducing unnecessary expense and delay.

79. Coverage, capacity and technical considerations demand network topologies having ever smaller and more numerous cell sites. TELUS projects the number of cell sites required to meet capacity the demands of 5G will be at least an order of magnitude increase from tens of thousands to hundreds of thousands nationally. The challenges arising from the current consultation process will consequently be magnified.

80. While ISED procedures do provide for the exclusion from consultation of non-tower existing structures in certain circumstances, the exclusion is accompanied by qualifications

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47 *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23.

48 *Radiocommunication and Broadcasting Antenna Systems*, Client Procedures Circular CPC-2-0-03 Issue 5. This procedure is incorporated by reference into the licence conditions of wireless service providers and non-compliance with its provisions may precipitate licence revocation or the application of substantial administrative monetary penalties. Although the procedures are said to apply to "third party tower owners" who are not licensees and thus not subject to conditions of licence it is not immediately obvious how this is given effect perhaps suggesting a need for attention in subsequent legislative amendments.

49 *Ibid*, CPC 2-0-03: "Health Canada has established safety guidelines for exposure to radio frequency fields, in its Safety Code 6 publication, entitled: Limits of Human Exposure to Radiofrequency Electromagnetic Fields in the Frequency Range from 3 kHz to 300 GHz.13. While the responsibility for developing Safety Code 6 rests with Health Canada, Industry Canada has adopted this guideline for the purpose of protecting the general public. Current biomedical studies in Canada and other countries indicate that there is no scientific or medical evidence that a person will experience adverse health effects from exposure to radio frequency fields, provided that the installation complies with Safety Code 6." In practice cell site parameters and design are such that the resulting radio frequency fields are orders of magnitude less than the Health Canada Limits in virtually all cases.

that call into question its scope. Exclusions are to be exercised "in consideration of local circumstances" and consequentially "it may be prudent for the proponent to consult even though the proposal meets an exclusion." Further proponents are cautioned that they "may benefit from local knowledge by contacting the land-use authority when planning an antenna system that meets this exclusion criteria." All parties are thereby left in a situation of uncertainty as to the procedural path to be followed. This uncertainty, delay and expense does not bode well for the deployment of 5G infrastructure involving tens of thousands of new sites.

81. The Broadcasting and Telecommunications Legislative Review Panel may wish then to recommend legislative improvements noting the example of the recent Federal Communications Commission ("FCC") initiative *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*.[50] The FCC is taking steps to "remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support" new 5G services by limiting the time consumed by local processes. In part, this is to be accomplished by the introduction of a "shot clock," the operation of which can be seen in the following extract:

- Establish two new shot clocks for small wireless facilities (60 days for collocation on pre-existing structures and 90 days for new builds) and codify the existing 90 and 150 day shot clocks for non-small wireless facility deployments that were established in the 2009 Declaratory Ruling.
- Make clear that all state and local government authorizations necessary for the deployment of personal wireless service infrastructure are subject to those shot clocks.

50 Declaratory Ruling and Third Report and Order, WT Docket No. 17-79; WC Docket No. 17-84, FCC, September 5, 2018. "To meet rapidly increasing demand for wireless services and prepare our national infrastructure for 5G, providers must deploy infrastructure at significantly more locations using new, small cell facilities. Building upon streamlining actions already taken by state and local governments, this Declaratory Ruling and Third Report and Order is part of a national strategy to promote the timely buildout of this new infrastructure across the country by eliminating regulatory impediments that unnecessarily add delays and costs to bringing advanced wireless services to the public."

- Conclude that a failure to act within the new small wireless facility shot clock constitutes a presumptive prohibition on the provision of services. Accordingly, we would expect local governments to provide all required authorizations without further delay.

82. In summary, the imminent deployment of tens of thousands of new small cell sites for the radio apparatus and associated antennas required for the delivery of 5G services to Canadians will be unnecessarily delayed and will incur undue extraordinary costs due to current burdensome site approval processes under the existing provisions of the *Radiocommunication Act*. These processes require simplification and streamlining and the imposition of greater discipline to avoid prolonged and unreasonable delays at the hands of local land use authorities. Also, it is not at all apparent that current legislation and approval processes adequately capture operators employing licence-exempt radio apparatus and third-party tower operators. These recommendations are intended to better position the regulator to effectively assert federal jurisdiction in the area and to develop new site approval processes that avoid unnecessary delay and burden and expedite the delivery of wireless services to Canadians.

83. Finally, TELUS also recommends facilitating the faster deployment of wireline and wireless networks by its enshrinement as a Canadian telecommunications policy objective in section 7 of the *Telecommunications Act*, as detailed in Section 5.1. It is crucial for Canada to be at forefront of the deployment of new telecommunications networks to facilitate future innovation in the digital economy.

3.0 Theme B – Supporting creation, production and discoverability of Canadian content

84. The global digital market place for programming content has fundamentally disrupted the traditional Canadian broadcasting system and, as a result, its foundational pillars are crumbling. First, the "walled-garden" in which consumers had no choice but to obtain programming through the regulated system is now a thing of the past. Consumers are moving to alternatives outside the regulated system. The CRTC Communications Monitoring Report shows four consecutive years of decline in subscriptions to broadcasting distribution undertakings ["BDUs"].[51] This downward trend is disconcerting, and complacency over the relatively slow pace of this market reduction is inadvisable. This trend is likely to continue as younger generations eschew the traditional broadcasting system. Indeed, a recent report by Communications Management Inc., using data from Statistics Canada, finds that 44.5% of Canadian households which are headed by individuals under 30 years of age don't subscribe to the traditional TV service.[52]

85. The second factor contributing to the demise of the foundational pillars of the Canadian broadcasting system is the erosion of the distinct Canadian program rights market, which has allowed Canadian media companies to build business models based on reselling foreign content (rather than relying on their own home grown productions). This is confirmed in a report by Mario Mota of Boon Dog Professional Services Inc., commissioned by TELUS in November 2017[53] and included as Appendix 5 to this submission. As noted in Mota's report "The traditional business model of Canadian broadcasters/media companies is contingent on having a separate rights market for Canada. In today's evolving program rights market, this can no longer be assured."[54] Mota notes that "[w]ith the growth of global behemoth video streaming players such as Netflix and Amazon, selling rights on a global

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51 CRTC Communications Monitoring Report 2017, section 4.3 ii) at pp. 194: https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2017/cmr2017.pdf ["CRTC CMR"].

52 "44.5% of under-30 households don't have TV: report", The Wire Report, January 7, 2019: https://thewirereport.ca/2019/01/07/44-5-of-under-30-households-dont-have-tv-report/?utm_source=The+Wire+Report+-+Paid+Subscribers&utm_campaign=6d5e9e1211-EMAIL_CAMPAIGN_2019_01_08_10_00&utm_medium=email&utm_term=0_762d18fda1-6d5e9e1211-91111325&mc_cid=6d5e9e1211&mc_eid=60571c9861.

53 Mota, Mario, Recent Developments in Television Program Rights in the Canadian Market: A Snapshot of Legal Options Available to Canadians to Access Television Content, November 2017 ["Mota"].

54 *Mota*, at p. 1.

basis, rather than by country or territory, is a new option available to rights holders and increasingly seen as a viable and lucrative one."[55] Some content suppliers are also choosing to enter the Canadian market on a direct-to-consumer basis, as the U.S. television network CBS recently did with its CBS All Access video streaming service that launched in Canada in early 2018.[56]

86. Whether or not the broadcasting regulatory framework has been successful in meeting the objectives of the *Broadcasting Act* in the past,[57] there can be little doubt that continued reliance on a crumbling regulatory framework will not prove successful in the future. Attempting to maintain all the constructs which have supported a myriad of cultural and social objectives in the past is likely to precipitate the exodus of consumers from the "regulated system" in favour of other alternatives in the global digital marketplace for programming content. Expectations for a new framework must be adapted to the new realities which make former support mechanisms unsustainable in the future.

87. However, not all new developments relating to how programming is distributed spell doom and gloom for the Canadian cultural industries and policy makers. The good news is that the global digital environment is ripe with opportunities for Canadian content creators and producers. There are innumerable success stories, such as the CBC's hit show *Kim's Convenience* which reports that it has found a new broadcast window for its first three seasons in Asia, and also that "Netflix already snapped up the global streaming rights to the show, and Amazon holds its VoD rights in the United States and United Kingdom."[58]

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55 *Mota*, p. 1.

56 CBS.com, *CBS All Access launches in Canada*, April 23, 2018: https://www.cbs.com/recommended/news/1008474/cbs-all-access-launches-in-canada/

57 This is something that has been hotly debated by experts over the years and has been a livewire of consumer discontent. It is therefore not surprising that the CRTC's own survey as part of the Let's Talk TV consultation resulted in Canadians boldly stating as their #1 suggestion to get rid of the CRTC: Broadcasting Regulatory Policy CRTC 2015-86, *Let's Talk TV - The way forward - Creating compelling and diverse Canadian programming*, March12 2015 and Broadcasting Regulatory Policy CRTC 2015-96, *Let's Talk TV - A World of Choice - A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, March 19, 2015.

58 "Thunderbird Entertainment's 'Kim's Convenience' heads to Asia", Cartt.ca, January 4, 2019: https://cartt.ca/article/thunderbird-entertainments-%E2%80%98kims-convenience%E2%80%99-heads-asia.

88. It is abundantly clear that the broadcasting sector will continue to see many new challenges and opportunities in the future. A fundamentally revamped broadcasting legislative framework is needed to capitalize on the opportunities and take into account the challenges presented by the new global digital environment for programming content.

3.1. New Definitions and Concepts Are Needed to Make a Revised Broadcasting Act Applicable to the Global Digital Programming Marketplace

89. It is clear that new forms of expression are challenging what constitutes "broadcasting". Many definitional lines that underpin the existing *Broadcasting Act* are being blurred as a result of technological advancement and the emergence of new business models.

3.1.1. *What Is "Broadcasting"*

90. The current definition of "broadcasting" in the *Broadcasting Act* provides that:

> **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;

91. This definition of broadcasting is intimately tied to the definition of "program" which is defined as follows:

> **program** means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;

92. The exclusion from the definition of "program" of any visual images that "consist predominantly of alphanumeric text" arguably creates incongruous distinctions among various programming services, especially news services which increasingly use video content to communicate with Canadians. When a video is the predominant form of communication for a particular news story, the current framework would, at least notionally, treat that story as a "program", and its transmission to the public as "broadcasting". Yet other news stories where a video is accompanied by alphanumeric text

may not reach the threshold to be considered "programs" at all. These incongruous distinctions stand in the way of good public policy. This appears to have been recognized by the Government when it recently chose to support journalism generally and without restricting its form.[59]

93. There are many other considerations relating to the definition of "broadcasting" and "programs" which can and should be examined. These include whether a distinction should be made for the purposes of the *Broadcasting Act* between streaming and downloading programs, and to what degree should personalization of content, *e.g.*, through viewer-directed storyline outcomes, affect whether audio-visual content is considered a program under the *Broadcasting Act*.

94. TELUS has not examined these issues at length in this submission because in its view, any determination to broaden the scope of the new *Broadcasting Act*, or alternatively to marginally limit its scope, would have no bearing on the need for other reforms which are the focus of the sections below.

95. The outcome of deliberations on what should constitute "broadcasting" may in fact lead to a renaming of the *Broadcasting Act.* For example, the emergence of new audiovisual service models 20 years ago, enabled by advances in broadband technology, created significant uncertainty about the scope of the term "broadcasting".[60] Thus, the *Broadcasting Act* may be more aptly named the "Audiovisual Media Services Act", or "Audiovisual Communications Act". However, since we make no proposals in this submission regarding the appropriate definition of broadcasting, we have continued to reference the *Broadcasting Act* when speaking of new legislation and to reference

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59 In the 2018 Fall Economic Statement, the Government committed close to $600M over five years to support Canadian journalism in all its forms. The measures to support Canadian journalism consist of three initiatives: allowing non-profit news organizations to act as registered charities, introducing a new refundable tax credit to support original news content creation, and introducing a new temporary non-refundable tax credit to support subscriptions to Canadian digital news media. See *2018 Fall Economic Statement*, November 21, 2018, at pp. 40-41: https://budget.gc.ca/fes-eea/2018/docs/statement-enonce/fes-eea-2018-eng.pdf

60 See, for example, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, *Report on New Media*, May 17, 1999, in which the CRTC considered the scope of the definition of "broadcasting" in light of uncertainty at the time about whether so-called "new media services" were engaged in broadcasting.

"broadcasting" and "programs" to mean whatever these terms may encompass in the new legislation.

3.1.2. *A New Terminology Focusing on "Programming Services" and "Content Aggregators"*

96. The current regulatory framework, enacted pursuant to the legislative structure and objectives of the existing *Broadcasting Act*, has resulted in a highly asymmetric application of rules and obligations for those who provide programs to Canadians. When such programs are provided by the traditional players of the former "walled-garden" broadcasting system, there is a burdensome and complex regulatory scheme that applies and that adds costs and takes away choice for consumers. But when programs are delivered by non-traditional providers of programming, notably large foreign services such as Netflix or Amazon Prime, few or no rules apply, enabling them to offer consumers more choice at lower cost.

97. This lack of symmetry in the treatment of similar services (at least in the eyes of the consumer) puts regulated Canadian companies at a serious disadvantage when competing with content services that offer programming to Canadians on an exempt basis.[61] These disadvantages are resulting in less innovative yet more costly regulated services, and will ultimately lead to further decline in subscriptions to the regulated broadcasting system, putting at risk Canada's ability to meet the cultural objectives underlying the *Broadcasting Act*.

98. The asymmetrical treatment described above is largely attributable to artificial distinctions within the *Broadcasting Act* and in the existing regulatory framework. Companies that perform a similar function within the broadcasting ecosystem, and are therefore in direct competition, must be put on a level competitive footing regardless of what platforms or business models they may use to perform that function.

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61 The CRTC, through Broadcasting Order CRTC 2012-409, *Exemption order for digital media broadcasting undertakings*, July 26, 2012, exempts services that are "delivered and accessed over the Internet".

99. An important first step to achieve that much-needed parity is to update our nomenclature to more accurately reflect how broadcasting services are operating in today's environment. This must start by re-examining the constituent elements of the broadcasting sector.

100. The existing terminology of the *Broadcasting Act* contemplates the following categories of "broadcasting undertaking": [62]

- a "distribution undertaking", which is defined as an undertaking "for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking";
- a "programming undertaking", which is defined as an undertaking "for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus."; or
- a "network", which is defined as "any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person".

101. In today's environment, these definitions fall short of adequately distinguishing between the different roles fulfilled by the service providers that form part of the Canadian broadcasting system. The simple functions of transmission and retransmission/distribution that allowed us to categorize traditional broadcasters and distributors no longer apply, as advances in technologies, and the shifting business models that accompany them, have rendered such distinctions obsolete.

102. In an attempt to provide a more evergreen concept for the definitional underpinnings of a new *Broadcasting Act*, TELUS proposes that the new "players" in the broadcasting sector be defined by whether or not they exercise control over programs, *e.g.*, whether they offer exclusive programming that is only available on their services. The concept of control

62 *Broadcasting Act* (S.C. 1991, c. 11), section 2.

over the availability of programs to Canadians is not tied to technology or specific business models and hence would more likely withstand the test of time.

103. Accordingly, TELUS proposes that a new *Broadcasting Act* be anchored by the following two definitions:

- "programming services" which are undertakings that exercise control over the availability of programs in Canada; and
- "content aggregators" which are undertakings that aggregate and curate content by licensing it on a non-exclusive basis and making it available to Canadians.

104. The concept of the exercise of control over programming in Canada goes to the heart of the purpose of the *Broadcasting Act*, namely to protect our cultural sovereignty. One of the central concerns that has underpinned Canadian broadcasting policies since the earliest days of television broadcasting has been the importance of programming to Canadian culture, identity, and sovereignty. This concern is well captured by the opening sentence of the Fowler Committee's report in 1965: "The only thing that really matters in broadcasting is program content: all the rest is housekeeping."[63]

105. Programming services exercise control over programming in a variety of ways, such as decision-making power over what programs to create or make available and how to make these available to the public. That control is exercised through the ownership of exclusive rights in programming, *e.g.*, the exclusive right to authorize distribution of the programming within the Canadian market. These rights allow programming services to control the extent and terms of access to programming for Canadians, and therefore directly affect the implementation of Canada's broadcasting policies.

106. When defined in this way, it is clear that the fundamental role of programming services has not changed in the global digital environment. Traditional broadcasters are merely taking advantage of advances in technology and the ubiquity of broadband networks to make

63 Report of the Committee on Broadcasting, (Ottawa: Queen's Printer, 1965).

available the programming they control in new ways. Broadcaster business models now include providing subscribers access to programs through websites, or app-based offerings such as Crave which provides access to programs controlled by Canadian media behemoth Bell Media.

107. Accordingly, programming services would continue to be expected to meet more significant objectives of the *Broadcasting Act* through a licensing regime when a minimum threshold of subscribers or revenue generation is met.[64]

108. Under TELUS' proposed terminology, foreign services such as Netflix, Amazon Prime or Facebook Watch would qualify as "programming services", as they exercise control over programming that is distributed in Canada, *i.e.*, they offer exclusive programming that is only available through their services. TELUS makes some recommendations regarding the treatment of these foreign programming services below in section 3.2.3 recommending that a "foreign element" be recognized in the Canadian broadcasting system and that foreign entities be subject to meeting some objectives of the Act commensurate with their access to the Canadian market.

109. TELUS further notes that the exclusivity, or control over the program, may be short lived in some instances, *e.g.*, where a broadcast program becomes available for purchase shortly after release on other services such as iTunes. The length of the exclusive "window" is irrelevant under this new definition. It would matter only that the program was initially only available through a specific programming service.

110. In contrast to programming services, content aggregators would be defined as having no control over programming in Canada. Not only do they not hold exclusive programming distribution rights, they also no longer have the *de facto* control they once had over the ability of programming services to reach a wide range of Canadian consumers with their content. The fact is that traditional distribution undertakings [commonly referred to as

64 In this regard, TELUS notes that the CRTC no longer requires licensing of niche programming services with fewer than 200,000 subscribers. See Broadcasting Order CRTC 2015-88, *Exemption order respecting discretionary television programming undertakings serving fewer than 200,000 subscribers*, March 12, 2015.

"BDUs"] are no longer "gatekeepers" standing between programming services and consumers, as broadcasters today can reach consumers directly over the Internet. These facts support a significantly different treatment under a new Act.

3.1.3. *Other Concepts Which Should Be Updated or Deleted from a New Broadcasting Act*

111. If history serves as a guide, the new legislation that results from this review process will likely be in place for decades. Thus, in addition to eliminating artificial distinctions that are keeping the statute mired in the past, we should also be discarding other out-dated concepts and making amendments aimed at ensuring that the statute is as resilient to future changes in technology as possible, even those that can't be envisioned today.

112. For example, characterizing the "transmission of programs" as being via radio waves "or other means of telecommunication" is unnecessarily redundant. So long as any means of telecommunication has been used, that is sufficient. Thus, we should discard the definition for "radio waves" entirely, and broaden the language relating to transmission of programs to apply if transmitted "by any means of telecommunication".

113. Similarly, the means by which the public receives the transmission of programs is irrelevant. The *Broadcasting Act* currently specifies that the public must receive the broadcasting by way of a "broadcasting receiving apparatus", however what really matters is the fact that the public is capable of receiving a broadcast, not the means of reception. Although the term is arguably broad enough at present to capture most means of reception for broadcasting, leaving it in the statute only invites future uncertainty when a technology is invented that arguably falls outside its bounds. In TELUS' view, so long as the public receives a transmission of programs intended for public reception, broadcasting has occurred.

114. Some additional proposed amendments are a consequence of the redefinition of the constituents of the broadcasting system into programming services and content aggregators, and the proposed licensing framework applicable to them. For example, the term "broadcasting undertaking" is no longer required in a statute that defines

"programming services" and "content aggregators" quite differently, *i.e.* based on the role they fulfill in the broadcasting system, and also regulates them differently to reflect the different functions they can fulfill in achieving Canada's cultural goals. Similarly, the term "licence" would need to be amended to reflect the fact that only programming services should continue to be licensed under the proposed framework.

115. The examples discussed above are not intended to be exhaustive, as any significant overhaul of a statutory framework will no doubt lead to many consequential amendments.

3.1.4. *Recommended Legislative Changes to the Definitions of the Broadcasting Act*

116. TELUS proposes the following specific legislative changes to section 2 of the *Broadcasting Act* (changes are shown in bold, with additions underlined and deletions in strikethrough text):

> **2 (1)** In this Act,
>
> *broadcasting* means any transmission of programs, whether or not encrypted, by ~~**radio waves or other**~~ **any** 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;
>
> …
>
> ~~***distribution undertaking***~~ ***content aggregator*** means an undertaking **engaged in the aggregation and distribution of programs over which it exercises no exclusive broadcasting rights, by any means of telecommunication, for reception by the public;** ~~for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication, to more than one permanent or temporary residence or dwelling unit or to another such undertaking~~;
>
> …

licence means a licence to carry on a ~~**broadcasting undertaking**~~ **programming service** issued by the Commission under this Act;

…

~~***network*** **includes any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person;**~~

…

~~***programming undertaking***~~ ***programming service*** means

(a) an**y** undertaking **that exercises exclusive broadcasting rights in one or more programs which it makes available** ~~**the transmission of programs**~~, either directly by ~~**radio waves or other**~~ **any** means of telecommunication or indirectly through a ~~**distribution undertaking**~~ **content aggregator**, for reception by the public ~~by means of broadcasting receiving apparatus~~;

(b) any delegate of a programming service as defined in subsection (a);

(c) any undertaking that makes use of radio waves as defined by the *Radiocommunication Act* [or *Telecommunications Act*]]

…

telecommunication **has the same meaning as in section 2 of the *Telecommunications Act*;**

~~***temporary network operation*** **means a network operation with respect to a particular program or a series of programs that extends over a period not exceeding sixty days.**~~

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

(2) For greater certainty, *broadcasting* includes making programs available to the public in a way that allows a member of the public to have access to them from a place and at a time individually chosen by that member of the public.

3.2. Redefining the "Elements" of the Canadian Broadcasting System

117. TELUS believes that the health and future success of Canadian content creation and Canadian programming distribution models requires a fundamental shift in paradigms to help Canadian content creators and business model innovators take advantage of the opportunities created by a global marketplace.

118. As Government develops new cultural policies and a new *Broadcasting Act,* it should consider the threat and opportunity that a global digital marketplace presents for Canadian content creators. While on the one hand, the business model of leveraging foreign programming to subsidize Canadian content creation may be rendered more difficult; on the other hand, Canadian content creators also have easier access to global markets for the distribution of their creations, which provides new commercial funding opportunities. Embracing the global marketplace may provide the right incentives for Canadian content creators to adopt a more entrepreneurial spirit with respect to marketing their creations. To foster this, Government should be looking at removing many of the asymmetries between the current regulated broadcasting system and other services currently providing programming on an exempt basis pursuant to the Digital Media Exemption Order ["DMEO"].[65]

[65] 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),* July 26, 2012 ["DMEO"].

119. A re-imagined regulatory framework should be focused on empowering Canadian creators to thrive on the global stage and on fostering an environment for innovation in content delivery models.

120. The current *Broadcasting Act* declares that:

> 3(1) b) the Canadian broadcasting system, […] **comprising public, private and community elements,** […] provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty; [Emphasis added.][66]

121. These elements, namely public, private and community, have all been granted various forms of support over the years. Since the enactment of the *Broadcasting Act* in 1991, however, the state of Canada's broadcasting industry has changed significantly. In the new global environment, it is no longer sustainable to ignore foreign competition, nor advisable to attempt to make the private element responsible for the "maintenance and enhancement of national identity and cultural sovereignty" on par with public broadcasters. Also, the community element has morphed over the years, its role being somewhat overtaken on the one hand by local programming and on the other by social media.

122. The current statement of "elements" wholly ignores the proverbial elephant in the room, namely, the proliferation and increasing dominance of foreign content providers operating in a global market. The time has come to acknowledge the existence of a foreign element in the Canadian broadcasting system and not merely exempt these providers from nearly all regulatory obligations.[67]

123. TELUS submits, that, to reflect the evolution of Canada's broadcasting system, the three elements identified in section 3(1)(b) of the *Broadcasting Act* should now be "private", "public" and "foreign".

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66 *Broadcasting Act*, (S.C. 1991, c. 11) at s. 3(1)(b).

67 As a result of the DMEO, *supra* note 64.

3.2.1. *The "Private" and "Public" Elements Continue to be Relevant Today and in the Future*

124. There is no doubt that the Canadian broadcasting system continues to have a private and public element. What has changed, as discussed below, is the competitive landscape in which they operate, which requires a fundamental shift in the treatment of each of these elements such that their functions no longer overlap.

125. While TELUS advocates for a more flexible regulatory framework governing private/commercial players, TELUS submits that many policy objectives currently found in the *Broadcasting Act* that cannot be fulfilled via market forces alone should be conferred upon our publicly funded institutions and services.

3.2.2. *The "Community" Element Is No Longer Necessary, Nor Sustainable*

126. Whereas the private and public elements have withstood the test of time, the reference to "community" as an element of the Canadian broadcasting system has lost its meaning and purpose over the years.

3.2.2.1. The Genesis of the Community Element

127. Canadian BDUs have been offering community television programming services since the early 1970s, well prior to prior to the inclusion of the "community" as an element of the Canadian broadcasting system in the current *Broadcasting Act.* In a 1975 document "Policies Respecting Broadcasting Receiving Undertakings (Cable Television)",[68] the Canadian Radio-Television Commission, predecessor of the current CRTC, stated that "the community channel must become a primary social commitment of the cable television licensee."[69] Accordingly, the provision of a community channel was an obligation on the cable licensee in return for the privilege of holding a cable licence.

128. In that original 1975 policy, the CRTC set out expectations for community cable channels to "... identify communities ... such as neighbourhoods, wards, boroughs and, where

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68 Canadian Radio-Television Commission, *Policies respecting broadcasting receiving undertakings (cable television)*, December 16, 1975.

69 Public Notice CRTC 1990-57, *Community Channel Policy Review*, June 5, 1990.

appropriate, municipalities, and give opportunities to individuals and groups in these communities to express their ideas and aspirations; cover the activities of municipal councils and school boards; search out and give opportunity for expression to individuals and groups with 'communities of interest'; reflect where appropriate the bilingual nature of the communities they serve."[70]

129. In 1986, the Report of the Task Force on Broadcasting argued that community broadcasting "must be seen as an essential third sector of broadcasting if we are to realize the objective of reasonable access to the system."[71] In 1991, in the revised *Broadcasting Act*, government made "community" one of the three elements of the system, rather than an adjunct to public and private services.[72]

3.2.2.2. The Community Element Was Intrinsically Tied to BDUs

130. In its 1991 revised Community Channel Policy, the Commission noted that "…the provision of adequate financial resources to support the community channel remains the cable licensee's principal contribution to the public in exchange for the privilege of holding a cable television licence."[73]

131. By 1997, the new entrants had started to emerge in the broadcasting distribution industry and the Commission sought to encourage such new entrance by alleviating the obligation for distributors to provide a community channel, recognizing that new entrants would have limited opportunity to provide sufficient programming, and in any case, multiple community channels in one serving area would not necessarily provide increased benefit.[74]

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70 Canadian Radio-television and Telecommunications Commission, *Policies Respecting Broadcasting Receiving Undertakings (Cable Television)*, December 16,1975, p. 4.

71 Report of the Task Force on Broadcasting Policy (Caplan-Sauvageau) (Ottawa: Minister of Supply and Services Canada, 1986), p. 491.

72 As noted in June 2003 report by Standing Committee on Canadian Heritage entitled "*Our Cultural Sovereignty, The Second Century of Canadian Broadcasting"* available online at: http://www.ourcommons.ca/DocumentViewer/en/37-2/HERI/report-2/page-165#ftn2.

73 Public Notice CRTC 1991-59, *Community Channel Policy*, June 5, 1991.

74 Public Notice CRTC 1997-25, *New regulatory framework for Broadcasting Distribution Undertakings*, March 11, 1997.

132. The new revised regulatory framework for broadcasting distribution undertakings opened the door to increased competition in the distribution market, putting an end to the monopoly conditions under which community television was born. It could no longer be said to be a "privilege" to hold a broadcasting distribution licence given that anyone could launch their own service.

133. In an evolving global digital marketplace, traditional BDUs are losing subscribers, making it increasingly difficult to sustain the support traditionally provided to the operation of a community channel.

3.2.2.3. The Morphing of the Community Element into Local Programming

134. Over the course of many years, the Commission reviewed its community programming policy many times.[75] In 2001, when the Commission undertook yet another review of its community channel policy,[76] the objectives of the policy increasingly leaned towards what was considered the more important requirement of ensuring more local programming and a greater diversity of voices. The Commission noted that the communications environment had evolved at a rapid pace, and led to a high degree of media consolidation and cross-media ownership. With fewer players in the conventional system, the Commission noted a reduction in programming reflecting local and community concerns.

135. Within this context, the Commission established the following as the objectives of its proposed new policies:

a. To ensure the creation and exhibition of more locally-produced, locally-reflective community programming.

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75 See: *Policies respecting broadcasting receiving undertakings (cable television)*, December 16, 1975, Public Notice CRTC 1991-59, *Community Channel Policy*, 5 June 1991, Pubic Notice CRTC 2002-61, *Policy framework for community-based media*, October 10, 2002, Broadcasting Regulatory Policy CRTC 2010-622, *Community television policy*, August 26, 2010, and Broadcasting Regulatory Policy CRTC 2016-224, *Policy framework for local and community television*, June 15, 2016.

76 Public Notice CRTC 2001-129, *Proposed policy framework for community-based media*, December 21, 2001.

b. To foster a greater diversity of voices and alternative choices by facilitating new entrants at the local level.[77]

136. In order to ensure that the programming of the community channel was truly local and reflective of the community it is serving, and given that the *Broadcasting Distribution Regulations* defined the term community programming, but not local community television programming, in 2002 the Commission adopted the following definition of local programming, for the purpose of community-based television programming undertakings:

> Local programming means station productions or programming produced by community-based independent producers that reflects the particular needs and interests of residents of the area that the community-based television programming undertaking is licensed to serve.[78]

137. With each review of the community channel policy, the Commission became more focused on defining the "local" nature of community channel programming, and continued to blur the lines between the local programming provided by conventional television services and locally-reflective programming provided by community programming services.

138. By the next review of the community channel policy in 2010, the lines had been blurred enough that the Commission considered allowing the newly created Local Programming Improvement Fund (LPIF) regime to be allocated in part to community programming.[79]

139. Though considered, the Commission ultimately rejected the idea because it did not consider that the funds in the LPIF[80] would be sufficient to provide funding to each of the public, private and community elements. While the Commission recognized the important role community programming played in delivering locally relevant content to communities

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77 Public Notice CRTC 2001-129, *Proposed policy framework for community-based media*, December 21, 2001, paras 41-44.

78 Public Notice CRTC 2002-61, *Policy framework for community-based media*, October 10, 2002, para 115.

79 Broadcasting Regulatory Policy CRTC 2010-622, *Community television policy*, August 26, 2010, paras 51-54.

80 The LPIF was funded through an additional contribution levy of 1.5% of the gross revenues of broadcasting distribution undertakings. See Broadcasting Regulatory Policy 2009-406, *Policy determinations resulting from the 27 April 2009 public hearing*, July 6, 2009.

across Canada, it found that the financial realities of the BDU-funded community channel were not the same as that being faced by the local conventional television market, and allocating LPIF funding to the community channel would dilute the amount of support available to local conventional television.

140. In 2015, the Commission expressed further concern over the increasing difficulties of conventional television stations in financing local news programming. To address this concern, the Commission undertook a review "of the overall state and funding of locally relevant and locally reflective television programming including community access programming." [81]

141. In the resulting 2016 Local and Community Television Policy, [82] rather than maintaining separate regulation requiring contribution to community channel programming, the Commission implemented a policy allowing a percentage of contribution traditionally earmarked for community programming to be allocated to conventional television services for the purposes of creating local news programming. Distributors are now permitted to offer a local community programming outlet, or direct all or a portion of those funds to the creation of local programming on conventional outlets throughout the country.

3.2.2.4. Digital Platforms Have Made Community Television Unnecessary

142. The reality today is that new technologies and high-speed broadband networks have dramatically lowered barriers to citizen access to the broadcasting system, both by providing Canadians with the tools to produce programming content and the means to widely distribute it to viewers across the globe, all at very low cost compared to more traditional broadcasting technologies. As a result, BDUs can no longer be considered gatekeepers who control access to the broadcasting system, or who exercise control over the production of community programming.

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81 Broadcasting Notice of Consultation CRTC 2015-421, A review of the policy framework for local and community television programming, Sept 14, 2015.

82 Broadcasting Regulatory Policy CRTC 2016-224, *Policy framework for local and community television*, June 15, 2016, at para 111.

143. On the contrary, digital platforms, including social media platforms such as YouTube or Facebook, now provide Canadians with ample means and opportunity to share their stories directly with one another. The CRTC has acknowledged the role and impact of these new platforms on the ability of Canadians to access the broadcasting system:

> …ubiquitous online video sharing sites form part of the broadcasting system and now allow Canadians to share their stories more easily than ever…the Commission is of the view that many Canadians can use these tools to obtain immediate and individual access to the broadcasting system.[83]

144. In this environment, a regulatory framework that is built around providing citizen access to a single specific platform – namely, linear television – is anachronistic, unnecessary, and inefficient. Indeed, the CRTC has concluded that the dual objectives traditionally fulfilled by the community element of the broadcasting system are currently being met through a number of new platforms:

> …many objectives traditionally fulfilled by the community element are now being met through other means, such as the use of online platforms and other technological and social trends to access the broadcasting system. The objective of reflecting communities, and particularly underrepresented communities, in the broadcasting system is being met on a number of platforms: Canadians have access to countless media sources providing community reflection and forums for community discussion, be it in the form of television and radio stations, community newspapers or online social media groups.[84]

145. TELUS submits it is time to acknowledge these new realities by recognizing that the "community" element is no longer sustainable or a necessary under the Act.

3.2.3. *A "Foreign" Element to the Broadcasting System Is Missing in the Act*

146. As noted above, foreign content services operating online are the proverbial elephant in the room which should no longer be ignored in Canada's broadcasting legislative context. TELUS believes that it is high time for Canada's broadcasting legislation to acknowledge

83 *Ibid.* at para 102.
84 *Ibid.* at para 116.

the existence of a foreign element in the Canadian broadcasting system. It is only through such legislative acknowledgement that steps can be taken to address the detrimental regulatory asymmetry that permeates the existing regulatory framework.

3.3. Different Policy Objectives Should Apply to Each Element of Canada's Broadcasting System

147. As noted above, private commercial Canadian companies now compete with global content providers operating within the broadcasting system. It is unsustainable to expect Canadian private companies to continue to contribute in the same manner to the Canadian broadcasting system as they did when they operated in a "walled-garden" protected from external competition.

148. In order to stop putting Canadian companies at a disadvantage, and thus risk destroying Canada's prospects of meeting any broadcasting policy objectives, expectations for private Canadian companies in regards to the objectives of the Act should be more realistically tied to the pursuit of commercial success.

149. Other more specific social and cultural goals should be ascribed to the public element of the Canadian broadcasting system.

150. Moreover, the foreign element should also be held accountable for making some contributions to the Canadian broadcasting system commensurate with their access to the Canadian market.

3.3.1. *Objectives That Should Apply to Private Programming Services*

151. As noted in section 3.1.2 above, whether public or private, Canadian or non-Canadian, programming services are the most important component of the broadcasting system because they control the programs that are made available to Canadians.

152. It is therefore appropriate that private programming services be given objectives which match the importance of their role.

3.3.1.1. Requirements in Relation to the Creation and Production of Canadian Content

153. The creation and production of Canadian content must remain a requirement for private Canadian programming services. The requirement to invest in Canadian content (Canadian programming expenditure requirements) should remain in place, as the *quid quo pro* for the control they exercise over the availability of programs in Canada.

154. However, a more open and flexible regulatory approach is needed to ensure that the pursuit of commercial success, domestically and globally, is a priority for private broadcasters. A new regulatory approach must empower private programming services to innovate and take risks, whether in the types of programs they create, the business models they pursue, or otherwise.

155. Accordingly, private broadcasters should not be burdened by obligations to meet extensive social and cultural objectives which may hinder the pursuit of commercial success. They should merely be required to produce home grown content using a percentage of their revenues. There should be no qualitative requirements as to the Canadian-ness of the programming created, nor any prescriptions as to the type of programming to be created.

156. In exchange for this relief, private programming services should no longer expect the support, financial or otherwise, of the rest of the broadcasting system. This would ensure that they are wholly committed to the success of the programming they create. Moreover, as discussed below, the insular contribution regime which exists within the Canadian broadcasting system is no longer sustainable in the global digital competitive environment. Further, the high degree of vertical integration in the domestic market, as discussed below, means that contribution merely results in BDUs having to fund the business models of their vertically integrated competitors.

157. In any event, the loss of subsidies may well spur great innovation to achieve commercial success. Excessive reliance on support mechanisms such as subsidies can often hinder innovation – "necessity is the mother of all invention", as the saying goes.

3.3.1.2. Requirement to Remain Canadian Owned and Controlled

158. The addition of a foreign element as a constituent element of the Canadian broadcasting system as proposed above stands in the way of the current overarching statement in section 3(1)(a) of the *Broadcasting Act* that "the Canadian broadcasting system shall be effectively owned and controlled by Canadians". Accordingly, the Canadian ownership and control requirements need to be applied more discretely within the Canadian broadcasting system. To the extent that such a requirement continues to remain relevant today, and TELUS is mindful of the very clear guidance from Government that it will not entertain any recommendations to alter foreign ownership restrictions for broadcasting undertakings,[85] they should apply only to licensed programming services and not content aggregators (the current BDUs).

159. It has long been recognized that what matters most to Canada's cultural identity and sovereignty is "programming decisions". For example, the Government's *Direction to the CRTC (Ineligibility of Non-Canadians)*[86] requires that a holder of a broadcasting licence be controlled by Canadians and that the parent company of a licensee, or the directors of that parent company, not exercise control over any of the licensee's programming decisions unless the parent company satisfies specific Canadian control requirements. [87] In the event these control requirements are not met, the CRTC requires that licensees establish an independent programming committee to act as a buffer against any foreign influence over programming decisions.[88] Thus, the fundamental concern behind Canada's ownership restrictions for broadcasting licences is that of control over the programming that is aired in Canada.

160. The 2006 TPRP report had rightly pointed out the challenges associated with asymmetrical foreign investment rules in the telecommunications and broadcasting sectors, and had recommended – as TELUS is recommending in this submission – that there be a separation

85 Broadcasting and Telecommunications Legislative Review – Terms of Reference, at p. 5.
86 Direction to the CRTC (Ineligibility of Non-Canadians), SOR/97-192.
87 *Ibid.*
88 See, for example, Broadcasting Decision CRTC 2018-26 - *Vintage TV Canada – Licensing of discretionary service*, January 23, 2018, at para 6.

of Canadian broadcasting "content" policy from policies for the "carriage" of telecommunications.[89] Such a separation would allow for the "creation of symmetrical foreign investment rules for traditional telecommunications carriers as well as the cable and satellite undertakings that now operate in the same telecommunications markets."[90]

3.3.2. ***Objectives That Should Apply to Private Content Aggregators***

161. Content aggregators as defined and described above do not exercise control over the availability of programming in Canada. They merely aggregate non-exclusive program rights and package this programming with a focus on the user experience. Programming decisions are not at the core of the business of a content aggregator and therefore they should not be treated on par with programming services.

3.3.2.1. An Incentive-based Framework Should Replace Burdensome Licensing

162. As discussed in the preceding sections, the Canadian broadcasting system is no longer a closed system. Broadband networks now provide a direct conduit to reach Canadians from across the globe. This has not only changed the *status quo* in the Canadian market, it has redefined the roles of traditional players. Thus, in an open system, it no longer makes sense (and indeed may no longer be possible) to impose uniform requirements on all elements of the system. Traditional distribution undertakings that fall under the term "content aggregators" are one of the elements where licensing no longer works, and ought to be changed.

163. The key to achieving the right balance for content aggregators lies in abandoning the prescriptive and highly burdensome licensing framework in favour of a permissive framework that offers the right incentives which encourage content aggregators, whether Canadian and foreign, to engage with the regulatory framework to support *Broadcasting Act* objectives, while also providing the flexibility for different companies to adopt

89 Telecommunications Policy Review Panel – Final Report 2006, at p. 11-25.
90 *Ibid.*

whichever business model will best enable them to serve the Canadian market in a competitive manner.

164. Under a new incentive-based regime, content aggregators would be able to register with the CRTC their commitment, for example by way of a service agreement as has already been contemplated by the Commission,[91] to meet a number of obligations, such as agreeing to distribute culturally important programming services such as the public broadcasters.

165. In exchange, those content aggregators would be permitted to access certain privileges that help offset the effect of those obligations on their ability to compete. The privileges of registered content aggregators would include, for example, the right to access the *Copyright Act*'s compulsory licensing regime for retransmission of over-the-air radio and television signals, and access rights to programming controlled by licensed Canadian programming services, on commercially reasonable terms.

166. The current regulatory system has shackled Canadian aggregators with regulatory requirements, and diminished their ability to meet consumer expectations at a time when unregulated foreign sources are offering them more viewing options than ever before.

167. TELUS firmly believes that letting market forces play a prominent role the development of a content aggregation industry will allow Canada to have the best of both worlds – a robust market that offers Canadians ample choice in terms of services or business models that meet their preferences, and support for the Canadian broadcasting objectives.

3.3.2.2. Licensing Fees Are Not Commensurate with Any Value in Holding a Licence

168. BDUs are currently licensed by the CRTC in an extremely asymmetrical fashion. Moreover, there are no special privileges associated with holding a licence as it is a completely open competitive entry framework. The days of the cable and satellite monopolies are over.

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91 CRTC, *Harnessing Change: The Future of Programming Distribution in Canada*, May 31, 2018.

169. Despite this, the broadcasting industry continues to be required to pay two sets of licensing fees. While there is some rationale to the requirement to pay Part I licence fees, as those fees recover the costs of the CRTC's administration of the *Broadcasting Act* and associated regulations, Part II licence fees are an unreasonable charge on the industry that do not fund any specific activity related the fees in question.

170. Part II fees were not introduced to recover the CRTC costs of administrating the broadcasting system. Instead, it is stated that

> The CRTC collects the Part II fees on behalf of the government, with all revenues collected being deposited to the Government of Canada's Consolidated Revenue Fund. Consistent with the policy objectives outlined in the government's External Charging Policy and as explained in the 1999 roundtable consultation with broadcasting fee payers, the rationale for assessing this fee is three-fold:
>
> - to earn a fair return for the Canadian public for access to, or exploitation of, a publicly owned or controlled resource (i.e. broadcasters' use of the broadcasting spectrum);
> - to recover Industry Canada costs associated with the management of the broadcasting spectrum; and
> - to represent the privilege of holding a broadcasting licence for commercial benefit.[92]

171. BDUs do not make use of spectrum and therefore only the last bullet of the above statement would apply to them. However, as noted in the introductory paragraph to this section, there is little privilege left for BDUs in holding a broadcasting licence.

172. The collection of Part II fees to the benefit of the general coffers of the government has a long history of dispute.

173. The *Broadcasting Act* allows the CRTC to make regulations with respect to broadcasting licence fees, but does not provide it with the authority to impose a tax. In 2003 and 2004,

92 See: http://publications.gc.ca/collections/collection_2015/crtc/BC9-22-2005-eng.pdf.

the Canadian Association of Broadcasters and Videotron (respectively) filed lawsuits in the Federal Court, arguing that Part II licence fees are taxes rather than fees that the CRTC is authorized to levy.

174. On December 14, 2006, the Federal Court found that the Part II licence fees were indeed a tax and outside the CRTC's jurisdiction. However, on April 28, 2008, the Federal Court of Appeal overturned the Federal Court, ruling that Part II fees were valid regulatory charges, finding that "the Federal Court judge erred by mischaracterizing the legal test to be applied in distinguishing a tax from a regulatory charge and concluded that the fees were, in pith and substance, a regulatory charge and not a tax".[93]

175. Leave to appeal the Federal Court of Appeal decision was granted by the Supreme Court on December 18, 2008, however, on October 7, 2009, a settlement was reached and in exchange for government forgiveness of Part II fees that were not paid while the issue was being appealed (approximately $450 million industry wide), the Canadian Association of Broadcasters agreed to drop its appeal at the Supreme Court. As part of that settlement, the government also recommended that the CRTC cap the annual Part II licence fees at $100 million per year, which it did starting in November 2010.

176. In 2018, Part II fees were $113,973,360.

177. These fees are not trivial. They add to the increasing burden which is no longer sustainable in global digital marketplace and they are putting Canadian aggregators at a disadvantage to foreign competitors, upon which none of these considerable obligations are imposed. Such general fees cannot be maintained by Canadian companies in an increasingly global broadcasting environment.

3.3.2.3. If a Contribution Regime Is Maintained, Content Aggregators Should Be Entitled to Determine How Best to Contribute

178. As noted above, TELUS proposes an incentive-based regime for content aggregators whereby content aggregators may choose to register and accept obligations in return for

93 See: https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=32703.

privileges. Such a regime does not contemplate a continued contribution requirement because it has become increasingly unsustainable in the global digital environment, and because the extent of concentration in the media market means that a contribution requirement amounts to funding the business model of vertically integrated competitors.

179. In a re-imagined framework, a contribution regime would no longer be necessary because private programming services would be given free rein to pursue commercial success, and the absence of subsidies is more likely to incentivize the achievement of that success.

180. However, if it is deemed necessary to maintain a contribution requirement for content aggregators in exchange for regulatory privileges, then it should be structured in a way that will fully maximize the potential for increasing diversity and innovation in the production of Canadian programming.

181. The current model for BDU (*i.e.* content aggregator) contributions to Canadian programming requires each licensed terrestrial BDU to contribute 5% of its gross revenues from broadcasting activities in each broadcast year to Canadian programming, less any allowable contribution to local expression (*i.e.* up to 1.5% of the previous year's gross revenues) it made in that broadcast year. At least 80% of the resulting contribution to Canadian programming must be allocated to the CMF, a single entity that is responsible for all decisions regarding the subsequent allocation of those funds to broadcasters.

182. Exacerbating this lack of diversity is that fact that the broadcasters to whom CMF funds are allocated operate in the most concentrated media sector in the developed world, due to the high degree of vertical integration that has been permitted to occur in the Canadian broadcasting industry over the past few decades (as discussed in detail throughout section 3.4). Thus, the majority of broadcasters receiving funding from the CMF, and making editorial decisions in the production of Canadian programming using those funds, are owned by a small number of vertically integrated companies. As a result, for content aggregators who are not vertically integrated, the current framework effectively (and inequitably) requires them to fund the media arms of their vertically integrated competitors.

183. Accordingly, TELUS recommends that if a contribution requirement is maintained, its spending shouldn't be so heavily prescribed. Content aggregators should be allowed to choose how to contribute to Canadian broadcasting objectives. It may be through maintaining an outlet for community expression, or it may be through creating content in keeping with its own vision and making it available to the public on a non-exclusive basis.

184. Providing such flexibility to content aggregators in choosing how to contribute to broadcasting policy objectives may well provide an important new source for a diversity of voices.

3.3.3. *Objectives That Should Apply to the "Public" Element of the Broadcasting System*

185. As detailed above, a re-imagined framework for the Canadian broadcasting system must provide greater flexibility to the private sector to pursue commercial success, domestically and globally, with its Canadian content creations and production. This means that the achievement of other important social and cultural goals will necessarily need to be met through the public broadcasting element.

186. This will require some reimagining of how the public sector is funded given that it would share the greater burden of non-commercially viable broadcasting policy objectives. The model in which the public broadcaster competes with private broadcasters for advertising revenues is broken in any event.[94] For example, over the last decade, the CBC has been unable to compete with large vertically integrated commercial broadcasters for sports rights associated with CFL and NHL. Though the CBC had been airing CFL games since 1952, it was not provided an opportunity to present a bid in 2006. "League commissioner Tom Wright said the CFL did not solicit a bid from the CBC because the league was satisfied with the rights fee that TSN was willing to pay." Although "Brace said the idea of putting

[94] See Globe and Mail article by William Houston entitled "Grey Cup moves to TSN in new deal", December 20, 2006 at: https://web.archive.org/web/20070930064843/http://www.theglobeandmail.com/servlet/story/RTGAM.20061220.wsptcfl20/TPStory/Sports/columnists.

the Grey Cup on CTV was discussed internally, but the main objective was to "build the profile" of TSN."

187. Similarly, after more than 60 years of holding rights to NHL hockey games and broadcasting *Hockey Night in Canada*, CBC lost control of those broadcast rights to Rogers Sportsnet starting in 2014. As the smallest player competing for these rights, "[T]he cash-strapped national broadcaster may have lost a Canadian institution it held for 62 years because it could not hope to match the money Rogers threw at the NHL".[95]

188. The role of the public broadcaster was initially set out by the Baird Commission in 1929:

> The potentialities of broadcasting as an instrument of education have been impressed upon us; education in the broad sense, not only as it is conducted in the schools and colleges, but in providing entertainment and of informing the public on questions of national interest. Many persons appearing before us have expressed the view that they would like to have an exchange of programs with the different parts of the country.
>
> At present the majority of programs heard are from sources outside of Canada. It has been emphasized to us that the continued reception of these has a tendency to mould the minds of the young people in the home to ideals and opinions that are not Canadian. In a country of the vast geographical dimensions of Canada, broadcasting will undoubtedly become a great force in fostering a national spirit and interpreting national citizenship.[96]

189. This initial view of the need for a Canadian public broadcaster has not changed. In the 1987 renewal of CBC's licences, with regard to the role of the public broadcaster, the Chairman of the Commission noted that:

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95 See Globe and Mail article by David Shoalts entitled "Hockey Night in Canada: How CBC lost it all", October 10, 2015 at: https://www.theglobeandmail.com/sports/hockey/hockey-night-in-canada-how-cbc-lost-it-all/article21072643/.

96 Aird, John (1929). "Report of the Royal Commission on Radio Broadcasting". Available at: http://publications.gc.ca/collections/collection_2014/bcp-pco/CP32-104-1929-eng.pdf.

> Our best bet for the protection, advancement and fostering of a distinctive Canadian broadcasting system is still [the CBC].[97]

190. Similarly, in that decision the CRTC noted:

> The CBC, above other broadcasters, is expected to be an instrument of public policy and to shoulder a special responsibility for safeguarding, enriching and strengthening the cultural, political, social and economic fabric of Canada.
>
> …
>
> The Commission in 1987 reiterates its view that the role of the CBC has become pivotal for the distinctiveness of the system, and even more essential than it was previously now that there is such an abundance of viewing choices.[98]

191. With regard to the increasing availability of foreign programming in Canada, in the CBC's 1994 licence renewal, it was similarly noted that:

> Considering the impact that satellite-delivered foreign signals are expected to have in Canada, the need may be greater than ever for an outlet to express truly Canadian stories, ideas and values amid these foreign voices. A strong Canadian national public broadcaster is indispensable in this context. What Canadians require and expect of their CBC, more than of any other Canadian broadcaster, is that it provide the means for them to talk to one another about things Canadian, both formally and informally, that it be a place where they can meet, a place where they can feel at home.[99]

192. What is clear is that public broadcasting is a public service, and should be distinct and serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada. As Canada's public broadcaster, the CBC remains capable and uniquely staged to fulfil the cultural and public interest objectives in the Canadian broadcasting system.

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97 Decision CRTC 87-140, Canadian Broadcasting Corporation/Société Radio-Canada Applications for the Renewal of the English and French Television Network Licences, February 23, 1987.

98 Decision CRTC 87-140, *Canadian Broadcasting Corporation/Société Radio-Canada Applications for the Renewal of the English and French Television Network Licences***,** February 23**,** 1987.

99 Decision CRTC 94-437, *Canadian Broadcasting Corporation - Renewal of the English-language and French-language television network licences*, July 27, 1994.

193. With a lessening of cultural regulatory obligation on commercial programming services, and a shift to a more natural competitive environment, the CBC's role as Canada's public environment can be reinvigorated, such that many of the cultural objectives currently strewn across so many parts of the industry can be focussed more justly to the CBC.

194. Canada's cultural objectives cannot not be left to be fulfilled by the commercial market. Indeed, as set out in the 2000 World Radio and Television Council paper authored by Pierre Juneau, the public service model, and the role of public broadcasting is based on mistrust of the ability of the market or the State to meet the public-service objectives of broadcasting and act in the public interest.[100]

195. With the objectives of the private system geared to ensuring ongoing and increased support for the creation, production and discoverability of Canadian content, and the goal of ensuring Canadian creations are competitive on the world stage, objectives relating to cultural goals, reflection of expression, and representation of all Canadians, should be maintained for the public broadcaster.

3.3.3.1. Local Programming, News and Reflecting communities

196. As explained at length above, there should no longer be a separate "community element" in the *Broadcasting Act* as community programming has naturally morphed with local programming support mechanisms.

197. Market forces may indeed result in the private element increasing its support for local programming. Take for instance the words of Elmer Hildebrand, Chairman of Golden West Broadcasting, on the continued success of Golden West radio stations

> …We do local and then we do more local. As long as you do that, then you're relevant. If you don't in today's age and the station is just about music, you're not needed. People can get music from

[100] Brochure presented by Pierre Juneau Chairman for World Radio and Television Council, entitled "*Public Broadcasting: Why? How?*" May 2000, available at: https://unesdoc.unesco.org/ark:/48223/pf0000124058.

> anywhere. The local information, however, you can't get anywhere.[101]
>
> …you will hear in the media many stories about radio stations having a hard time - losing both listeners and audience. In our case that's the reverse, we're growing both with listeners and with revenue, and basically it has to do with one hundred per-cent local service[102]

198. There is still a viable commercial business to be made with local programming and it would be premature to consider that private programming services will turn their back on this type of programming under a more flexible regime.

199. However, to the extent there remain concerns that commercial programming services will not continue to create sufficient local programming, or locally reflective programming, this responsibility should fall on the public broadcaster.

200. The CBC is uniquely qualified for this responsibility. As noted in a 2017 Innisherald article entitled "Examining the Importance of the CBC",

> …public broadcasting has the increased importance of delivering news to isolated communities. The CBC goes where no commercial markets exist and no private company will set up shop. Beginning in 1969, the CBC built transmitters across the Artic territories and flew tapes into the region by plane to provide four hours of television per day to remote communities. Throughout the 1970s, the CBC made a widespread effort to record Indigenous music artists. The network continues to provide local news in multiple Inuit languages, as well as English and French. [103]

201. Accordingly, to the extent that concerns remain regarding the continued availability of local and community reflection in an increasingly competitive market, the CBC as a national broadcaster should, and can be relied upon to provide programming considered essential to our Canadian democracy.

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101 See http://www.mbhf.ca/laureates/elmer-hildebrand/.
102 See https://www.okotoksonline.com/local/golden-west-broadcasting-turns-60.
103 See http://theinnisherald.com/examining-the-importance-of-the-cbc.

3.3.4. *Applying New Objectives to the "Foreign" Element of the Canadian Broadcasting System*

202. Canada has a long history of regulating the entry of foreign services. Being added to the *Revised List of Eligible Satellite Services* ["ESSL"] provides non-Canadian services with privileged access to the Canadian broadcast distribution market where the penetration of BDU services is much higher than in the US. As such, over the years, foreign services have had to meet eligibility specific requirements to be authorized for distribution in Canada.

203. Providers of the non-Canadian pay and/or specialty services must have obtained and must remain in possession of all necessary rights for the distribution of their programming in Canada, and must not hold, nor try to obtain, nor exercise, preferential or exclusive programming rights in relation to the distribution of programming in Canada.

204. Most importantly, services that are deemed to be either totally or partially competitive with Canadian specialty or pay television services whose licence applications have been approved by the Commission have been denied authorization for distribution in Canada.[104] Factors considered in its assessment of the competitiveness of a non-Canadian service include the nature of the service, the language of operation, the genres of programming provided, and the target audience. The Commission continues to provide that it "...won't authorize non-Canadian English- and French-language services if they compete with Canadian pay and specialty services" as "[t]his helps to ensure that Canadian services have priority."[105]

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104 For example, in October, 2008 the Commission denied Shaw's request to add the U.S. service "The Sportsman Channel" to the lists of eligible satellite services as it determined the service would be competitive with both Wild TV and the World Fishing Network. See Broadcasting Public Notice CRTC 2008-96, *Request to add The Sportsman Channel to the lists of eligible satellite services for distribution on a digital basis*, October 20, 2008. Similarly, in 2016, the Commission denied adding the U.S.-based cable television shopping service QVC to the list as it could not be approved for a Canadian programming service licence, though it clearly intended to do business with Canadians, and the sale of products, as an integral component of the service could not be separated from the programming. See Broadcasting Decision 2016-122, the Commission denied that application.

105 https://crtc.gc.ca/eng/INFO_SHT/b311.htm.

205. However, over the years, to facilitate Canadian subscribers' access to more ethnic and multicultural programming, the Commission has taken an increasingly relaxed approach to the authorization of non-Canadian third-language services, instead relying on regulation governing the packaging of these non-Canadian services with Canadian third-language services in order to ensure maximum exposure for Canadian services.

206. Most recently, when the Commission was reviewing the applicability of its proposed Wholesale Code,[106] TELUS proposed that it was essential that the Wholesale Code be made applicable and enforceable against non-Canadian programming services. TELUS further argued that:

> There is no reason to avoid subjecting non-Canadian services to the same standards and rules as Canadian programming services regarding commercial practices which will ensure that choice and flexibility is provided to Canadian consumers in the broadcasting market. Making compliance with the Wholesale Code an explicit condition of authorization for distribution of non-Canadian services in Canada is also consistent with the Commission's expectation that "non-Canadian parties that have a presence in Canada will conduct their negotiations and enter into agreements in a manner that is consistent with the intent and spirit of the Code if they wish to continue to have their programming services available in Canada".[107]

207. The Commission agreed, and authorization for the services and stations on the ESSL is now subject to the following provision:

> The Wholesale Code, set out in the appendix to *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015, applies as a set of guidelines for non-Canadian pay and/or specialty services. The Commission expects these services to conduct their negotiations and enter into agreements with their Canadian partners in a manner that is consistent with the intent and spirit of the Wholesale Code. In particular, non-Canadian services may not include terms in their affiliation agreements that

106 Broadcasting Notice of Consultation CRTC 2015-97, *Call for comments on a Wholesale Code*, March 19, 2015.

107 TELUS' Reply Comments dated May 14, 2015.

> prohibit the distribution of their services on a stand-alone, build-your-own-package or small package basis.[108]

208. These are the rules that have been applied and continue to apply in the out-dated walled-garden model that is our current broadcasting system. When it comes to acknowledging the much greater threat to the Canadian broadcasting system, namely, foreign content providers operating online and entering the Canadian market via the Internet, the CRTC and the Canadian government have turned a blind eye.

209. Similar to the means the Commission employed in imposing the Wholesale Code on foreign services in exchange for authorization to be distributed in Canada, is would not be an undue burden to impose some broadcasting policy objectives on foreign services choosing to enter the Canadian market and provide services to Canadians using alternative distribution models, including direct to consumer digital media services. As such, TELUS recommends that, in exchange for the authority to access the Canadian market when a certain subscriber and revenue threshold is met, non-Canadian services be held responsible for the achievement of some policy objectives, specifically supporting the creation and production of Canadian content.

210. Regulatory parity between domestic and foreign programming services is not only a matter of fairness, it is essential to successfully implementing Canada's broadcasting policies, in which control over programming is a fundamental concern that impacts Canadian culture, identity, and sovereignty.

211. Further, regulating foreign broadcasters does not conflict with the Government's desire to avoid reducing Canadian ownership of broadcasting. It simply accounts for the real and fundamental shift that the presence of foreign broadcasting services has created in the Canadian broadcasting sector. Without some form of oversight of these services, it will not be possible to successfully implement Canada's broadcasting policies.

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[108] See https://crtc.gc.ca/eng/publications/satlist.htm.

212. TELUS believes that foreign programming services should have obligations commensurate to their access to the Canadian market. It is envisioned that only the largest foreign programming services would require authorization to continue to operate in the Canadian market and that authorization would come with requirements relating to Canada's broadcasting policy objectives and potentially also with opportunities to access industrial policy tools supporting the cultural sector.

213. The Commission's existing practice of exempting discretionary television programming undertakings serving fewer than 200,000 subscribers[109] offers a useful precedent for setting the appropriate demarcation point for an authorization requirement for foreign services, and TELUS therefore recommends using that same subscriber threshold for this purpose.

214. Promoting investment by foreign services into the Canadian independent production sector by providing access to industrial policy benefits (*e.g.,* tax credits) will benefit Canadian content creation, by providing independent producers with greater opportunity to obtain funding. This is especially needed in a sector where high levels of concentration has greatly reduced the number of options available for funding. The Writer's Guild of Canada has recently described the difficulties faced by Canadian screenwriters in having their creative content produced as a result of these high levels of vertical integration, as follows:

> As the Commission is aware, a number of broadcasting mergers and acquisitions…have played out over the past two decades…The result is that three large private English-language corporate groups—Bell Media, Corus Entertainment, and Rogers Media—collectively control 83.1% of audience viewing in the English market, and their contribution to PNI counted for close to 80% of the total PNI expenditures reported for all of the English-language services during that period. This means that English-language Canadian screenwriters pitching many kinds of medium-to-big-budget projects only have four "doors to knock on"—i.e. the three large private broadcast groups and the CBC. The list gets even smaller when you consider that some groups tend to specialize in certain types of content…this is crucial when you consider that hit television shows are high-risk, and cannot be easily predicted.

109 Broadcasting Order CRTC 2015-88 – *Exemption order respecting discretionary television programming undertakings serving fewer than 200,000 subscribers*, March 12, 2015.

> Stranger Things was reportedly rejected by other networks 15 to 20 times before getting a green light from Netflix. Canadian screenwriters would actually appreciate the opportunity to get 15 to 20 rejections, because it would mean they had 15 to 20 doors to knock on—and a chance that the person behind the 21st door could say yes.[110]

3.3.5. *Recommendation for Legislative Change to the Broadcasting Policy Objectives*

215. TELUS recommends that the declaration at section 3 of the *Broadcasting Act* be deleted and replaced with the following declaration redefining the elements of the broadcasting system, and setting out policy objectives for each element of the system.

> **3 (1) It is hereby declared that the Canadian broadcasting system is comprised of a private element, a public element, and a foreign element.**
>
> **(2) It is hereby declared as the broadcasting policy for the private element of the Canadian broadcasting system that it shall:**
>
> (a) **facilitate the provision of a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, to consumers,**
>
> (b) **be responsive to the evolving demands of the public,**
>
> (c) **be readily adaptable to scientific and technological change,**
>
> (d) **provide access to programming at affordable rates, using the most effective technologies available at reasonable cost,**
>
> (e) **ensure that programming services:**
>
> **(i) are effectively owned and controlled by Canadians,**
>
> **(ii) contribute to the creation and presentation of Canadian programs, and facilitate the provision of such Canadian programs to the world, and**
>
> **(iii) have a responsibility for the programs they broadcast;**

110 Writers Guild of Canada, "Broadcasting Notice of Consultation CRTC 2017-359, *Call for comments on the Governor in Council's request for a report on future programming distribution models",* December 1, 2017 at para 24.

(3) It is hereby declared as the broadcasting policy for the regulation of the public element, consisting of the Corporation, that it shall:

(a) be effectively owned and controlled by Canadians;

(b) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(c) provide, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty,

(d) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(e) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(f) be readily adaptable to scientific and technological change;

(g) originate programming that:

- **(i) is predominantly and distinctively Canadian,**
- **(ii) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern,**
- **(iii) reflects Canada and its regions to national and regional audiences, while serving the special needs of those regions,**
- **(iv) actively contributes to the flow and exchange of cultural expression,**
- **(v) is in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,**
- **(vi) strives to be of equivalent quality in English and in French,**
- **(vii) contributes to shared national consciousness and identity,**
- **(viii) is made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and**
- **(ix) reflects the multicultural and multiracial nature of Canada,**

(h) extend a range of broadcasting services in English and in French to all Canadians as resources become available;

(i) provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;

(j) provide programming that reflects the aboriginal cultures of Canada as resources become available for the purpose;

(k) provide programming accessible by disabled persons as resources become available for the purpose;

(l) provide alternative television programming services in English and in French where necessary to ensure that the full range of programming contemplated by that paragraph is made available through the Canadian broadcasting system.

(3) It is hereby declared as the broadcasting policy for the foreign element that it shall contribute in an appropriate manner to the creation and presentation of Canadian programs.

3.4. Addressing Vertical Integration in the Domestic Market

216. Canada has the most concentrated media and entertainment industries in the developed world,[111] with four vertically integrated companies controlling nearly 80% of the Canadian television market.[112] Over the past decade, the Commission has permitted a high degree of vertical integration between programming undertakings and distribution undertakings to take place within the Canadian broadcasting industry. In fact, the Canadian Media Concentration Research Project notes in its November 2017 report that "by 2013, after Shaw and BCE acquired Global TV, CTV and Astral Media, respectively, Canada had the highest levels of vertical integration and cross-media ownership out of the 28 countries studied".[113] Indeed, in the most recent update of that report, it is noted that "[w]hile there have undoubtedly been changes in many of the countries shown…the direction of change for most countries…is down, not up".[114]

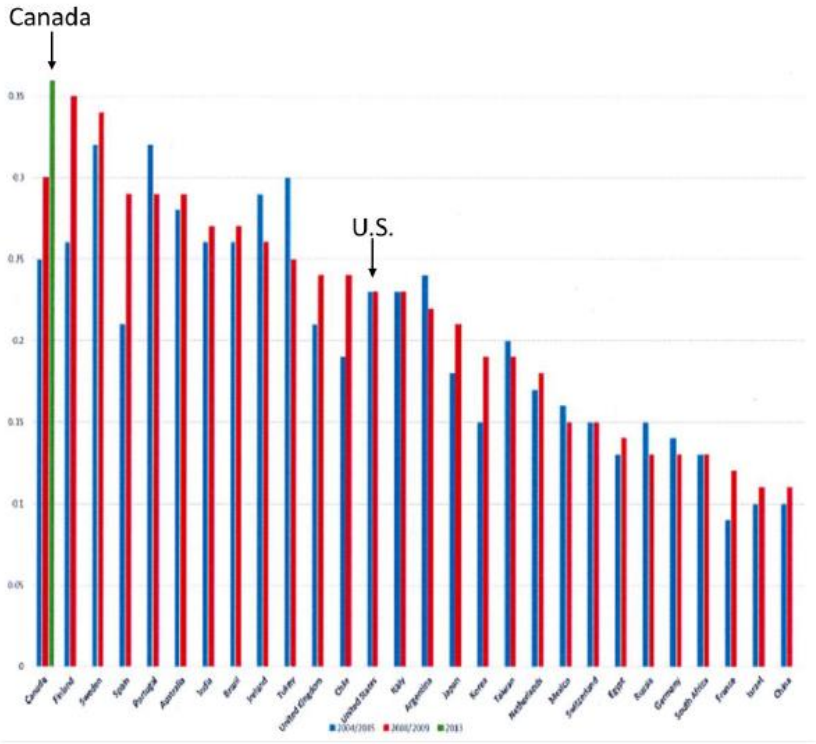
111 See Dwayne Winseck, *"Canadian Media Concentration Research Project: Media and Internet Concentration, 1984-2016*", November 28, 2017, which states, notably: "by 2013, after Shaw and BCE acquired Global TV, CTV, and Astral Media, respectively, Canada had the highest levels of vertical integration and cross-media ownership out of the 28 countries studied **[***Winseck***]**, accessible online at: http://www.cmcrp.org/media-and-internet-concentration-in-canada-results/.

112 CRTC Communications Monitoring Report 2017, at Tables 4.3.3 and 4.3.5.

113 In fact, it has been noted in the November 2017 report from the Canadian Media Concentration Research Project, *Media and Internet Concentration in Canada 1984-2016* (found here: http://www.cmcrp.org/media-and-internet-concentration-in-canada-results/), that "by 2013, after Shaw and BCE acquired Global TV, CTV and Astral Media, respectively, Canada had the highest levels of vertical integration and cross-media ownership out of the 28 countries studied" and that, in particular, "vertical integration in the United States is at less than one-quarter what it is in Canada (14% versus 55%, respectively)."

114 See Dwayne Winseck, "Canadian Media Concentration Research Project: Media and Internet Concentration in Canada, 1984-2017", December, 2018.

Vertical Integration and Cross-Media Ownership – Canada in a Global Context, 2004-2013



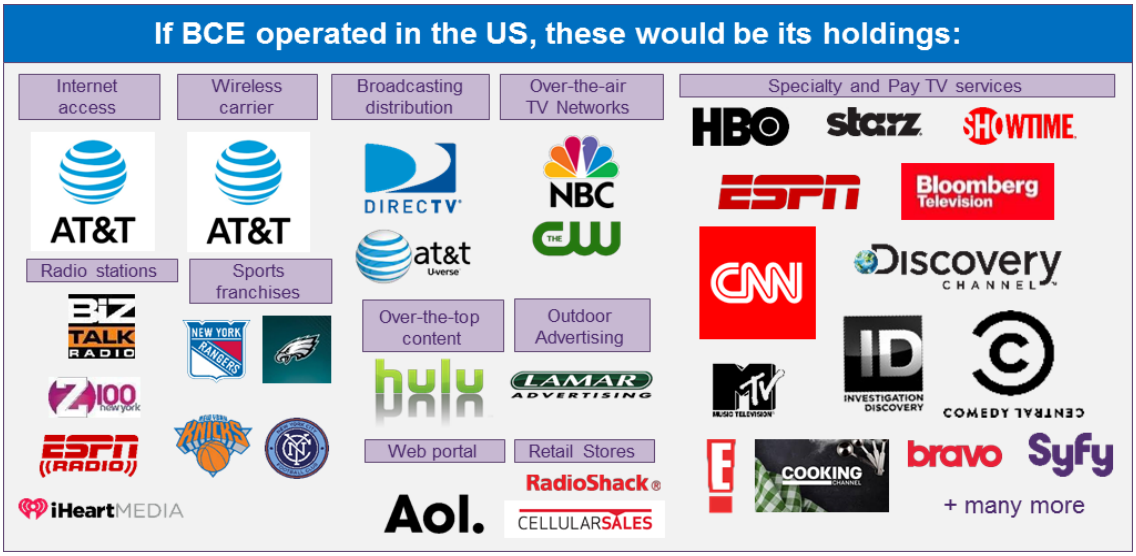
Source: Windseck, D, "Canadian Media Concentration Research Project: Media and Internet Concentration, 1984-2017, December 2018

217. The concentration of Canada's media market is not merely about control over what Canadian content is created and produced in Canada, rather it is about all the programming, both domestic and foreign produced, made available to Canadians. These companies already control the vast majority of popular (mostly foreign) programming distributed in Canada. A survey commissioned by TELUS in November 2017 and provided to the Panel as part of this submission found that 88% of the top 100 English-language television programs aired in Canada had been licensed by a vertically integrated media company.[115]

218. Shortly after the survey was conducted, Bell Media announced that it had signed an exclusive, multi-year agreement with Starz, the No. 2 ranked premium paid U.S. television platform, to bring its content to Canada. As a result of this agreement, Bell Media now

115 See *Rights Ownership of the Top 100 TV Programs in Canada (English Channels) According to AMA* by Mario Mota, Boon Dog Professional Services Inc., November 2017.

owns the Canadian rights to programming for the top three premium U.S. brands (HBO, Starz, and Showtime),[116] in addition to the top programming from U.S. network television services. This all further exacerbates the concerns over concentration in media rights ownership in Canada. The chart below illustrates the sheer market power of BCE in Canada by putting it in perspective relative to ownership of these properties in the United States.



219. The Canadian Media Concentration Research Project notes in its December 2018 report that "combined, Bell and Shaw (Corus) accounted for nearly half of the entire television universe (e.g. television distribution and services) by revenue and possessed a total of 130 television stations and services between themselves in 2017".[117]

220. The wave of consolidation that has occurred in Canada's communications sector over the past decades was blessed by the CRTC, based partly on the belief that it would allow Canada's broadcasters to better compete on the world stage, and lead to the creation of more – and better – Canadian content. However, the reality has not matched the rhetoric.

116 Bell Media Press Release: "Bell Media Brings Starz to Canada", January 23, 2018, accessible online at: http://www.bellmedia.ca/pr/press/bell-media-brings-starz-to-canada/.

117 See Dwayne Winseck, "Canadian Media Concentration Research Project: Media and Internet Concentration in Canada, 1984-2017", December 2018, Executive Summary, p v.

Vertically integrated broadcasters have yet to fulfill the promises of vertical integration, which has instead resulted in a loss of competitiveness in Canada's broadcasting market.

221. Indeed, vertically integrated entities hardly compete with foreign players when it comes to content production. Canadian broadcasters largely remain intermediaries and, as a result, do not compete directly with U.S. studios and distributors. Rather, they acquire content from them.[118] Furthermore, while convergence may have helped these dominant players to better compete against international platforms by allowing them to acquire premium content,[119] any such benefit has been achieved at the cost of thwarting the development of new competition within Canada.[120] Indeed, while Bell, Shaw/Corus, Rogers and Quebecor have been able to assert their dominance in the Canadian market, independent market actors have suffered as a result: in the best case scenario, they have witnessed their bargaining power erode, while in the worst case scenarios, they have been denied market access.

222. Despite its numerous failings, vertical integration is akin to the cowbell in the iconic 2000 *Saturday Night Live* comedy sketch: some always think there needs to be more of it. A December 2017 Scotiabank report recommending that Bell and Corus merge in order to fend off competition by Netflix is a case in point.[121] TELUS believes that any further consolidation of the broadcasting sector would not be in the interest of consumers and Canada's broadcasting ecosystem, and would lead to a further dampening of competition in the domestic market.

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118 Brad Danks, "ANALYSIS: Why more mergers may not be the answer for the Canadian broadcasting system (part one)", CARTT, January 31, 2018, accessible online at: https://cartt.ca/article/analysis-why-more-mergers-may-not-be-answer-canadian-broadcasting-system-part-one. **[***Danks***]**

119 Even such a claim would be questionable, considering the ease with which Netflix was able to enter, and establish a strong presence, in the Canadian market.

120 See *Danks*.

121 Greg O'Brien, "ANALYSIS: As falling TV viewing levels seek a floor (but not at zero), it's time to think differently, Act differently", December 14, 2017, accessible online at: https://cartt.ca/article/analysis-falling-tv-viewing-levels-seek-floor-not-zero-its-time-think-differently-act.

3.4.1. *Vertical Integration Creates Negative Incentives Which May Hamper the Achievement of Objectives of the Broadcasting Act*

223. There is a valid concern that vertically integrated media companies have market power over programming available to Canadians and how Canadians will receive that programming. The concern lies in the fact the most prominent Canadian media companies may not be operating pursuant to the natural incentives of a media company, which under normal circumstances would seek to pursue commercial success of its programming offerings. Instead, a vertically integrated entity may use its media assets as a tool for achieving greater success on the more lucrative network access operations of the entity.

224. The high degree of vertical integration in Canada's communications market has the potential to stifle innovation and harm Canadian content creators and consumers. Indeed, vertical integration in the broadcasting system creates an incentive for vertically integrated entities to foreclose competition from both (1) competing content providers by disadvantaging carriage on their own networks; and (2) competing content aggregators/BDUs by refusing to negotiate commercially reasonable carriage rights for the content they control. This is particularly egregious given that the regulatory framework prevents competitors from seeking out these foreign content rights on their own.

225. While the CRTC has been instrumental in allowing Canada's communications industry to reach astonishingly high levels of concentration, it has also recognized that such a state of affairs can lead to anticompetitive behaviour. In a 2013 decision that authorized the sale of Astral Media to BCE, the CRTC stated that vertical integration:

> […] could impede the efficient delivery of programming at affordable rates and reasonable terms of carriage and ultimately work against a competitive and dynamic marketplace in the Canadian broadcasting system. This could also have consequences on the availability and diversity of programming for Canadians.[122]

122 Broadcasting Decision CRTC 2013-310, *Astral broadcasting undertakings – Change of effective control*, June 27, 2013, at para 64.

226. The following year, in a decision renewing Rogers' broadcasting licence, the regulator recognized that Rogers' acquisition of NHL broadcast rights could create an incentive for the broadcaster to act in an anti-competitive manner:

> The acquisition of the NHL broadcast rights by Rogers is similar to the acquisition of premium programming services by BCE and Corus since the acquired broadcast rights are extensive in terms of length of time and broadcast opportunities, and relate to premium content that is very lucrative and attractive to subscribers. The very nature of the content acquired could create a potential for Rogers to use its market power in an anti-competitive manner in its negotiations with parties over the terms and conditions for the distribution of its services, in particular, Sportsnet and Sportsnet 360.[123]

227. The Commissioner of Competition has also voiced similar concerns. In a submission to the CRTC made in the context of the *Let's Talk TV* proceedings, the Commissioner stated:

> The potential for vertically integrated firms in the broadcasting industry to use their market power to engage in anticompetitive acts or to lessen or prevent competition substantially is a concern for the Bureau. In particular, the Bureau is concerned that vertically integrated firms may have the incentive to disadvantage rival downstream BDUs to the benefit of their own distribution offerings in a number of ways, including raising rivals' costs, limiting rivals' consumer offerings and stifling innovation.[124]

228. TELUS agrees with the concerns aired by both regulators, and is in particular agreement with the Commissioner's assertion that vertically integrated firms can use the market power they derive from the ownership of "must-have" discretionary services to disadvantage downstream rivals. This, in turn, can harm consumers in the form of higher subscription fees, less choice and less innovation.

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123 Broadcasting Decision CRTC 2014-399, *Rogers Media Inc. – Group-based licence renewal*, July 31, 2014, para 175.

124 Submission by the Commissioner of Competition before the Canadian Radio-television and Telecommunications – Broadcasting Notice of Consultation CRTC 2014-190 Let's Talk TV, June 27, 2014, accessible online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03753.html.

229. But TELUS' concerns go beyond the realm of the theoretical. Vertically integrated firms do not only have *incentives* to act in an anti-competitive manner; there are *real-life examples* showing that they have engaged in such behaviour. The following are but a few examples of vertically integrated firms engaging in practices aimed at (i) foreclosing competition; (ii) raising rivals' costs; or (iii) hampering innovation:

3.4.1.1. Foreclosing Competition

230. ***Shomi*** – Shomi was a joint venture between Rogers and Shaw that provided over-the-top television content service competing with platforms such as Netflix. When it launched in 2014, however, the service was only offered to Shaw and Rogers' internet and cable customers, which circumvented clear CRTC rules prohibiting exclusive content offerings. While the service was later opened up to everyone, it was shut down in November of 2016 due to poor customer take-up, perhaps due to the fact that it wasn't initially made broadly available at launch.

231. ***Rogers GamePlus***–Only Rogers' wireless or cable subscribers can access the GamePlus service, which provides access to unique camera angles during NHL hockey games, among other NHL-related content. The CRTC has found that the use by Rogers of its NHL broadcast rights to favour its own services does not violate rules prohibiting content exclusives, as these rules only apply to "television programming" and not to complementary programming.[125]

3.4.1.2. Raising Rivals' Costs

232. ***Bell Media vs TELUS arbitration case*** – Bell Media sought egregious rate increases for the distribution of its services by TELUS' Optik TV, insisting that TELUS pay a significant premium for offering consumer choice regarding programming services they receive. The

125 CRTC, Broadcasting Decision CRTC 2015-89, "*Complaint by Bell Canada against Rogers Media Inc., formerly Rogers Broadcasting Limited, alleging violations of the Digital Media Exemption Order*", March 16, 2015, accessible online at: https://crtc.gc.ca/eng/archive/2015/2015-89.htm.

CRTC sided with TELUS and many of the principles established in that arbitration were later codified in the CRTC's Wholesale Code.[126]

233. ***Rogers preventing the launch of its Sportsnet 4K programming*** – In defiance of a rule that prohibits a vertically integrated provider from giving itself a "head-start" when launching a new programming service, Rogers refused to give access to its 4K programming unless TELUS agreed to pay exorbitant rates. TELUS complained to the CRTC, which issued an expedited ruling ordering Rogers to provide the 4K programming to TELUS in the absence of a commercial agreement. [127] TELUS has described this issue in further detail below.

3.4.1.3. Hampering innovation

234. ***Corus dragged its feet on granting rights until Shaw could catch-up with its own "on the go" service*** – After months of negotiations with TELUS for the rights to an "on the go" service that would include what was then Movie Central as a flagship programming service, Corus abruptly declined to proceed, citing a need to reconsider its strategy for granting rights. A complaint filed with the CRTC failed to provide the sought-after relief. Shortly thereafter, Shaw launched a mobile service called Shaw Go which included Movie Central content.

3.4.1.4. Lessons from the AT&T/Time Warner merger

235. Canada is not the only country where a high degree of consolidation has resulted in sub-optimal competitive outcomes – both from a consumer and an industry standpoint. A look at recent developments occurring in the United States – namely the merger of telecom giant

126 CRTC, Broadcasting Decision CRTC 2012-393, "*Request for dispute resolution by Bell Media Inc. concerning affiliation agreements with the Canadian Independent Distributors Group and TELUS Communications Company in regard to Bell Media Inc.'s specialty services*", July 20, 2012, accessible online at: https://crtc.gc.ca/eng/archive/2012/2012-393.htm.

127 CRTC, "Broadcasting Commission Letter Addressed to Susan Wheeler and Ann Mainville-Neeson (Rogers Media Inc. and TELUS Communications Inc.)", April 5, 2017, accessible online at: https://crtc.gc.ca/eng/archive/2017/lb170405a.htm.

AT&T with Time Warner, a media and entertainment conglomerate – should give pause to advocates of unrestrained vertical integration.

236. In what was dubbed one of the most important antitrust battles of modern times, the U.S. Department of Justice ("DOJ") sued to prevent AT&T and Time Warner from merging in November 2017, claiming that the merger would result in higher monthly television bills for consumers and stifle innovation.[128] Specifically, the DOJ claimed that the combined company would force its rivals to pay hundreds of millions of dollars more per year for the right to distribute Time Warner's networks, and would also use its increased power to slow the industry's transition to new video distribution models that provide greater choice for consumers.[129] AT&T countered that the merger would create efficiencies that lead to lower consumer prices and greater innovation, and maintained that owning its own media company was necessary to take on platforms such as Netflix, Facebook, Google.[130] On June 12, 2018, a U.S. District Court judge rejected the DOJ's arguments in their entirety, and allowed the merger to proceed without any conditions.[131]

237. Yet, only a few months have passed since the merger was approved, and the fears voiced by the DOJ appear to have materialized. On November 1st, AT&T blacked out the HBO and Cinemax networks for both DISH and DISH-Sling, the main competitors of AT&T's television services, as the parties failed to agree on a new distribution agreement.[132] These actions vindicate critics of the merger, who claimed that it would provide AT&T with the means and incentive to raise prices on valuable content for cheaper, "unintegrated" telecom

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128 Cecilia Kang and Michael J. de la Merced, "Justice Department Sues to Block AT&T/Time Warner Merge", New York Times, November 20, 2017, accessible online at: https://www.nytimes.com/2017/11/20/business/dealbook/att-time-warner-merger.html.

129 Department of Justice, "Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner, November 20, 2017, accessible online at: https://www.justice.gov/opa/pr/justice-department-challenges-attdirectv-s-acquisition-time-warner.

130 Pretrial brief of AT&T Inc., DirecTV Group Holdings, LLC and Time Warner Inc., March 9, 2018, accessible online at: https://about.att.com/content/dam/snrdocs/time_warner_pre_trial_brief.pdf.

131 United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), accessible online at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv2511-146.

132 Reuters, "HBO goes dark on Dish Network in carriage dispute", accessible online at: https://www.reuters.com/article/us-dish-at-t/hbo-goes-dark-on-dish-network-in-carriage-dispute-idUSKCN1N6530.

competitors.[133] And, as antitrust expert Tim Wu has indicated, such behaviour on the part of AT&T might become the "new normal":

> 238. Unfortunately, there is every reason to think AT&T will keep using HBO and other media properties as weapons in the industry. The more it raises prices or withholds content, the more it either harms its rivals or gains new customers for itself. It's a win-win situation made possible by the merger's integration of content and content delivery.[134]

239. The lessons from the AT&T/Time Warner merger should be heeded by the Panel in its assessment of the impact of vertical integration on Canada's communications sector. That said, the Panel should keep in mind that the negative impacts linked to vertical integration are likely worse in Canada than in the United States, considering the higher degree of concentration north of the border. Indeed, even when factoring in the AT&T/Time Warner merger, vertical integration in the United State is just over half the Canadian levels.[135]

3.4.2. *Measures Are Needed to Address Vertical Integration in the Canadian Broadcasting System*

240. While TELUS generally favours deregulating the Canadian broadcasting market, it also believes that the CRTC should be able to address anti-competitive concerns stemming from vertical integration, and conferred express legislative powers to do so. Implementing measures to address the harmful effects of vertical integration is not antithetical to the deregulation advocated in other sections of this submission. On the contrary, both stances are consistent with the need to ensure competitiveness. Targeted deregulation is needed to ensure competitiveness in the global market against foreign and other unregulated competitors, while measures to address vertical integration are about ensuring competitiveness and innovation within the domestic market.

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133 Tim Wu, "How AT&T Fooled the Federal Judiciary", New York Times, November 7, 2018, accessible online at: https://www.nytimes.com/2018/11/07/opinion/att-hbo-antitrust.html.

134 *Ibid.*

135 See *Winseck.*

241. As described in ample detail above, the anti-competitive consequences of a highly consolidated broadcasting sector are not issues to which regulators and government can afford to turn a blind eye. Given free rein, vertically integrated entities will continue to exploit their significant advantages of scale and integration to their benefit, and to the detriment of innovation and the interests of consumers. Measures are therefore needed to address this threat to the long-term health of the domestic market.

242. New regulatory powers proposed should not be seen as merely addressing anti-competitive behaviour, but addressing all the potential negative impacts that vertical integration can have on Canada's broadcasting system, and allow the CRTC to set expectations on how vertically-integrated firms are expected to mitigate these impacts while conducting their business activities. Notably, access to programming – which is one of the themes the Panel is focusing on as part of the Review – should be a key rationale for adding this new regulatory power.

243. The CRTC has expressed concerns that vertically integrated players would limit access to their programming. In its decision approving Bell's acquisition of Astral Media, the Commission was expressly concerned with Bell acting "as a 'gatekeeper', effectively preventing other distributors from offering services to their customers until Bell's BDU has decided to offer such services on its own platforms."[136]

244. In fact, regarding the safeguards the Commission established to deal with the anticompetitive opportunities and incentives that come part and parcel with vertical integration, the Commission noted when it approved Bell's acquisition of Astral Media that: "…**but for these safeguards** it would not have been persuaded that the present transaction is in the public interest and **would not have approved it**.[137] [Emphasis added.]

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136 Broadcasting Decision CRTC 2013-310, *Astral broadcasting undertakings – Change of effective control*, 27 June 2013, at para 75 ["the Astral Decision"].

137 *The Astral Decision*, opening paragraphs.

245. The Commission echoed this notion in the Wholesale Code, where it noted that "…access to programming for distribution on a multiplatform basis on reasonable terms is an increasingly essential strategy for gaining and keeping customers."[138]

246. The addition of this regulatory power would be particularly useful, considering that the CRTC's expectations in allowing consolidation in the broadcasting sector have not entirely been met, as argued earlier in this submission. Indeed, as Brad Danks, the CEO of OutTV, pointed out, "[t]he real problem for Canada is that the vertically integrated companies may be both unwilling and unable to play the role that the policy makers assumed they would."[139] A new regulatory power would allow the CRTC to clarify what this role ought to be, and ensure that some of the benefits vertically-integrated firms have been able to reap through vertical-integration should accrue to Canada's broadcasting ecosystem.

3.4.2.1. Conferring Specific Powers to the CRTC to Regulate the Wholesale Relationship between Programming Services and Content Aggregators

247. The CRTC has, over the years, imposed various safeguards on vertically integrated firms. It has done so within their broadcasting licences,[140] as part of regulations,[141] in the form of the 2011 Vertical Integration Framework,[142] and the 2015 Wholesale Code [collectively, the "VI Framework"].[143]

248. The Wholesale Code is by far the most important component of the CRTC's VI Framework, as it set out a number of new rules that broadcasters and content aggregators/BDUs had to follow. Notably, under the Code, affiliation agreements could not prohibit the distribution of programming services on a stand-alone basis, or prohibit the offering of programming services on a build-your-own-package or small package basis,

138 Broadcasting Regulatory Policy CRTC 2015-438, *The Wholesale Code*, September 24, 2015, at para 115, ["The Wholesale Code"].
139 *Danks*.
140 Such as those included in *The Astral Decision*.
141 Such as those included in Sections 12 through 15 of the *Broadcasting Distribution Regulation.*
142 Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration*, September 21, 2011.
143 *The Wholesale Code*, starting at para 97.

or talk about minimum penetration, revenue or subscription levels.[144] The Code also listed a number of practices that the CRTC considered to be commercially unreasonable, and provided for a dispute resolution mechanism if a BDU had not renewed an affiliation agreement with a programming service by 120 days preceding its expiry.[145] The CRTC recognized that the Code was a necessary tool to address problems created by industry consolidation and vertical integration, and to ensure that negotiations between programming services and BDUs are conducted in a fair manner.[146]

249. Unfortunately, many of the safeguards found in the VI Framework have been under attack – most notably the Wholesale Code, which the Federal Court of Appeal recently deemed could not be implemented via an order pursuant to section 9(1)(h) of the *Broadcasting Act*.[147] Vertically-integrated firms are also challenging as a group the notion that negotiations for the distribution of content on video-on-demand services can be subject to dispute resolution.[148] Finally, some are also challenging the requirement to offer programming services once they are no longer subject to mandatory carriage requirements.[149]

250. TELUS believes it is more important than ever for the CRTC to enforce the safeguards that seek to protect the accessible, affordable and competitive distribution of diverse programming in Canada. At a time when innovation and creativity is most needed in order to compete on the world stage, competition should not be foreclosed. Strong-arm tactics that fly in the face of clear rules established as part of the VI Framework must continue to

144 *The Wholesale Code*, s.4.
145 *The Wholesale Code*, s. 5 and 13.
146 See *The Wholesale Code*.
147 *Bell Canada* v. *7265921 Canada Ltd.*, 2018 FCA 74. The Code, however, is incorporated into Bell Media's conditions of licence, and therefore remains in place until Bell's broadcasting licence comes up for renewal, in 2022.
148 Rogers Media, Corus Entertainment and Bell Media filed joint comments in response to Broadcasting Notice of Consultation CRTC 2017-280, *Call for Comments on measures to provide for dispute resolution between video-on-demand operators and discretionary services*, which included a legal opinion challenging the CRTC's jurisdiction over the licensing of video-on-demand programming rights.
149 Rogers Media, in particular, has argued that where a service no longer benefits from mandatory carriage, the broadcaster should no longer be obligated to make the service available to a distributor. See para 34 of Rogers' January 6, 2017 final reply in Broadcasting Notice of Consultation CRTC 2016-225, *Renewal of television licences held by large English- and French-language ownership groups*.

be dealt with swiftly and decisively by the Commission. Consumers should not be deprived of content because of the unwillingness of vertically-integrated firms to compete fairly.

251. TELUS believes it is crucial for the *Broadcasting Act* to be amended to remove any ambiguity regarding the CRTC's power to regulate commercial arrangements between programming undertakings and content aggregators/BDUs. Bell's successful challenge of the Wholesale Code before the Federal Court of Appeal makes such a legislative amendment even more relevant: it would ensure that the CRTC's vertical integration framework – including the Wholesale Code – could be enforced without fear of a successful legal challenge.

252. Given the high degree of vertical integration and concentration that exists in today's broadcasting industry, it is reasonable and necessary for the Commission to have the clear authority to establish enforceable safeguards to ensure that wholesale negotiations and agreements do not stand in the way of the Commission's ability to meet the objectives of the *Broadcasting Act*.

253. As such, TELUS recommends that sections 9 and 10 of the *Broadcasting Act* be amended to include the authorization for the CRTC to both issue conditions of licence and make regulations generally which govern the wholesale relationship between programming services and content aggregators.

3.4.2.2. Ensuring Timeliness of Relief Against Anti-competitive Conduct

254. Providing additional powers to the CRTC to sanction anti-competitive behaviour is not sufficient; processes are needed to ensure that anti-competitive practices can be dealt with in a time-sensitive manner by the regulator. Under the *Broadcasting Act*, the CRTC is required to conduct a public hearing as a pre-condition to issuing a mandatory order under section 12(2) of the Act, which reads as follows:

> The Commission may, by order, require any person to do, without delay or within or at any time and in any manner specified by the Commission, any act or thing that the person is or may be required to do under this Part or any regulation, licence, decision or order

> made or issued by the Commission under this Part and may, by order, forbid the doing or continuing of any act or thing that is contrary to this Part, to any such regulation, licence, decision or order or to section 34.1.

255. The requirement, which is codified in section 18(d) of the *Broadcasting Act*, often results in the regulator being incapable to respond in a timely and meaningful way to anti-competitive abuses. In order to remedy this state of affairs, TELUS recommends that section 18(d) of the *Broadcasting Act* be repealed.

256. TELUS believes that the repeal of section 18(d) would substantially enhance the CRTC's ability to effectively respond to violations of Act, regulations, licence conditions or orders of the CRTC. Furthermore, removing the public hearing requirement would not impose an unfair or unrecoverable risk on an affected party, as section 12(3) of the Act provides a mechanism for a person affected by a mandatory order to apply for reconsideration and empowers the Commission to rescind or vary any order made under section 12(2).

257. An example of why it must be that the Commission can respond in a timely fashion arose in early 2017, just prior to the start of the Major League Baseball (MLB) season. Rogers Media, owner of the service Sportsnet, was denying TELUS access to 4K content, claiming that section 10.3 of the *Specialty Services Regulation* did not cover this programming, as the new high definition content was not a "new service". This argument had no legal footing given that the term "new programming service" is a defined term in the Regulations and that this definition "includes, but is not limited to, a high definition version […] of an existing programming service". It was a delay tactic on the part of Rogers in its attempt to strong arm higher wholesale fees.

258. On March 27th, 2017, just two weeks before the Blue Jays' home opener in 4K on April 11th, TELUS applied to the Commission for a quick resolution of this denial of service, noting that if the Commission did not act quickly, TELUS subscribers who had invested in 4K television sets would miss out on viewing this upcoming programming.

259. Rogers attempted to further stall the provision of the service, arguing that, not only was the 4K programming not a new programming service to which s. 10.3 would apply, but that TELUS' request involved policy issues and matters for regulatory compliance that should be subject to the procedures under Part 1 of the *CRTC Rules of Practice and Procedure.*

260. This was not the case, as the regulations did indeed apply to this new 4K programming service, and in a letter dated April 5, 2017, the Commission directed Rogers Media to provide its 4K content to TELUS immediately, despite the absence of a commercial agreement. This was a blatant attempt at delaying access to Rogers' 4K programming which was clearly non-compliant with the Regulations.

261. However, not all instances are so clearly defined that the Commission can make an expedited decision as in the example above, and given the lack of any punitive measures available to the Commission to address such cavalier disregard for the CRTC, only the power to make expedited orders will send a clear message to those engaged in anti-competitive behaviour that such conduct will not be tolerated.

262. To provide clear power for the CRTC to issue mandatory orders, and to ensure that this can be done on a timely basis, TELUS recommends changes be made to the CRTC's powers to issues mandatory orders. Specifically, TELUS recommends that the requirement to hold a public hearing as a pre-condition to issuing mandatory orders under s. 12(2) of the *Broadcasting Act* be repealed, in order to allow for the timely treatment of complaints dealing with anticompetitive behaviour.

3.4.2.3. Additional Powers to Address Other Concerns Arising From Vertical Integration

263. TELUS also believes that high degree of vertical integration can negatively affect other aspects of the broadcasting ecosystem. In particular, TELUS has previous raised concern relating to the use of news and information programming by vertically integrated entities.

264. The Commission has long been concerned over the impact that increased consolidation in the media industry would have on news reporting. As far back as 1997,[150] the Commission sought assurances from licensees in response to concerns raised by cross-media ownership when assessing applications for changes in control of licences.

265. In 2001, in its renewal of the licences for the television stations controlled by CTV, the Commission indicated that it "considers that it has a responsibility to ensure that a sufficient diversity of broadcasting news and information voices remains as convergence continues to take place between broadcasters and related industries."[151]

266. In the course of that hearing, the Commission adopted extensive conditions of licence for CTV which incorporated a Statement of Principles and Practices relating to journalistic integrity and which instituted a Monitoring Committee which would be an "impartial, neutral body charged with receiving all complaints concerning the compliance of CTV with the Statement of Principles and Practices".[152] The requirements further stated that the "Committee members shall be individuals of unquestioned impartiality and credibility who have no existing relationship with Bell Globemedia or its affiliates and subsidiaries."[153]

267. A similar Monitoring Committee requirement was imposed on Global in its licence renewal decision in 2001.[154] In that decision, the Commission expressed its concerns as follows:

> The Commission is concerned that cross ownership of television stations and newspapers, such as is the case with Global, could potentially lead to the complete integration of the owner's television and newspaper news operations. This integration could eventually result in a reduction of the diversity of the information presented to the public and of the diversity of distinct editorial voices available in the markets served. For example, under a fully integrated

150 Broadcasting Decision CRTC 97-482, Transfer of effective control of TQS inc., a company to be incorporated and to be controlled by Communications Quebecor inc. – Application approved, August 22, 1997.

151 Broadcasting Decision CRTC 2001-457, *Licence renewals for television stations controlled by CTV*, August 2, 2001, at para 103.

152 *Ibid*., Appendix A – Monitoring Committee Structure.

153 *Ibid*.

154 Broadcasting Decision CRTC 2001-458, *Licence renewals for the television stations controlled by Global*, August 2, 2001, at para 30.

> structure, **the same editor could decide what matters would be investigated and what stories would be covered by a commonly owned television station and newspaper**. Under such an integrated structure, the television station and the newspaper may no longer compete and might present a **single editorial position and approach to the selection of stories considered relevant to the viewers and readers.**[155] [Emphasis added.]

268. Concurrent with the 2007 Diversity of Voices proceeding, the CRTC released a public notice to consider a Code of Journalistic Independence, proposed by the Canadian Broadcast Standards Council (CBSC).[156] As a result, the Commission subsequently approved the Journalistic Independence Code to be adopted by the industry and to be administered by the CBSC.[157]

269. Despite all this activity around measures to ensure the independence of journalistic reporting, concern over journalistic independence has continued to be raised and has increased in recent times. The opportunity and incentive to make competitors "invisible" in the media while bolstering their own corporate profiles is of sufficient concern that the CRTC should be granted powers to make regulations or conditions of licence to address any such conduct.

270. Similar incentives to "use" affiliated programming services for the greater good of the VI entity are at play in respect of advertising availabilities. A VI entity has similar incentives to forego advertising revenues generated by its programming services in favour of using the advertising spots for its own advertising of affiliated carriage services, such as for wireless and Internet-access services. It is relevant to note that wireless services are among the biggest users of TV advertising in Canada. Accordingly, there is significant benefit to a VI entity getting preferential access to advertising availabilities.

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155 *Ibid*, at para 107.

156 Broadcasting Notice of Public Hearing CRTC 2007-5, Diversity of Voices Proceeding and Broadcasting Public Notice CRTC 2007-41, *Call for comments on the Canadian Broadcast Standards Council's proposed Journalistic Independence Code*, both dated April 13, 2007.

157 Broadcasting Public Notice CRTC 2008-8, *Regulatory Policy – Journalistic Independence Code*, January 15, 2008.

271. The Commission expressed concern over VI entities' ability to exert control over the advertising market. In the Astral Decision, the Commission stated that:

> …with the acquisition of Astral's services, BCE will control a significantly large advertising inventory, both on television and radio, and will be in a position to limit access to valuable advertising space by its competitors. This situation could have a detrimental effect on competitors not controlling similar advertising availabilities themselves. [158]

272. However, in that decision, the Commission did not deem it necessary to implement any new rules with respect to television advertising stating that "[i]n regard to television undertakings, the Commission considers that the provisions relating to undue preference found in a number of the regulations address these concerns."[159]

273. TELUS discussed this issue in detail in more recent proceedings before the Commission,[160] noting that this type of undue preference has a significant negative impact on sustainable competition. Not only does it limit access to valuable advertising space for competitors, it also allows VI entities to water down the effectiveness of the advertising its competitors purchase, by "drowning it out" with a far greater volume of their own advertising. Indeed, VI entities are using significantly greater volume of advertising space on their programming services at either discounted rates, or at no cost at all.

274. As part of the Group-Based Licensing Hearing, TELUS tabled a report from Cossette Media[161] which demonstrated how Bell is not reporting spending on advertising on its own television stations. Clearly, Bell is in fact advertising their mobility services on their own programming properties. Anyone who watches CTV, TSN or any other Bell Media television property for any length of time is likely to see multiple advertisements for Bell

158 *The Astral Decision*, para 77.
159 *The Astral Decision*, para 78.
160 Comments of TELUS Communications Company, August 15, 2016, at paras. 84-131, filed in Broadcasting Notice of Consultation CRTC 2016-225 – *Renewal of television licences held by large English- and French-language ownership groups*, June 15, 2016.
161 Cossette Media, *Television Analysis: Competitive Spend View*, August 15, 2016, at p. 3.

TV or Bell wireless services. Yet, Cossette has uncovered no record of any payment having been logged against this advertising by Bell on its own properties.

275. Bell Canada justified this latter practice to the Commission by stating that "additional advertising inventory may be provided to Bell Canada or other clients based on their advertising spending as a "bonus".[162]

276. Further, given the significant benefit to using "remnant" advertising, the incentive and opportunity exists for a vertically integrated programming service to artificially inflate its advertising rate cards in order to create more "remnant" advertising. This creates a win-win for the VI entity – it extracts higher than commercial rates from its competitors for its advertising (thereby diminishing the competitors' purchasing power and decreasing the number of ads they are able to buy) and it benefits from having access to more advertising for itself at lower cost (thereby diminishing the value of the ads purchased by competitors at a premium).

3.5. Calls to Shift the Burden of Funding Canadian Content to Telecommunications Providers Should Be Rejected

277. In its recent report entitled "Harnessing Change: The Future of Programming Distribution in Canada"[163], the CRTC presented options to address the future of Canada's broadcasting system, and notably recommended that consideration be given to extending the Canadian content contribution regime to other distribution networks such as ISPs and mobile operators.

278. TELUS also notes that there have been proposals for an additional ISP tax in the context of recent House of Commons Committee hearings reviewing the *Copyright Act.*[164]

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162 Reply Comments of Bell Media, August 25, 2016, at para 98, filed in Broadcasting Notice of Consultation CRTC 2016-225 – *Renewal of television licences held by large English- and French-language ownership groups*, June 15, 2016.

163 CRTC, "Harnessing Change: The Future of Programming Distribution in Canada", accessible online at: https://crtc.gc.ca/eng/publications/s15/.

164 See, for example, Canada, Parliament, House of Commons, Standing Committee on Canadian Heritage, *Minutes of Proceedings and Evidence*, 42nd Parl, 1st Session, No. 119 (September 20, 2018).

279. TELUS urges the Panel to reject this unsustainable policy recommendation, which would harm Canada's digital economy and digital citizenship.

280. Imposing a tax on ISPs to fund Canadian content production would be counterproductive and inappropriately blur the distinction between common carriers and content aggregators. Not only would such a policy conflict with the principle of affordable access; it would also create market distortions that would hinder future investments in broadband networks.

3.5.1. *An ISP Tax Would Hinder Network Investments*

281. A tax on ISPs would undermine Canada's innovation strategy by dampening ISPs' incentives to invest in much-needed infrastructure. As noted elsewhere in this submission, broadband networks on which programming is increasingly distributed also serve as the means of delivery of a myriad of telecommunication services. And investments in infrastructure continue to be needed across the country as the demand for greater capacity and speed of networks increase. Market distortions, whether the result of added regulatory burdens or government policies designed to pick winners,[165] do not favour continued investments in the broadband networks that will serve as a platform for future innovation in programming distribution and other areas.

282. The importance of investing in broadband networks was recently recognized by the Government of Canada when it rejected a proposal by the Standing Committee on Canadian Heritage to expand the current five percent levy on broadcasting distribution undertakings so that it applies to broadband distribution revenues.[166] The Government rejected the proposal on the basis that it would conflict with the principle of affordable access. Specifically, in a letter addressed to the Chair of the Standing Committee and

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165 A recent, and particularly harmful, example is the Government proposal to exclude incumbent providers from bidding on a large portion (~43%) of the 600 MHz spectrum that has recently been released for auction by Innovation, Science and Economic Development Canada. This type of market distorting action not only decreases the available supply of spectrum available for the incumbent to acquire, but also artificially raises the demand for the unrestricted spectrum on which it is allowed to bid (effectively imposing a "double tax" on the incumbent's investment). The end result is less competition and higher investment costs for the companies that primarily contribute to the development and deployment of broadband networks.

166 Government Response to the Sixth Report of the Standing Committee on Canadian Heritage, October 16, 2017, at p. 4.

signed by the Ministers of Canadian Heritage, Finance, and Innovation, Science and Economic Development, the Government's position was stated as follows:

> The Committee's recommendation to generate revenue by expanding broadcast distribution levies so that they apply to broadband distribution would conflict with the principle of affordable access. […] The open Internet has been a powerful enabler of innovation, driving economic growth, entrepreneurship, and social change in Canada and around the world. The future prosperity of Canadians depends on access to an open Internet where Canadians have the power to freely innovate, communicate, and access the content of their choice in accordance with Canadian laws. Therefore, the Government does not intend to expand the current levy on broadcast distribution undertakings.[167]

283. TELUS is in full agreement with the Government on this issue. In the context of the Competition Bureau's market study on competition in broadband services, TELUS recently filed evidence with the Bureau [(see Appendix 3 to this submission) demonstrating that the deployment of broadband services in Canada requires comparatively greater capital and operating costs than in most OECD countries.[168] Canadian broadband networks must be deployed in areas of much lower population density, which make the required investments less economical.[169]

284. For rural and remote areas in particular, some intervention is necessary to incent investment and construction of networks. Accordingly, the Government of Canada has implemented various programs to improve the economic viability of broadband deployment in these communities. These include:

- the *Broadband Canada* program (2009), which was launched with the objective of extending broadband Internet to more than 200,000 households in underserved areas;[170]

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167 *Ibid.*

168 Expert Report of Dr. Robert W. Crandall filed as part of TELUS' submission to the Competition Bureau in the context of its market study on competition in broadband services, available at Appendix 9.

169 *Ibid.*

170 *See*: https://www.ic.gc.ca/eic/site/ichepi.nsf/eng/02120.html.

- the *Connecting Canadians* program (2014), which provided further funding for high-speed Internet with target speeds of at least 5Mbps for 98% of Canadian households;[171] and
- the *Connect to Innovate* program (2016), which will invest $500 million by 2021 to bring high-speed Internet to 300 rural and remote communities in Canada.[172]

285. In addition to these programs, the CRTC recently created a $750 million fund for investment in high-cost rural and remote areas. [173] This investment vehicle will be entirely industry-funded, meaning that its costs will ultimately be borne by consumers in the form of higher broadband access prices. Adding yet another levy on these consumers' broadband bills would discourage investment and drive cost-sensitive consumers away from broadband connectivity.

286. TELUS has invested close to $150 billion dollars in capital and operations since 2000[174] in extending its wireline and wireless communications networks to provide enhanced broadband services to Canadians, including expanding its broadband facilities to rural and remote areas. TELUS expects to spend many more billions in the future to continue developing and operating its networks. That said, one of the keys to ensuring that networks are able to keep pace with ever-increasing future capacity requirements, particularly in rural and remote areas, lies in ensuring that future policies and regulations take into account the high cost of investment in these networks, are fair to existing stakeholders that have already made significant investments in their networks, and favour the most efficient allocation of capital required to further develop and operate these networks. A tax on ISPs to finance the production of domestic content would do none of these things.

287. The Minister of Innovation, Science and Economic Development considers that Canada's innovation strategy is a pillar of Canada's economic strategy, and has stated that "Canada

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171 *See*: https://www.ic.gc.ca/eic/site/028.nsf/eng/50009.html.

172 *See*: https://www.ic.gc.ca/eic/site/119.nsf/eng/home.

173 CRTC, Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada's digital economy*, December 21, 2016.

174 TELUS Press Release dated May 31, 2017, available at: https://www.telus.com/en/about/news-andevents/media-releases/telus-investing-usd4-7-billion-through-2020-to-extend-advanced.

needs to capitalize on [new] technologies to give businesses, research institutions and cities a competitive edge."[175] A new tax would dull this competitive edge and harm economic growth.

3.5.2. *An ISP Tax Would Hurt Canadian Consumers*

288. In addition to harming infrastructure investment at a time where Canada and its international peers are in the "Race for 5G", a tax on ISPs would make Internet access more expensive for all Canadians. Doing so would be particularly questionable when, as noted above, broadband consumers are already being asked to fund broadband development in rural and high cost areas of the country. Further in this regard, pursuant to its determinations in *Modern Telecommunications Services: The path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496, the CRTC will be levying its telecommunications contribution charge on hitherto contribution exempt retail Internet revenues and texting revenues in the foreseeable future to fund its new broadband funding regime, the details concerning which were released in *Development of the Commission's broadband funding regime*, Telecom Regulatory Policy CRTC 2018-377.

289. A tax on ISPs would disproportionately hurt lower-income households. Indeed, the regressive nature of the levy would mean that it would affect people with low incomes more severely than people with higher incomes because it would be applied uniformly to all broadband consumers, regardless of their economic situation. Such a policy would be fundamentally unfair, considering that Canadians of all economic backgrounds now require an Internet connection to fully participate in the 21st century economy.

290. The need to ramp up government and industry efforts to assist underserved, lower-income and marginalized communities has been a constant area of focus of the current federal government – and TELUS commends the government for its efforts in that regard. As the government itself acknowledged, adding a tax to the Internet bill of millions of Canadians would contradict the government's stated objective of helping more Canadians get online.

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175 Government of Canada, *Positioning Canada to Lead: An Inclusive Innovation Agenda*, accessible online at: https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00009.html.

In February 2018, the federal government announced it was launching the Digital Literacy Exchange Program, a $30 million initiative to support not-for-profit organizations that teach fundamental digital literacy skills to Canadians who would benefit from participating in the digital economy.[176] This program would notably provide much-needed assistance to seniors, new and low-income Canadians, Indigenous people, and those living in northern and rural communities.[177] Providing funding to these constituencies on the one hand, while adding a tax to their Internet bills on the other, would be counterproductive and inefficient.

291. The same conclusion can be drawn when reviewing the interim report of the federal government's Digital Industries Table,[178] which was constituted to set long-term goals to ensure the growth of Canada's ICT sector. Among other things, the report found that increasing the domestic uptake of digital innovation may be the single most important element to improving productivity, noting that a one percent increase in digital technology adoption could generate $2.5 billion for Canada.[179] The report also stressed the need to foster the growth of homegrown digital companies, finding that Canada lags behind its trading partners in the creation of large digital technology firms and in having a community of successful high-growth firms.[180] It also recognizes that any action plan must allow for greater inclusion of "those traditionally underrepresented in the workforce, such as Indigenous Peoples, women, Canadians with disabilities and older workers."[181]

292. If Canada wants to foster digitally-skilled talent able to successfully compete in an ever-more competitive economy, it must continue its efforts to democratize broadband access; not impede them by treating broadband networks as proverbial "cash cows" that are to be milked to fulfill industrial policy objectives. TELUS contends that a tax on ISPs would

176 Innovation, Science and Economic Development Canada, "Government announces funding for digital skills training to help more Canadians get online", accessible online at: https://www.newswire.ca/news-releases/government-announces-funding-for-digital-skills-training-to-help-more-canadians-get-online-674479753.html.

177 *Ibid.*

178 Government of Canada, *Digital Industries: The sector today and opportunities for tomorrow, Interim Report*, accessible online at: https://www.ic.gc.ca/eic/site/098.nsf/vwapj/ISEDC_Table_DI.pdf/$file/ISEDC_Table_DI.pdf.

179 *Ibid*, at p. 4.

180 *Ibid.*

181 *Ibid*, at p. 1.

hurt the very demographics the government wants to attract into the sector. If the most vulnerable are disincentivized from connecting to the Internet and learning key skills that will allow them to flourish in the digital economy, then the federal government will have failed in its efforts to increase digital literacy and build an inclusive economy.

293. Shortly before the launch of this Broadcasting and Telecommunications Legislative Review was launched by the federal government, ISED Minister Bains indicated that the impact of proposals on consumers – particularly cost implications – would be a key factor in the government's review of the report.[182] TELUS agrees with the Minister, and submits that, at a time when government policy is focused on democratizing access to the Internet and improving digital literacy, adding yet another tax to consumers' bills should, self-evidently, be a non-starter.

3.5.3. *There is No Compelling Policy Rationale for Taxing ISPs*

294. TELUS has recommended, elsewhere in this submission, that Canadian content exhibition and spending requirements for private commercial companies be eliminated in order to level the regulatory playing field with unregulated competitors such as Netflix, Google and Amazon. However, should the Panel not endorse such a recommendation, TELUS contends that – at the very least – the Panel should reject calls to expand the contribution regime to ISPs.

295. While there is a rationale – outdated as it may be – for TV distributors to contribute to the creation of Canadian content, this rationale does not exist for ISPs. Indeed, unlike distributors, ISPs do not play any role in the selection or marketing of content available over the internet. In fact, net neutrality principles prevents them from doing so.

296. Furthermore, consumers have many uses for their Internet that are completely unrelated to broadcasting, including email access, social media, online research, telework and online shopping. Going forward, wireless technology, including 5G, will enable driverless cars

182 Daniel Leblanc, "CRTC wants Netflix, Spotify to fund Canadian content", *Globe and Mail*, May 31, 2018, accessible online at: https://www.theglobeandmail.com/business/article-crtc-calls-for-levies-on-internet-providers-and-foreign-streaming/.

and smart homes, businesses and cities, as well as applications, devices and services that promote wellness, improve educational outcomes and support environmental sustainability. None of these activities fall within the purview of the *Broadcasting Act*, so why should they be made to contribute to the fulfillment of its objectives? And, if ISPs are to finance the production of Canadian content because their networks are used to distribute programming, then what prevents government from subsidizing any sector of the Canadian economy via ISP taxes, in the coming "Internet of Everything" era? Should ISPs subsidize Canada's auto industry because their networks are used to enable driverless cars? Should they finance Canada's healthcare system because their networks are used to provide telemedicine and e-health solutions? Should they subsidize the travel industry because most trips are now being booked online? While these examples may be wild-eyed, they rely on the same faulty logic as the case for funding Canadian content through an ISP tax. And TELUS urges the Panel to reject that logic.

297. It must be noted that Canada is not alone among its international peers in having refrained from relying on ISPs to support the creation and dissemination of domestic content. As shown in a report authored by former CRTC Commissioner Suzanne Lamarre, submitted as Appendix 7 to this submission, a majority of Western countries have rejected that policy option. Even members of the European Union, which have implemented numerous measures over the years to promote the creation and dissemination of domestic cultural products, have largely shied away from implementing ISP taxes.[183] Canada should emulate these countries by confining the ISP tax to the dustbin of bad policy ideas.

[183] Two notable exceptions are France and Spain, which have both imposed a tax on telecommunications operators to finance the activities of their respective public broadcastiers. Earlier this year, however, the French government decided to no longer use the proceeds of its "taxe télécoms" to fund France's public broadcaster. *See:* Cyril Lacallière, "L'État prive France Télévisions de la 'taxe Copé'… mais la garde pour lui!", l'Opinion, 24 septembre 2018, accessible online at : https://www.lopinion.fr/edition/economie/l-etat-prive-france-televisions-taxe-cope-garde-lui-163158.

4.0 Theme C – Improving the Rights of the Digital Consumer

4.1. Enhancing Digital Literacy Is the Greatest Opportunity to Promote Participation in the Digital Economy

298. In order to fully participate in the digital economy, Canadians need the knowledge and tools to do so. Digital literacy is the single greatest opportunity to facilitate the adoption of broadband services and participation in the digital economy. While digital literacy does not need to be part of any of the Acts under review and is outside the purview of the CRTC, other government departments including Innovation, Science and Economic Development Canada, Employment and Social Development Canada, Public Safety Canada and the Privacy Commissioner of Canada have a role to play in increasing digital literacy.

299. The CRTC has described digital literacy as "the set of knowledge, skills, and behaviours that enable people to understand and use digital systems, tools and applications, and to process digital information." The CRTC further notes that "these capabilities and aptitudes link strongly with a population's capacity to be innovative, productive and creative, and to participate in democracy, the digital economy, and other spheres of life."[184]

300. The digital literacy problem exists in Canada and the CRTC has acknowledged that there is a gap that contributes to limiting consumers' ability to participate in the digital economy and society, and that closing this gap would maximize the potential benefits for Canadians.[185] Almost a quarter of Canadian non-adopters surveyed by Statistics Canada say they do not use the Internet is because they lack the skills or the Internet is too difficult for them to use. Almost two thirds of non-adopters say that they have no need, no interest or not enough time to use the Internet.[186] The former is a direct indication of a digital literacy gap, which the latter is likely a proxy for it.[187]

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184 CRTC Submission to the Government of Canada's Innovation Agenda, 21 December 2016, online: https://crtc.gc.ca/eng/publications/reports/rp161221/rp161221.htm.

185 *Modern telecommunications services – The path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496, para 245.

186 Karine Landry and Anik Lacroix, "The Evolution of Digital Divides in Canada," *2014 TPRC Conference Paper*, August 15, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418462 using data from Statistics Canada, Canadian Internet Use Survey (2012).

187 *Ibid*, p. 12-13.

301. Clearly more can be done to show non-adopters the benefits of participating in the digital economy and to equip them with the skills and knowledge to do so. A multi-pronged approach that engages government agencies at all levels is necessary. At the present time, there are digital literacy programs overseen by Employment and Social Development Canada, Public Safety Canada and the Privacy Commissioner of Canada, and the Department of Innovation, Science and Economic Development has launched its Digital Literacy Exchange Program.[188] Various provincial and territorial government, particularly in British Columbia, Northwest Territories, Nunavut and Yukon, also have digital literacy programs.[189] These agencies are funding initiatives to enhance digital literacy and address skill deficits that are significant barriers to broadband adoption.

302. TELUS has also played a role in increasing digital literacy. TELUS WISE (Wise Internet and Smartphone Education) is an educational program focused on Internet and smartphone safety to help keep families safe from online criminal activity such as financial fraud and cyberbullying. This program is available to all Canadians in a variety of ways including in-person seminars, visits to schools and online activities. TELUS WISE content was developed in partnership with leading industry experts and aims to provide timely, informative and relevant information about topics related to Internet safety. TELUS has also launched TELUS WISE for seniors, a program to increase internet literacy with seniors, which is delivered to senior citizens in select multi-dwelling buildings. These educational sessions take place either monthly or yearly and, in the last year, TELUS held 122 workshops educating 3,029 attendees.

303. These public and private digital literacy programs need to continue and expand. The CRTC has noted on at least two occasions that digital literacy is not within its core mandate and that it is not well placed to handle the digital literacy gap alone.[190] As a result, there needs to be a multi-faceted approach which includes the participation of other stakeholders.

188 Further details are available at the following link: http://www.ic.gc.ca/eic/site/102.nsf/eng/home.

189 CRTC Submission to the Government of Canada's Innovation Agenda, 21 December 2016, online: https://crtc.gc.ca/eng/publications/reports/rp161221/rp161221.htm.

190 *Modern telecommunications services – The path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496, para 245-46; CRTC Submission to the Government of Canada's Innovation Agenda, 21 December 2016, online: https://crtc.gc.ca/eng/publications/reports/rp161221/rp161221.htm.

While the digital literacy gap does not need to be addressed in any of the statutes under review, this important issue should be addressed by programs administered and funded by other federal and provincial departments and ministries.

4.2. No Legislative Changes Are Required to Address Consumer Protection

304. There are no legislative changes required pertaining to consumer protection and rights in the *Telecommunications Act.* The CRTC already has full jurisdiction over consumer protection and rights for telecommunications services by virtue of the powers granted to it by Parliament. The courts have repeated affirmed telecommunications regulation to be within the exclusive jurisdiction of the federal Parliament. The CRTC implements such protections and rights by way of tariff terms, in the case of tariffed services, and various codes of conduct for forborne services.

305. While no legislative changes are necessary for the CRTC to effectively regulate consumer protection, TELUS recommends a clear legislative statement regarding the exclusivity of Parliament's authority over telecommunications, to discourage further intrusions into this field by the Provinces. All stakeholders would benefit from eliminating the uncertainty, confusion, and complexity caused by such provincial laws and the expense of litigating their constitutionality. TELUS recommends that such a statement be included in the revised telecommunications policy objectives, and discussed further in Section 5.1.

4.3. No Legislative Changes Required to Address Accessibility

306. On the related matter of accessibility, the CRTC has jurisdiction to implement rules about accessibility of telecommunications services, and has done so in many past decisions. As noted in Section 5.1 in this submission, TELUS is asking that accessibility of telecommunications services be enshrined as a Canadian telecommunications policy objective. As a result, the CRTC would continue to have jurisdiction over accessibility of telecommunications services.

307. In addition, TELUS notes that under the proposed Bill C-81, the *Accessible Canada Act*, telecommunications service providers would be required to implement an accessibility plan

to be filed with the CRTC. The CRTC would continue to have jurisdiction to impose conditions about accessibility and to enforce the provisions of the Accessible Canada Act. This demonstrates that it is Parliament's desire to continue to have the CRTC to be the body that enforces telecommunications services accessibility under both the *Telecommunications Act* and the *Accessible Canada Act*.

4.4. No Legislative Changes Required to Address Privacy

308. Privacy should continue to be included as a Canadian telecommunications policy objective. The CRTC has and continues to carry out a number of functions to fulfill this objective. In this regard, the CRTC has established regulatory measures to safeguard customer information and to protect the privacy of consumers. For example, in *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657, the Commission directed all primary ISPs, as a condition of providing retail Internet services, not to use for other purposes personal information collected for the purposes of traffic management and not to disclose such information.[191]

309. However, consumers recognize that privacy protections, and protections for their data, can be more holistically and functionally provided to Canadians through the enactment of law of general application. For consumers, the value of their privacy does not change industry by industry. They care deeply about how their data is handled and protected and they are looking for clarity about what that means. For this reason, cross-industry privacy protections, such as are provided to consumers in *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), are the most effective approach for legislation.

310. There is simply no reason for additional industry/sector specific regulations for privacy, and there are many arguments against such a move. Industry specific regulation will result in confusion for customers as to why regulations apply to one industry and not another. Further, such legislation is likely to stifle innovation by making cross-industry partnerships complicated and potentially inequitable. Consumers are rightly more concerned with what

191 TRP 2009-657, para 103.

is being done with their data (the uses and activities) rather than with which sector holds their data. Regulating one sector differently than another could result in misleading assurances for consumers, who are interacting with multiple providers from various industries on a regular basis, and inequitable regulation of the same business activities. Further, it is not apparent that the telecommunications industry holds any more sensitive data than those in other industries that are not captured by the *Telecommunications Act* (*e.g.*, social media, online/web industry, financial industry, technology device manufacturers, etc.).

311. Due to the oversight of privacy by other Canadian, federal and provincial, legislation and bodies, TELUS recommends that no change to the *Telecommunications Act* is required with respect to privacy. While including privacy among the policy objectives found in section 7 recognizes this right as an important consideration for those organizations subject to the *Telecommunications Act*, the Commission needs no new legislative powers to fulfil this policy objective for the reasons outlined above.

4.5. No Legislative Changes Are Required to Address Net Neutrality

312. The existing provisions of the *Telecommunications Act* are sufficient to protect net neutrality. Under section 27(2) of the *Telecommunications Act*, carriers are prohibited from providing an undue preference and engaging in unjust discrimination when providing telecommunications services, or subjecting any person to an undue or unreasonable disadvantage. Section 36 of the *Telecommunications Act* also prevents Canadian carriers from controlling the content or influencing the meaning or purpose of telecommunications carried by them for the public. In the aggregate, these provisions reflect the elements of a conventional approach to net neutrality.

4.5.1. *Context of the Public Discussion on Net Neutrality*

313. Net neutrality has re-entered telecommunications policy discussions since the United States Federal Communications Commission announced its decision to repeal the Obama administration's so-called "Title II" regulations, which classified the internet as a public utility. These developments caused a significant reaction – both in the United States and

internationally – with many critics warning that the policy changes brought about by the FCC would mark "the end of the internet as we know it."[192] However, to be clear, the Title II policy had not yet come into effect before it was repealed, so the "internet as we know it" was the one without net neutrality rules.

314. The Canadian government has reiterated its support for net neutrality.[193] On May 9, 2018, the House of Commons Standing Committee on Access to Information, Privacy and Ethics released a report entitled "The Protection of Net Neutrality in Canada," which recommended that the federal government consider enshrining the principle of net neutrality in the *Telecommunications Act*.[194] Shortly after the report was published, the House of Commons passed a motion acknowledging Canada's existing net neutrality protections and calling on the government to make net neutrality a "guiding principle" of the *Telecommunications Act* and *Broadcasting Act* review and to consider enshrining it in the *Telecommunications Act*.[195] Finally, in announcing the Panel's review of Canada's communications legislation, the federal government indicated that the review would be "guided by the principle of net neutrality."[196]

315. TELUS commends the federal government for its commitment to net neutrality and wishes to underscore its commitment to an open internet. Notably, no legislative changes are required to achieve this goal as the existing provisions of the *Telecommunications Act*

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192 Joe Concha, "CNN heading declares 'End of the Internet as we know it" After Michael Lewis, "Repeal of net neutrality in U.S. could impact Canada", *Toronto Star*, 22 November 2017, accessible online at: https://www.thestar.com/business/tech_news/2017/11/22/repeal-of-net-neutrality-in-us-could-impact-canada.html.

193 Michael Lewis, "Repeal of net neutrality in U.S. could impact Canada", *Toronto Star*, 22 November 2017, accessible online at: https://www.thestar.com/business/tech_news/2017/11/22/repeal-of-net-neutrality-in-us-could-impact-canada.html.

194 House of Commons, "The Protection of Net Neutrality in Canada: Report of the Standing Committee on Access to Information, Privacy and Ethics", May 2018 **[*The Protection of Net Neutrality in Canada*]**, accessible online at: http://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9840575/ethirp14/ethirp14-e.pdf.

195 House of Commons, Private Members' Motion – M-168 – Net Neutrality, 23 May 2018, accessible online at: http://www.ourcommons.ca/Parliamentarians/en/members/John-Oliver(88881)/Motions?sessionId=152&documentId=9630989.

196 Canadian Heritage, "Government launches review of Telecommunications and Broadcasting Acts", 5 June 2018, accessible online at: https://www.canada.ca/en/canadian-heritage/news/2018/06/government-of-canada-launches-review-of-telecommunications-and-broadcasting-acts.html

provide the CRTC with sufficient tools to enforce net neutrality principles of no unwarranted blocking or throttling, no harmful prioritization, and transparency – goals which TELUS fully supports. TELUS cautions the Review Panel against adopting any overly rigid legislative amendments aimed at protecting net neutrality that could have counterproductive results. Further in this regard, TELUS wishes to stress the need for the CRTC to adopt a more flexible approach to net neutrality using its existing legislative powers.

4.5.2. *There Is No Need for a Net Neutrality Amendment*

316. Existing legislative provisions have enabled the CRTC, over the years, to issue a series of policy decisions responding to evolutions in telecommunications services that form the CRTC's net neutrality framework.[197] These include: (i) *the Internet traffic management practice framework*,[198] which established rules governing the use of internet traffic management practices; (ii) the *Mobile TV decision*,[199] which directed ISPs to stop giving their mobile television services an unfair advantage in the marketplace, to the disadvantage of other internet content; and (iii) the *Differential pricing practices framework* ("DPP Framework"),[200] which effectively banned most forms of zero-rating and sponsored data programs.

317. In a recent testimony before the House of Commons Standing Committee on Access to Information, Privacy and Ethics, Chris Seidl, the Executive Director of the CRTC's telecommunications branch, contended that sections 27(2) and 36 of the *Telecommunications Act* "provide the CRTC with the tools and the flexibility to establish and enforce a net neutrality framework that is entirely appropriate and reasonable for

197 CRTC, "Strengthening Net Neutrality in Canada", accessible online at: https://crtc.gc.ca/eng/internet/diff.htm

198 *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657

199 *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*, Broadcasting and Telecom Decision CRTC 2015-26

200 *Framework for assessing the differential pricing practices of Internet service providers*, Telecom Regulatory Policy CRTC 2017-104.

Canada."[201] Mr. Seidl further cautioned against enshrining the principle of net neutrality in the *Telecommunications Act*, claiming that such an amendment might not fit with the flexibility needed going forward.[202] Even Professor Michael Geist, a strong net neutrality proponent, has indicated that a net neutrality amendment to the *Telecommunications Act* should not be considered a priority.[203]

318. Entrenching the principle of net neutrality in legislation is not only unnecessary; it could potentially bring about negative unintended consequences. Indeed, adopting an overly prescriptive net neutrality amendment could harm innovation and investment, prevent new offerings from being brought to market, and even hinder telecommunications carriers' ability to address cyber-security concerns. In this regard, TELUS echoes the comments of CRTC Chairman Ian Scott, who recently indicated that net neutrality is not a "black-and-white" issue and that flexibility may be required going forward for situations relating to public safety or security, telemedicine or self-driving cars.[204]

4.5.3. *The CRTC Should Provide a More Flexible Net Neutrality Framework Using its Existing Powers Under the Telecommunications Act*

319. TELUS submits that it is crucial to develop a balanced approach to net neutrality that reconciles the core statutory protections on the one hand, and the need for a regulatory environment conducive to capital investment and innovation, on the other. TELUS recommends that the CRTC adopt a less rigid approach to different pricing practices, as is the case in other peer jurisdictions, to ensure that carriers retain the ability to protect the integrity of their networks from cybersecurity threats, and to make innovative service offerings. The approach recommended in this section is consistent with TELUS' proposed principle 9: once it is credibly demonstrated that regulation is required, some form of *ex post* regulation should be adopted as a default. If and only if it is credibly demonstrated

201 The Protection of Net Neutrality in Canada, at p. 8.
202 *Id.*
203 *Id.*
204 CRTC, *Ian Scott to the annual conference of the Canadian Chapter of the International Institute of Communications*, November 1, 2018, accessible online at: https://www.canada.ca/en/radio-television-telecommunications/news/2018/11/ian-scott-to-the-annual-conference-of-the-canadian-chapter-of-the-international-institute-of-communications.html.

that *ex post* regulation fails to achieve the stated objectives should some form of *ex ante* regulation be considered. Net neutrality, to the extent it requires regulation, should rely on *ex post* measures.

320. While Chairman Scott does not oppose enshrining net neutrality in the *Telecommunications Act*, he cautioned the government about being overly prescriptive:

> I will give you a simple example. When it comes to public security or public safety, do we want to be net neutral? Not necessarily. When it comes to a 5G environment and the priority given to driverless cars versus parking metres, do we want to be net neutral? The answer is obviously no. The commission has the tools today, interestingly enough, without any mention of the term "net neutrality," because we have the ability to say you mustn't give an undue preference or unjustly discriminate against someone, and carriers cannot influence the content of the messages they carry without our permission. In fact, those broad principles have given us all the tools we need.[205] (emphasis added)

321. It is particularly critical to ensure that cybersecurity needs not be subjugated to an overly rigid definition of net neutrality. It is important for ISPs to retain the ability to protect subscribers from fraudulent and malicious websites and software, particularly in light of the fact that cybersecurity threats are constantly changing. An overly prescriptive net neutrality approach could act as a straightjacket that would impede on ISPs' ability to protect the integrity of their networks. TELUS provides further comments with respect to the issue of security in Section 6.0, response to Question 5.1.

322. Further in this regard, certain components of the CRTC's net neutrality framework do not show a sufficient degree of regulatory flexibility and have the ability to hinder innovation and harm consumers. The DPP Framework is a case in point. Established in April 2017, the framework effectively bans the use of zero-rating, a practice by which network operators allow end-users to access certain content without being charged for the corresponding data consumption.

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205 The Standing Senate Committee on Transport and Communications, Evidence, October 30, 2018, accessible online at: https://sencanada.ca/en/Content/SEN/Committee/421/trcm/54343-e.

323. The DPP Framework underscores how a regulator's commitment to net neutrality can sometimes lead to counterproductive rules. Banning innovative practices such as zero-rating does nothing to protect the integrity of the internet; rather, it raises prices for certain consumers and lowers them for no one. In making such a decision, the CRTC downplayed or ignored the obvious benefits that DPPs can have in the broadband ecosystem. These include enhancing internet affordability; enhancing the discoverability of, and demand for, online content; encouraging non-users to access the internet; and helping close the digital divide. In most cases, the use of DPPs is a "win-win-win" situation: consumers win by accessing services and applications at exempt or discounted rates; ISPs see the demand for services increase as a result of the availability of more content; and content providers are able to reach a larger number of consumers. Even strong net neutrality proponents such as former FCC chair Tom Wheeler have recognized that DPPs do not constitute *per se* violations of net neutrality and can be pro-competitive.[206]

324. TELUS recommends that the CRTC adopt a less rigid approach to zero-rating as is the case in other peer jurisdictions. For example, in the United States, the FCC has recognized that the practice of zero-rating enhances not only consumer welfare, but also broadband competition in general.[207] In Europe, net neutrality rules do not ban zero-rating,[208] and BEREC (the Body of European Regulators for Electronic Communications) has recommended that zero-rating programs be assessed on a case-by-case basis, rather than being banned outright.[209] In 2017, 20 of the European Union's 28 nations had some form of zero-rating.[210] The practice is also widespread in Australia.[211]

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206 Indeed, the FCC's *2015 Open Internet Order* acknowledges that zero-rating-based business models may, in some instances, provide consumer and competitive benefits.

207 Taylor Hatmaker, "Trump's FCC just dropped all investigations into zero-rating practices", *TechCrunch*, accessible online at: https://techcrunch.com/2017/02/03/pai-zero-rating-fcc/.

208 See EU Regulation 2015-20, accessible online at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120.

209 BEREC, "What is zero-rating?", https://www.berec.europa.eu/eng/netneutrality/zero_rating/.

210 Michael Chaia, "Net Neutrality Challenges in the World: Zero-Rating in the European Union", *Public Knowledge*, accessible online at: https://www.publicknowledge.org/news-blog/blogs/net-neutrality-challenges-in-the-world-zero-rating-in-the-european-union.

211 Australian Broadcasting Corporation, "Net neutrality: The digital landscape set to change as the US moves to overturn regulations", 21 November 2017, accessible online at: http://www.abc.net.au/news/2017-11-22/net-neutrality-regulations-to-be-overturned-in-the-us/9179512.

325. The shortcomings of the CRTC's DPP framework – while not being an area of focus *per se* of the Panel's review – highlight the need for legislative and regulatory humility, and demonstrate that regulations adopted with the best of intentions do not always end up enhancing the general welfare of society. The CRTC should exercise greater flexibility using its existing powers under the *Telecommunications Act* with respect to differential pricing practices. These practices should not be the subject of an *ex ante* ban as is the case under the current DPP framework and should be assessed on a case-by-case basis, as is the case in other jurisdictions.

4.6. Additional Provisions Are Required to Protect Carriers from Liability in Light of Their Neutral Position with Respect to Content

326. A new limitation of carrier liability should be included in the *Telecommunications Act*. Under section 36 of the *Telecommunications Act,* carriers have statutory duties not to control the content or influence the meaning or purpose of telecommunications carried by them for the public. However, carriers appear to be at risk of liability where the content they carry is itself illegal. Canadian carriers are potentially exposed to liability for carriage of problematic types of content that customers or other users might distribute via non-tariffed services, such as defamatory material, child pornography and illegal commercial electronic messages or computer program installations. The risks of carrier liability for carrying such material is unwarranted, especially given the restrictions placed on carriers in section 36 of the *Telecommunications Act,* as noted above.

327. Section 36 potentially exposes carriers to some unique risks. A message they carry may be defamatory, and because of their role in the distribution of that message, they may be deemed to be liable as a "publisher" of the message; a video accessed through their networks that is hosted on the site of a "pirate" may make them potentially complicit in copyright infringement; they may be involved, unbeknownst to themselves, in distributing child pornography, and therefore potentially party to a criminal offence.

328. More recently, a new source of potential liability has arisen with respect to Canada's anti-spam legislation ("CASL").[212] The CRTC has signalled its intent to pursue intermediaries (including telecommunications and Internet service providers) under a provision prohibiting the aiding or inducing of substantive CASL violations.[213] The CRTC is suggesting that carriers have some (undefined) obligation to proactively limit the distribution of illegal commercial electronic messages or installation of computer programs. Although the CRTC's interpretation is legally dubious,[214] it nevertheless signals a tension between carriers' obligation to remain neutral under the *Telecommunications Act* and law enforcement's desire to conscript carriers into a non-neutral role for purposes of other legislation.

329. Most of Canada's peer jurisdictions, including the European Union, the United States, and Japan, recognize that it is undesirable and unjust to hold telecommunications carriers liable where they have played an essentially passive role in carrying such messages and distributing such content on behalf of third parties. A summary of the measures used by those jurisdictions is included in Appendix 8 to TELUS' submission.

4.6.1. *Limitations of Liability in Carrier Terms of Service of Limited Application*

330. In 1986, the CRTC exercised its authority over carrier limitations of liability [215] to exempt carriers from liability in a wide range of circumstances. The 1986 Terms of Service provide that Canadian carriers are not liable for:

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212 An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-*television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act,* S.C. 2010, c. 23.

213 See *Guidelines on the Commission's approach to section 9 of Canada's anti-spam legislation (CASL),* Compliance and Enforcement Information Bulletin CRTC 2018-415. These guidelines are in reference to the prohibition set out in s 9 of CASL, which states "[i]t is prohibited to aid, induce, procure or cause to be procured the doing of any act contrary to any of sections 6 to 8."

214 Amongst other things, the CRTC guidelines seem to contradict Parliament's intention to limit carrier liability, at least with respect to s 6 of CASL. Subsection 6(7) provides "[t]his section does not apply to a telecommunications service provider merely because the service provider provides a telecommunications service that enables the transmission of the message."

215 The CRTC's authority flows from sections 24, 24.1, 31 and 32(g) of the *Telecommunications Act*.

> (a) any act or omission of a telecommunications carrier whose facilities are used in establishing connections to points which the Company does not directly serve;
>
> (b) defamation or copyright infringement arising from material transmitted or received over the Company's facilities;
>
> (c) infringement of patents arising from combining or using customer-provided facilities with the Company's facilities; or
>
> (d) copyright or trademark infringement, passing off or acts of unfair competition arising from directory advertisements furnished by a customer or a customer's directory listing, provided such advertisements or the Information contained in such listings were received in good faith in the ordinary course of business. [216]

331. However, the Terms of Service apply only to tariffed services.[217] In 1986, essentially all services were tariffed. Tariffed services now account for only 4% of carrier revenues.[218] While the CRTC has from time to time approved limitations of liability in specific instances for inclusion in carrier contacts,[219] there is no general CRTC-approved or prescribed limitation of liability applicable to non-tariffed (so-called "forborne") services. The result is that there is no CRTC-mandated limitation on carrier liability applicable for 96% of Canadian carrier traffic (by revenues).

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216 See *Review of the General Regulations of the Federally Regulated Terrestrial Telecommunications Common Carriers*, Decision 86-7, Appendix, item 16.2.

217 *Ibid*., item 1.1.

218 CRTC Communications Monitoring Report 2018, Table 4.1 (Percentage of telecommunications revenues generated by forborne services).

219 For example, Co-Location, Telecom Decision CRTC 97-15, at paras 106-109. In *Conditions of service for wireless competitive local exchange carriers and for emergency services offered by wireless service providers*, Telecom Decision CRTC 2003-53, the CRTC approved the text of a provision limiting the liability of wireless carriers relating to emergency services provided to end-users on a mandatory basis, as well as a provision limiting inter-carrier liability.

332. In 2012, Parliament enacted the *Copyright Modernization Act*, which provides ISPs with protection from liability for copyright infringement. [220],[221,222] This measure had the effect of restoring, where non-tariffed (forborne) services of Canadian carriers are concerned, the protection originally provided by the Terms of Service. But there is no similar legislation that extends protection to Canadian carriers for carriage via non-tariffed services of other problematic types of content that customers or other users might distribute, such as defamatory material, child pornography and illegal commercial electronic messages or computer program installations.[223]

4.6.2. *Recommendations for Legislative Changes*

333. As is clear from the above, at present, the law does not clearly protect carriers from any liability they may incur for their role in distributing such content. Other entities that are engaged in the distribution of content (such as newspapers and social media) *are* allowed to control the content they distribute (a newspaper can refuse to print defamatory content;

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220 S.C. 2012, c. 20, s. 31.1.

221 There are other provisions in the Act relevant to the matter of carrier liability. Section 2.4(1)(b) of the Act provides that "a person *whose only act* in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public" (emphasis added). Section 2.3 provides that "[a] person who communicates a work or other subject-matter to the public by telecommunication does not *by that act alone* perform it in public, *nor by that act alone is deemed to authorize its performance in public"* (emphasis added). These sections imply that, if an ISP goes further than merely communicating infringing material and "*authorizes*" communication of such material, the protection afforded by those sections will be unavailable.

222 The phrase "services related to the operation of the Internet or another digital network" is not defined in section 31.1(1), nor are any of the key words. It appears to include P2P intermediaries as well as ISP intermediaries. Sections 31.1(2) and (4) make it clear that the phrase also includes caching providers and hosting intermediaries. The protection provided by s. 31.1(1) may overlap with s. 2.4(1)(b), which applies more generally to providers of telecommunications services.

223 The common law does not at present provide any defences to such claims, although the common law may be evolving in a way that will eventually establish such protection. For example, where carriers can establish that they are "innocent disseminators" of content or have had a purely passive role as distributors and not engaged in a "deliberate act". See Crookes *v.* Newton, 2011 SCC 47, http://canlii.ca/t/fngpv. Whether Canadian law will eventually recognize a robust defence to content-related claims, and what qualifications might be attached to such a defence, remains to be seen. In TELUS' submission, Parliament should not await the uncertain outcome of future litigation, which may endure many years, before providing telecommunications carriers relief from content-related claims along the lines available in peer jurisdictions.

a social media company can block access to websites that include offensive content). As a consequence, these entities do not face the same legal exposures as carriers.

4.6.3. *Recommended Legislative Changes*

334. As a *quid pro quo* for their legal duties under section 36, the law should make it clear (as it does in other jurisdictions) that carriers have no liability for the content they carry. Therefore, TELUS proposes that the *Telecommunications Act* be amended as follows:

> **36.1** A Canadian carrier is not liable for the content, meaning or purpose of the telecommunications it carries, provided that:
>
> (a) the carrier did not initiate the transmission or select the receiver;
>
> (b) the carrier did not select or modify the content meaning or purpose of the telecommunications; and
>
> (c) the carrier does not store the content longer than is reasonably necessary for the transmission.

4.7. Addressing the Proliferation of False or Misleading Information

335. An informed citizenry is essential to the democratic process. The continued creation of, and access to, trusted, accurate and diverse news is a worthy policy objective. Journalistic integrity principles should be made requirements for all programming services which provide news and information content to Canadians. Social media would not be captured in the definition of programming services under the *Broadcasting Act* but we recognize that this form of communication raises important concerns that should be addressed by government outside of the broadcasting framework.

336. Government has rightfully recognized that a large part of the answer to this thorny problem is the creation of "good news" to combat the "fake news". To this end, in the 2018 Fall Economic Statement, the Government committed close to $600M over five years to support Canadian journalism in all its forms. The measures to support Canadian journalism consist of three initiatives: allowing non-profit news organizations to act as registered charities, introducing a new refundable tax credit to support original news content creation, and

introducing a new temporary non-refundable tax credit to support subscriptions to Canadian digital news media. [224]

337. TELUS also addresses the need for journalistic integrity principles in the context of addressing concerns relating to the extreme vertical integration of Canada's media industry. As discussed in greater detail in Section 3.4 above, TELUS remains concerned with the way in which the ownership of media assets provides vertically integrated entities with the ability to exert influence on news and informational programming to the benefit of their own corporate interest and the detriment of competitors. It is important for Canadians to access unbiased information, and the ever-rising level of vertical integration in the Canadian media landscape provides certain news programming organizations with the incentive to act in ways benefiting themselves and their shareholders as opposed to consumers. As a result, legislative and regulatory levers must be developed to uphold Canadians' right to access unbiased news, and curb the ability of vertically integrated firms to unduly influence their news programming organizations.

338. Ultimately, in regards to the proliferation of fake news on social media, TELUS notes that much of this content would not be captured by the legislative framework for the broadcasting system. TELUS nevertheless recognizes that this form of communication raises important concerns that should be addressed by government outside of the broadcasting framework.

339. To this end, TELUS notes the recent Report of the Standing Committee on Access to Information, Policy and Ethnics,[225] and supports the recommendation of the committee with regard to enacting regulation to obligate social media:

- to clearly label content produced automatically or algorithmically (e.g. by 'bots');
- to identify and remove inauthentic and fraudulent accounts impersonating others for malicious reasons;

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224 https://budget.gc.ca/fes-eea/2018/docs/statement-enonce/fes-eea-2018-eng.pdf.

225 Report of the Standing Committee on Access to Information, Privacy and Ethnics, "*Democracy under threat: Risks and solutions in the era of disinformation and data monopoly*, December 2018.

- to adhere to a code of practices that would forbid deceptive or unfair practices and require prompt responses to reports of harassment, threats and hate speech and require the removal of defamatory, fraudulent, and maliciously manipulated content (e.g. "deep fake" videos); and
- to clearly label paid political or other advertising.[226]

5.0 Theme D – Renewing the Institutional Framework for the Communications Sector

340. Changes to the institutional framework are necessary to calibrate the regulatory system to modern conditions. Below, TELUS identifies several opportunities for improvement, including amending the Canadian telecommunications policy objectives to emphasize competition, innovation and investment; transferring responsibility for spectrum to the CRTC; crafting specific powers for the CRTC (instead of relying on general basket clause powers); reducing asymmetric regulation; revising the structure and organization of the CRTC; eliminating cabinet appeals; amending to the administrative monetary penalty regime; and the creation of procedural protections for regulatory investigations.

5.1. The Telecom Policy Objectives Should Be Amended to Emphasize Competition, Innovation, Investment, and Timely Deployment of Facilities

341. TELUS recommends replacing the existing Canadian telecommunications policy objectives with new objectives emphasizing competition, innovation and investment and the timely deployment of infrastructure as key Canadian public policy objectives for the telecommunications services industry. The policy objectives should also express support for the exclusive federal authority over telecommunications.

342. The *Telecommunications Act* lacks a clear, consistent, and unambiguous statement of contemporary and future-oriented policy objectives. The current objectives constitute an open-ended, unranked, largely undefined and indeed often contradictory policy statement that has the effect of governmental abdication to the regulatory agency to be the primary policy maker. The Chairperson of the CRTC has recently asked for more effective

226 *Ibid*, at section entitled "*Potential Regulatory Solutions*".

legislative policy guidance on the grounds that this would enable the CRTC to carry out its mandate in the most efficient and effective way.

5.1.1. *Historical Overview of Canadian Telecommunications Policy Objectives and the Need for Reform.*

343. TELUS has commissioned Dr. Richard Schultz, Professor of Political Science at McGill University in Montreal, to provide the Broadcasting and Telecommunications Legislative Review Panel with a historical overview of the Canadian telecommunications policy objectives and the need for reform. In his report entitled "Controlling the Habit: A Paper Submitted in Support of the TELUS Submission to the Broadcasting and Telecommunications Legislative Review Panel," Dr. Schultz provides a detailed examination of the development of the current objectives as seen in their political context, underlining the seminal importance of providing the regulator with effective legislative policy guidance to enable it to carry out its mandate in the most efficient and effective way, without which any other proposed reforms will be a wasted opportunity. Dr. Schultz's expert report may be found in Appendix 9 to TELUS' submission, along with his C.V.

5.1.2. *Current Policy Objectives Should be Removed and Replaced by New Objectives*

344. The following are TELUS' specific comments on the existing individual clauses in section 7. In the following paragraphs, TELUS briefly explains the problems with the existing policy objectives which should be removed, and in certain cases recommends new or clarified policy objectives in their place.

Preamble: *It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identify and sovereignty and that the Canadian telecommunications policy has as its objectives*

345. The preamble of section 7 is derived from the *Broadcasting Act,* whose emphasis is primarily of a cultural nature, rather than an economic nature as is the *Telecommunications Act.* Notwithstanding, the specifics of this role and the link between telecommunications and "the maintenance of Canada's identity and sovereignty" have never been effectively established and arguably are of limited relevance to telecommunications as compared to

the broadcasting sector. To the extent that there are concerns about telecommunications linkages to national security and consequent sovereignty-related matters, these should be addressed through laws of general application as explained elsewhere in this submission, and consistent with TELUS' proposed principle 6: social regulation and technical regulation, where required, should be applied symmetrically and should be applied through laws of general application, as distinct from sector-specific regulation, whenever possible.

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions.

346. The idea of an "orderly development" is reflective of the state planning concept that was popular in the 1960s but surely is of questionable relevance in today's dynamic telecommunications sector. The concept also reflects the failed attempt at a Ministerial licensing regime for telecommunications carriers which was rejected by Parliament at the time of the passage of the 1993 Act. And, as noted above, the language "to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions" is derived from the *Broadcasting Act*, whose primary focus differs and is of limited relevance to telecommunications. To the extent that such goals are considered relevant, they are best achieved through competition.

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada.

347. This objective is best achieved through competition and innovation and investment, which TELUS proposes as new policy objectives. TELUS elaborates upon the importance of competition, innovation and investment elsewhere in this submission (see Section 2.3).

348. This policy objective refers to affordability. For the reasons explained elsewhere in this submission (see Section 2.4), this issue is best addressed by government by other means than through sector-specific regulation, and for this reason TELUS proposes to omit reference to it as a section 7 policy objective.

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications.

349. Again, this objective is best achieved through competition and innovation and investment, which TELUS proposes as new policy objectives.

(d) to promote the ownership and control of Canadian carriers by Canadians.

350. As noted elsewhere in this submission (see Section 2.5) today, the Canadian telecommunications ownership and control regime now effectively applies to a handful of entities. The existing regime entails expensive compliance costs and limits access to foreign capital that is required to invest in new and innovative networks and services. There is no longer any need for this regime. TELUS further notes that in the telecommunications sector, these rules have been effectively superseded by national security concerns under the *Investment Canada Act.*

351. Short of abolition of the regime, which TELUS recommends, further liberalization is possible. Notably, the Canadian ownership and control regime for telecommunications services has not been liberalized to the extent as is the case in the Canadian airlines sector. With recent amendments under the *Canadian Transportation Act*, direct foreign investment up to 49% is now permitted in the airlines sector, with a control-in-fact regime still in place. Amending the *Telecommunications Act* to provide for the same regime would go at least some way to achieve liberalization and to encourage further investment and innovation in the telecommunications services sector

(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside of Canada.

352. The utilization of Canadian facilities is another legacy objective from the mid-1980's whose origins lie in the ill-conceived attempt at Government licensing and supervision of the telecommunications services industry. The objective has been made further obsolete by technology. Canadians will use Canadian facilities only to the extent that they offer

them the best value for their money and satisfy their needs for the most modern and efficient telecommunications systems and services.

> *(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective.*

353. The objective, as currently worded, is at best a limited nod towards competition rather than an explicit statement that competition is a fundamental policy objective that is required in today's environment. As a result, TELUS proposes a much stronger endorsement of competition as a Canadian telecommunications policy objective.

> *(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services.*

354. This policy objective can be replaced by TELUS' proposed new policy objectives of competition, which foster research and development, and innovation and investment. Research and development and innovation will not result from a government-regulated command and control telecommunications sector.

> *(h) to respond to the economic and social requirements of users of telecommunications sector*

355. This objective is vague and open-ended. Economic requirements of telecommunications users are best provided by competitive market forces, hence TELUS' recommendation to explicitly specify competition as a telecommunications policy objective. TELUS provides comments on social requirements immediately below.

> *(i) to contribute to the protection of privacy of persons.*

356. Privacy is an important social public policy issue and should be maintained as an objective. In addition to privacy, TELUS proposes accessibility, security and safety to be specified

as social policy objectives for the reasons explained elsewhere in this submission (see Section 6.0, Response to Terms of Reference Question 5.1). Social requirements, as is true in most other economic sectors, are also best provided for by market forces. However, where there is a clear case of market failure, then regulation may be necessary to address such failure, either through sector-specific regulation or through laws of general application.

5.1.3. *Guidelines for Implementing the Policy Objectives*

357. Following the recommendations of the 2006 Telecommunications Review Panel Final Report, TELUS proposes including as part of an amended section 7 a new sub-clause enunciating guidelines for the implementation of the policy objectives. Put another way, the TELUS proposal in this regard is effectively the incorporation of the Policy Direction directly into the *Telecommunications Act* for greater legal certainty.

5.1.4. *Declaration Regarding Constitutionality*

358. TELUS further recommends the addition of section immediately following the objectives and guidelines declaring Parliament's exclusive authority over telecommunications. Although the 1993 Act did not state it in the terms proposed here by TELUS, it was clearly Parliament's intention. During the parliamentary debates preceding the adoption of the *Telecommunications Act*, Minister of Communications at the time, Mr. Perrin Beatty, mentioned the following with regards to the importance of a national regulation:

> Three years ago the Supreme Court of Canada ruled that members of Telecom Canada fell within federal jurisdiction. Since then we have successfully concluded agreements with six of the seven provinces affected. Now we need to build on those agreements. We must pull the correct patchwork of legislation into one bill designed to encourage efficiency and excellence and help us compete in international markets.
>
> Bill C-62 will do exactly that. It will eliminate the barriers which fragment our internal market, leaving us with one unified telecommunications market. It will establish a coherent policy for

> the entire country that will be co-ordinated by one regulatory agency, the CRTC.[227]

359. Since that time, contrary to Parliament's intentions, provincial and municipal governments have frequently purported to regulate telecommunications and undermine the purpose of the *Telecommunications Act* and the regulatory regimes established thereunder. For example, some municipalities have created by-laws frustrating public access rights and delaying network deployment, and some provinces purport to apply "consumer protection" laws to telecommunications services, interfering with Parliament's intent for a single coherent policy for the country (relying on market forces and CRTC rules), thereby creating the exact patchwork of regulation that Parliament was trying to avoid in the 1993 Act.

360. Although the courts have repeatedly ruled in favour of exclusive federal authority, the continued need for litigation over unconstitutional provincial and municipal measures is wasteful of resources for all stakeholders, creates confusion about what laws apply, and exposes industry players to undue risk. Affirming exclusive federal authority in the legislation would establish that exclusive federal jurisdiction is not just a constitutional fact, but a present objective to be nurtured and defended. Practically speaking, it may encourage federal authorities to give fuller voice to the jurisdiction they are exercising. Among other things, the CRTC should take its cue to issue decisions that are exclusive and not concurrent with provincial laws. Additionally, such an express legislative statement may prompt the Attorney General of Canada to more proactively intervene in litigation where exclusive federal authority is being challenged.

5.1.5. ***Recommended Legislative Changes***

361. In view of the above, TELUS proposes that the following be substituted for the current section 7:

Canadian Telecommunications Policy

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227 House of Commons Debates, 34th Parliament, 3rd Session : Vol. 14, pp. 18067 and following.

Objectives

7.1 It is hereby affirmed that telecommunications performs an essential role in the economic and social welfare of Canada and that Canadian telecommunications policy is based on the following objectives:

(a) to allow competition and market forces to achieve the efficient, dynamic and reliable provision of telecommunications services in all regions of Canada, including urban, rural and remote areas;

(b) to regulate the provision and pricing of telecommunications services where it is demonstrated that market forces do not and will not protect users from the abuse of market power and the costs of regulation do not outweigh the benefits;

(c) to ensure that where it is demonstrated that the provision and pricing of telecommunications services must be regulated, all regulatory measures are efficient, effective and proportionate to their purpose and interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;

(d) to promote investment and innovation in the telecommunications sector, thus enhancing the efficiency of Canadian telecommunications markets and the productivity of the Canadian economy;

(e) to facilitate the expeditious deployment of telecommunications facilities and services to benefit Canadians; and

(f) to enhance the social well-being of Canadians and the inclusiveness of Canadian society by:

(i) facilitating access to telecommunications by persons with disabilities;

(ii) maintaining public safety and security, including limiting public nuisance through telecommunications.

(iii) contributing to the protection of personal privacy.

Guidelines

7.2 (a)The Commission, when relying on regulation, should use measures that satisfy the following guidelines:

(i) specify the telecommunications policy objective that is advanced by those measures and demonstrate their compliance with the objective.

(ii) if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry,

(iii) if they are not of an economic nature, to the greatest extent possible, are implemented in a symmetrical and competitively neutral manner.

(iv) ensure technological and competitive neutrality, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers.

(b) The Commission, to enable it to act in a more efficient, informed and timely manner, should adopt the following practices, namely,

(i) to use only tariff approval mechanisms that are as minimally intrusive and is minimally onerous as possible;

(ii) to publish and maintain performance standards for its various processes; and

(iii) to continue to explore and implement new approaches for streamlining its processes.

7.3 It is further declared that the Canadian telecommunications system constitutes a single system and that the objectives of the telecommunications policy set out in subsection (1) can best be achieved through the exercise of Parliament's exclusive authority over all aspects of telecommunications, including the offering and provisions of telecommunications services, and the construction, maintenance and operation of telecommunications networks.

5.2. Proposals to Modernize and Streamline Radiocommunication

362. TELUS recommends making numerous changes to the legislative framework pertaining to radiocommunication. These changes promote the first principle underpinning TELUS' submission, namely that market forces be relied on to the greatest extent possible, and the eighth principle, that any regulation used be justified and proportionate. The rationale for these proposals is provided in the following sections. In particular, TELUS recommends:

- The transfer of the responsibility for spectrum regulation from the Minister of Industry and the Governor in Council to the CRTC.
- The codification of principles of independent regulation and governance.

- That radiocommunication and telecommunications be the subject of a single unified Act sharing clear concise economic objectives and requiring market-based approaches to regulation as in the current Policy Direction.
- A provision for the Government of Canada to establish overall spectrum policy in a manner that is transparent and provides for public input.
- The inclusion of a form of radio authorization for flexible commercial use of the spectrum having exclusive usage rights and being tradable in the secondary market and being subject to bankruptcy and insolvency laws. Further that licensees be permitted to sub-lease licence spectrum usage rights, in whole or in part, to third parties who would not be required to hold their own subordinate licence.
- A requirement that the spectrum regulator publish a five-year work plan for spectrum management on an annual basis and report progress against the previous year's work plan.
- The spectrum regulator should be required to maintain by electronic means a registry of apparatus, spectrum and class licences and devices to be made publicly available on the regulator's website. The registry is to contain administrative and technical details with respect to the licences as well as the status and history of licence trading and sub-leasing arrangements in the secondary market.

5.2.1. *Spectrum Management Should be Transferred to the CRTC to Promote Regulatory Independence*

363. Wireless services hold enormous economic importance and a prominent place in the Canadian telecommunications industry landscape. This is a direct result of the importance placed on wireless services by Canadians. Given this importance, radiocommunication must be regulated with the utmost of integrity, fairness and transparency. As was observed by the Telecommunications Policy Review Panel, a strong majority of peer countries have placed spectrum regulation into the hands of an independent expert regulator to achieve this end while maintaining the ability of government to establish policy.[228] There is an

[228] 2006 Telecommunications Policy Review Panel Final Report, Recommendation 5-10.

extensive international body of evidence that favours this model, demonstrates its effectiveness and guides its implementation with established best practices.

364. TELUS supports the transfer of the responsibility for spectrum regulation from the Minister of Industry[229] to the CRTC. Making this change will deliver several key benefits, notably by providing for more stable regulatory processes and the avoidance of political pressures. The Telecommunications Policy Review Panel ("TPRP") made this recommendation in 2006, observing that "Canada is one of the few OECD countries where a politically appointed minister remains responsible for spectrum licensing and management."[230]

365. The Telecommunications Policy Review Panel noted the key benefits of having an independent regulator:[231]

- providing more stability in processes
- providing a greater degree of continuity
- allowing for arbitration
- having more effective enforcement powers
- freedom from political pressure.

366. The Telecommunications Policy Review Panel's characterization of the role of government as policy-maker being distinct from that of the regulator has become the established norm internationally and across many fields of regulation.[232] In this regard, the Telecommunications Policy Review Panel recommended that spectrum regulation follow the clear distinction between "the role of government — to establish policies from the role

229 Now known as Innovation, Science and Economic Development.
230 Telecommunications Policy Review Panel, Final Report, 2006, pp 5-22.
231 OECD, Telecommunication Regulatory Institutional Structures and Responsibilities, DSTI/ICCP/TISP(2005)6/REV1, September 15, 2005, paragraph 8, cited in the 2006 Telecommunications Policy Review Panel Final Report, pp 5-22.
232 See, for example, The policy-regulatory nexus in Canada's energy decision making: From best practices to next practices, Stephen Bird, Pre-workshop Discussion Paper for the Positive Energy Workshop on The Policy-Regulatory Nexus in Canadian Energy Decision Making. June 6 & 7, 2017, uOttawa.

of the regulator, which is to implement those policies in an independent and transparent manner."[233]

367. TELUS recommends to the Broadcasting and Telecommunications Legislative Review Panel the body of expert analysis and guidance accumulated by the OECD in this regard, noting the extensive treatment given to important issues such as policy-making, regulation, regulatory agency independence, accountability, legitimacy, credibility, investor confidence, and competition.[234] Canada's efforts to re-cast legislation may profit enormously from these insights and the adoption of the internationally recognized best practices found therein.

5.2.2. *Radiocommunication Regulatory Authority Should Be Streamlined and Principles-Based*

368. The *Radiocommunication Act* currently bestows regulatory powers to both the Minister of Industry and the Governor in Council, with the former being the operative regulator. The Minister of Industry, while having broad powers, has a limited set of regulatory tools to give force to decisions and frequently relies on conditions of licence to indirectly give them effect. Both actors make extensive use of incorporation by reference.

369. The combined result of these schemes is a complex network of interrelated and interdependent regulatory instruments which unduly complicates compliance and frustrates broader public participation in their formulation. The current Legislative Review offers the opportunity to consolidate spectrum regulation under the CRTC and take advantage of its more flexible and accessible processes and regulatory instruments.

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233 2006 Telecommunications Policy Review Panel, pp 5-22.

234 Examples of OECD products include:
Telecommunications Regulations: Institutional Structures and Responsibilities.
Enhancing Market Openness Through Regulatory Reform: Regulatory Reform in Canada.
Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance.
The Governance of Regulators.
Creating a Culture of Independence: Practical Guidance Against Undue Influence.

370. There are notable gaps under the *Radiocommunication Act* having implications for enforcement both for current and emerging networks and devices.[235] Two illustrative examples follow.

371. Section 5.(1)(f) of the *Radiocommunication Act* provides that the Minister of Industry may "approve each site on which radio apparatus, including antenna systems, may be located, and approve the erection of all masts, towers and other antenna-supporting structures." The Minister of Industry routinely exercises this power in the course of considering applications for radio authorizations (*e.g.* licences). Those who wish to install, operate or possess radio apparatus are compelled by *Radiocommunication Act* section 4 to seek a radio authorization from the Minister of Industry unless the apparatus has been exempted. It is evident then that the requirement to seek a radio authorization for non-exempt apparatus is a "hook" that brings to the Minister of Industry for approval the applicant's proposed support structure (*e.g.* a tower). What is not evident is any similar hook where the proponent intends to use exempt apparatus as there is no requirement for a radio authorization in that case and no explicit requirement for an authorization for the support structure itself. This apparent omission takes on greater significance to the extent that licence exempt apparatus may become much more common in the provision of wireless services.[236] Similarly it is not apparent that the Minister's approval is required for the erection of a tower by a third party tower owner having no intention themselves to install, operate or possess radio apparatus.[237]

372. The Minister of Industry has no ability to make regulations of general application to radiocommunication, but the Minister of Industry does have frequent occasion to promulgate policies for which he/she would wish to secure compliance. The Minister of Industry therefore makes frequent use of the power to fix the terms and conditions of radio

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235 "The scope of the Minister's discretion under the *Radiocommunication Act* is broad." The Attorney General of Canada, Factum of the Appellant, Supreme Court of Canada, Court File No. 33041.

236 For example the Minister is considering making several bands available for licence-exempt use for the provision of 5G services. See: Consultation on Releasing Millimetre Wave Spectrum to Support 5G, SLPB-001-17, June 2017.

237 The Minister's procedures do purport to apply. See: Radiocommunication and Broadcasting Antenna Systems, CPC-2-0-03, Issue 5.

authorizations as an indirect means give effect to various policies, secure in the knowledge that non-compliance is an offence under the *Radiocommunication Act* that may result in severe penalties or revocation. Examples of such policies include spectrum aggregation limits, licence transfers, displacement of incumbents, antenna tower consultations, periodic provision of technical information, coordination requirements, provision of lawful intercept capability, research and development expenditure, deployment requirements, tower and site sharing, mandated roaming and annual reporting. The length of the list alone is testimony to the need for a more direct and explicit regulatory tool. And, similar to the situation previously cited with respect to support structures, the Minister of Industry is entirely without a regulatory hook for these or any other policies when it comes to those who would provide wireless services using licence exempt apparatus.

373. Essential to the effective and efficient functioning of decision-making structures governing the use of spectrum is having clarity in policy. In this regard, TELUS recommends that radiocommunication regulation have the same policy objectives as those that apply to other telecommunications. This can be accomplished by combining the radiocommunication legislative provisions with the *Telecommunications Act.* At present, there is a disconnect. While the CRTC *must* have regard to Canadian policy objectives set out in the *Telecommunications Act*,[238] the Minister of Industry, when acting under the *Radiocommunication Act,* is *empowered but not obliged* to consider those same objectives.[239]

374. Moreover, government direction regarding implementation of communications legislation should be consistent between the different Acts. In particular, radiocommunication should also be subject to the Policy Direction provided by Governor-in-Council to the CRTC on implementing the objectives found in the *Telecommunications Act*. [240] The Policy Direction requires that the CRTC "take a more market-based approach." TELUS agrees and encourages the Panel to recommend that the essence of the Policy Direction be enshrined

238 *Telecommunications Act,* s 47.
239 *Radiocommunication Act,* s 5(1.1).
240 *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives,*P.C. 2006-1534, December 14, 2006.

in new legislation governing telecommunications, including radiocommunication, noting the anomalous situation wherein currently the Minister of Industry is not required to follow the Policy Direction in the exercise of powers under the *Radiocommunication Act*.

375. Although the Minister of Industry has recognized the importance of efficient regulatory processes and reliance on market forces to the maximum extent possible,[241] he is not bound by these principles. For example, despite its own guidelines, the Minister imposed additional regulatory oversight in 2013 through the implementation of a spectrum licence transfer framework[242] that requires ISED review of all spectrum licence transfer requests. Since its introduction, the administratively burdensome review and approval process has brought into question whether Canada has a well-functioning secondary market for spectrum licences. TELUS recommends legislative change to ensure that radiocommunication regulation is carried out under the same principles as telecommunications regulation.[243]

5.2.3. ***Radiocommunication Regulation Should Rely on Market-Based Measures***

376. Radiocommunication legislation in Canada has not been comprehensively revised since the 1938 *Radio Act***.** The scheme of the *Radiocommunication Act* reflects the "command and control" mindset prevalent in an era when radiocommunication regulation was an exercise in imposing order on the emerging deployment and operation of a manageable number radio stations. The *Radiocommunication Act* is ill-suited to effectively governing radiocommunication in a decentralized environment of smart devices, dynamic spectrum

241 Spectrum Policy Framework for Canada, DGTP-001-07, June 2007. See s 4.4, "Enabling Guidelines", "Market forces should be relied upon to the maximum extent feasible", and "Regulatory measures, where required, should be minimally intrusive, efficient and effective". See also Study of Market-based Exclusive Spectrum Rights, McLean Foster & Co., August 31, 2007, including proposals to enable secondary markets for spectrum, regulatory independence, and periodic milestones to review progress.

242 Framework Relating to Transfers, Divisions and Subordinate Licensing of spectrum Licences for Commercial Mobile Spectrum, DGSO-003-13, June 2013.

243 Study of Market-based Exclusive Spectrum Rights, McLean Foster & Co., August 31, 2007. The Study was the subject of several Access to Information requests and was eventually released under that process with no announcement.

access and rapid spontaneous innovation and where the efficient functioning of markets demand new approaches to regulation.

377. TELUS encourages the Broadcasting and Telecommunications Legislative Review Panel to examine the recommendations of the 2006 Telecommunications Policy Review Panel with respect to Spectrum Policy and Regulation.[244] As the Panel noted: "[i]nternationally, there has been a trend among spectrum managers to move away from the traditional prescriptive models of spectrum assignment toward more flexible and market-oriented approaches." While the Panel allowed that "Canada has also been moving toward more flexible and market-oriented approaches to spectrum management" it qualified that this movement "has been tentative." TELUS contends that in the intervening period the movement to more flexible and market-oriented approaches in Canada has ground to a standstill if not regressed.

378. The current *Radiocommunication Act* establishes a regulatory regime that is largely concerned with obviating the potential for radio interference. The *Radiocommunication Act* is ill-suited to creating the flexibility and certainty required in a competitive environment characterized by massive investment and rampant innovation. Here again TELUS concurs with the Telecommunications Policy Review Panel and recommends legislative changes that will establish clear, concise policy objectives and regulation that supports the effective functioning of markets through the use of market-based mechanisms and the extension of tangible spectrum usage rights to licensees.[245]

379. The concept of spectrum users having anything akin to spectrum usage rights is entirely foreign to the command and control premise of the *Radiocommunication Act*. If new legislation is to result in effective spectrum regulation in an environment of rapid market-driven technological change, dynamic innovation, competition and intensive spectrum use, it must embrace the concept of spectrum usage rights and provide for remedies both regulatory and civil. So as not to limit the ability to embrace new regulatory models and

244 Telecommunications Policy Review Panel, Final Report, 2006, Chapter 5 Technical Regulation.
245 2006 Telecommunications Policy Review Panel Final Report, Recommendation 5-9.

recognizing that knowledge of how future technology and markets will evolve is imperfect, new legislation should afford the regulator sufficient flexibility to decide whether any given portion of the spectrum will be regulated as a commons, subject to managed and restricted access, as akin to private property or anything along the continuum.

380. Accordingly, in addition to the current provisions for the issuance of radio (apparatus) licences, spectrum licences and for the exemption from licensing, new legislation should provide for the issuance of class licences as well as device registration so as to better facilitate various "light regulation" options.

5.2.4. *The Demand for Spectrum Requires More Timely Spectrum Auctions*

381. Further, as the pace of change of technology development continues to accelerate, new demands for services in turn require new spectrum releases. The cadence of Canada's public consultation process and spectrum release plan has historically worked well. However, as the need for new spectrum releases is rapidly accelerating, the regulator should consider ways to fast track their processes for spectrum release in order to address increasing demand.

382. World-leading networks will enable Canada to meet the needs of its citizens and industries by providing the coverage, speed, capacity, reliability and ultra-low latency required for future applications such as artificial intelligence, smart cities, autonomous vehicles, innovative healthcare, emergency services, the IoT and many other complex applications being envisioned and developed by innovators across Canada. For Canada to truly fulfill its innovative potential and establish itself as a global innovation hub, it cannot happen without the timely and equitable access to spectrum.

383. At the heart of good policy must be a spectrum strategy based on a stable regulatory process that avoids political pressure to create the best possible opportunity for wireless deployment, resulting in the enrichment of Canadian society. To this end, the spectrum regulator should publish a five year work plan for spectrum management on an annual basis and report progress against the previous year's work plan.

5.2.5. *The Legislation Should be Amended to Promote Coordination and Predictability in Regulation*

384. Moreover, with the trend of looking to share spectrum bands among services, there will be an increased need to coordinate with other operators. Currently, there is an issue with the ISED database, whereby some required data is incomplete or inaccurate. A complete data set is needed to efficiently manage coordination issues and for future spectrum band planning. Beyond the accuracy and validity of site registration data comes the challenge of scale. As the number of licensed bands increases and with further network densification, the data set will grow accordingly. To better control interference and ensure effective coordination among various spectrum users, TELUS recommends that the spectrum regulator maintain technical and administrative data that is readily accessible to the public and reassess the scalability of its existing systems to accommodate the order of magnitude growth for site data and spectrum licences that is anticipated in the near term.

5.3. <u>The CRTC Should Be Given Specific, Circumscribed Regulatory Powers</u>

385. In addition to providing a clear set of objectives to provide better guidance to the regulator, TELUS recommends that the *Telecommunications Act* be modified such that services are by default forborne from rate regulation and to provide the CRTC with suitable legislative tools to engage in the types of regulation that have come to dominate its mandate, and that such regulation occurs in a predictable manner, in the form intended by Parliament.

386. The telecommunications sector was once governed primarily by tariff regulation. The legislation provides a detailed scheme for regulating in this manner. However, as tariff regulation has receded, it has been replaced by thorough and invasive regulation through the operation of sections 24 and 24.1 of the *Telecommunications Act*. These sections are catch-all clauses and are insufficiently detailed to enable principled regulation of the scope seen today. Indeed, in the broadcasting context, the CRTC's reliance (or proposed reliance) on basket clause powers has been determined to be invalid by the Supreme Court of Canada.[246] TELUS' recommendations in this section will help the CRTC to avoid crafting

[246] See R*eference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489

invalid regulation as well as the significant disruption and uncertainty occasioned by litigation.

5.3.1. *Retail Telecommunications Services Are Now Mostly Provided Outside of the CRTC Pre-approval Regime*

387. Most retail telecommunications services are now provided pursuant to a forbearance order. For example, mobile wireless voice and data services,[247] retail internet services,[248] and long distance ("toll") services are all forborne on a national basis[249] and have been since the late 1990s (at the latest). Retail local telephone services provided by non-dominant providers to end-users are forborne nationally.[250] Local telephone services provided by the local incumbent exchange carriers ("ILECs") are forborne on an exchange-by-exchange basis rather than nationally.[251] The large majority of local and access revenues are now forborne – 83% in 2017.[252] Thus, the vast majority of retail services are provided without CRTC pre-approval of tariffs. Section 25 accordingly has little practical application.

388. While forbearance is prevalent, forbearance does not mean "not regulated." Forbearance powers do not apply to every section of the *Telecommunications Act*,[253] for where applicable, the *Telecommunications Act* expressly allows for partial and conditional forbearance.[254] As a matter of practice, forbearance is virtually always partial or conditional. In this regard, it is standard practice for the CRTC to retain powers to impose conditions pursuant to section 24 (Conditions of Service), and to assess allegations of

247 Forbearance of this services beginning with *Regulation of wireless services*, Telecom Decision CRTC 94-15, extended to all carriers over time, final such decision Telecom Order CRTC 99-991.
248 Extended to all carriers by *Forebearance from retail internet services,* Telecom Order CRTC 99-592.
249 Forbearance for dominant carriers in *Forbearance - Services provided by non-dominant Canadian carriers* Telecom Decision CRTC 95-19; extended to ILECs in *Forbearance – Regulation of toll services provided by incumbent telephone companies*, Telecom Decision CRTC 97-19.
250 *Local competition,* Telecom Decision CRTC 97-8.
251 *Forbearance from the regulation of retail local exchange services,* Telecom Decision CRTC 2006-15, as varied by Order in Council P.C. 2007-532.
252 2018 CRTC Communications Monitoring Report, Table 4.1 (Percentage of telecommunications revenues generated by forborne services).
253 Section 34(1): forbearance orders may apply only to section 24, section 25, section 27, section 29, and section 31 powers.
254 Section 34(1).

unjust discrimination under section 27(2), among other sections. In practice, these sections have been used to craft pervasive and onerous regulation applicable to "forborne" services.

389. By way of illustration, consider the regulation of retail mobile wireless services, which since 2013 have been governed by a "Wireless Code."[255] The Wireless Code regulates most aspects of the provision of retail wireless services, except for price, and even price is greatly affected by the contract term limit. To illustrate the breadth of the obligations, the Code

- effectively limits contracts to two years in length;
- institutes caps on data overages or roaming charge overages;
- requires that devices be provided "unlocked," or be unlocked without charge;
- mandates the provision of a trial period;
- limits the collection of early termination fees;
- requires the provision of a permanent copy of the contract, including in paper (at the consumer's choice); and
- requires numerous other contract form requirements, including the requirement to provide a "critical information summary" to prospective customers.

390. The Wireless Code is an example of a comprehensive, detailed regulatory regime. It was created under the authority of section 24 of the *Telecommunications Act.*[256] It applies to services that had been forborne for many years.

391. The CRTC is currently consulting on a potential ISP Code,[257] which it proposes be applicable to the large fixed wireline Internet service providers and which would seek to match many of the *Wireless Code* requirements, and would also rely on the apparent power of section 24 of the *Telecommunications Act* for imposition.[258] Regardless of what the CRTC elects to do with respect to this proposed code, retail internet services are already

255 First established in *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271. Revised code established in *Review of the Wireless Code*, Telecom Regulatory Policy CRTC 2017-200.
256 See, for example, *Review of the Wireless Code*, Telecom Regulatory Policy CRTC 2017-200, para 451.
257 *Call for comments – Proceeding to establish a mandatory code for Internet services*, Telecom Notice of Consultation CRTC 2018-422.
258 *Ibid*, para 34.

subject to a variety of regulatory requirements pursuant to earlier rulings, including contract clarity and bill management tool measures,[259] as well as requirements related to management of traffic and differential pricing.[260]

392. Forborne local telephone services, now being rapidly displaced by mobile wireless services, are subject to a host of service conditions imposed via section 24 of the *Telecommunications Act*, including requirements related to:

- emergency services (e.g. 9-1-1 service);
- message relay service ("MRS");
- access to long distance networks of the customer's choice;
- various customer privacy safeguards;
- the customer transfer regime;
- provision of alternative format billing;
- provision on request of specific service information; and
- other requirements.[261]

5.3.2. *Regulation of the Industry No Longer Matches the Legislative Structure*

393. The foregoing is not an exhaustive list but is illustrative of the scope of retail regulation in the telecommunications industry. What has happened, as explained above, is that the retention of section 24 powers, in conditional and partial forbearance rulings, has led to regulation with little guidance or constraint from the empowering legislation. Section 24 simply states that the "[t]he offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission." The CRTC need do little more than satisfy itself that something is a "good idea" before imposing it as a regulatory requirement. While the CRTC must ensure consistency with policy objectives

259 *Modern telecommunications services – The path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496.

260 *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657; *Framework for assessing the differential pricing practices of Internet service providers*, Telecom Regulatory Policy CRTC 2017-104.

261 *Forbearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15, as varied by Order in Council P.C. 2007-532.

(as well as ensure that the Policy Direction is applied), these are sufficiently vague, as noted elsewhere in this submission, so as to allow for almost any desired outcome. Consequently, telecommunications policy is subject to far-reaching regulatory intervention, but the regulatory authority has few constraints on its power to set policy.

394. Rather than simply delegating authority to the CRTC to regulate telecommunications in any manner it sees fit, Parliament should provide the CRTC with a robust set of specific tools allowing it to achieve legitimate regulatory goals. Such tools would ensure that telecommunications regulation unfolds in a predictable manner, in the form intended by Parliament.

395. To this end, TELUS proposes a number of measures. First, TELUS proposes that the *Telecommunications Act* be amended such that full, tariff-based (economic) regulation be permitted only where it is demonstrated that the provider possesses significant market power. This was proposed in the 2006 Telecommunications Policy Review Panel Final Report,[262]and it continues to be sage policy in the current era characterized by widespread forbearance (much more so than existed in 2006, prior to the forbearance of local telephone services provided by incumbent local exchange carriers). As noted above, most services provided to most customers are now forborne. The legislation should better reflect that economic regulation is the exception rather than the rule.[263]

396. Second, TELUS recommends several amendments to existing sections 24 and 24.1.

397. In this regard, TELUS recommends that a new combined section 24 include requirements that track the new Canadian telecommunications policy objectives discussed in Section 5.1. TELUS also recommends the elimination of the distinction between carriers and non-carriers, which exists in the current legislation by virtue of the language respectively applying under sections 24 and 24.1. In particular, TELUS recommends that the new

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262 2006 Telecommunications Policy Review Panel Final Report, Recommendation 3-3.

263 Wholesale regulation, which is the more common form of economic regulation, can continue on the same basis: if the CRTC determines that there is significant market power, it may regulate the rates and other terms and conditions on which wholesale services are provided.

section specify that the CRTC's powers thereunder apply to telecommunications services provided by any person, including a Canadian carrier.

398. Additionally, the new provision should be limited to the specific measures contemplated. The current section 24.1, though more specific than section 24, nevertheless begins with a general power and then identifies particular types of measures as being included ("any condition, including those related to …"). TELUS recommends that the reference to "any condition" be eliminated. If a general grant of power for residual matters is required, it should be addressed at the end, and should denote that it is for regulating other similar matters.

399. Finally, TELUS proposes a change that would reduce the instances of asymmetric regulation, consistent with TELUS' proposed principles 6 and 7. If the CRTC determines social regulatory measures are required, there is no principled basis to limit their application to only one type of provider. For example, it would not make sense to extend an ISP code only to "large providers," as the CRTC has recently proposed to do.[264] If regulatory requirements are deemed necessary in the absence of significant market power, then the size or type of provider should not matter, since the implicit finding is that some form of protection is required that the market will not deliver.

400. With the amendments proposed below, the *Telecommunications Act* will provide the CRTC with a set refreshed tools for the regulatory oversight required for the modern telecommunications services provided to the Canadian public.

5.3.3. ***Recommended Legislative Changes***

401. As a means of addressing these above-noted concerns, TELUS proposes the following specific legislative changes.

402. In place of section 25, TELUS proposes the following:

264 See *Call for Comments – Proceeding to establish a mandatory code for Internet services*, Telecom Notice of Consultation CRTC 2018-422, Appendix 1, Internet Code Working Document, Application.

> 25 (1) Where the Commission finds that a telecommunications service provider possesses significant market power in respect of a telecommunications service, the Commission may prohibit the telecommunications service provider from providing the telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.[265]

403. In place of section 24 and section 24.1, TELUS proposes the following:

> 24 (1) The offering and provision of any telecommunications service by any person are subject to conditions imposed by the Commission relating to
> (a) service terms and conditions in contracts with users of telecommunications services;
> (b) protection of the privacy of those users;
> (c) access to emergency services;
> (d) access to telecommunications services by persons with disabilities; and
> (e) limiting public nuisance through telecommunications.
>
> 24(2) Conditions imposed pursuant to section 24(1) shall be imposed on all persons who offer or provide the service, unless the Commission determines, as a question of fact, that it would be consistent with the telecommunications policy objectives and the purpose of the condition to exempt a telecommunications service provider or class of telecommunications service providers from the condition.

5.4. Symmetrical Regulation for All Providers of Communications Services

404. TELUS recommends that regulation, when required, be imposed symmetrically to the greatest extent possible.

405. Symmetrical treatment under the *Broadcasting Act* is discussed at length in Section 3 of this submission in which TELUS proposes that the Canadian broadcasting system should formally acknowledge a "foreign" element in the system and that this element should also have some obligations towards Canadian cultural policy goals commensurate with its access to the Canadian market. In parallel, the private element of the Canadian broadcasting system should be provided the flexibility to seek commercial success both globally and domestically and no longer be subject to as many prescriptive rules that put Canadian companies at a disadvantage in the global digital content market place.

[265] Subsections 25(2) through 25(4) should remain in place.

406. Symmetrical treatment is also important within the context of the *Telecommunications Act.* This recommendation is consistent with TELUS' guiding principle 6 for telecommunications recommendations, which states that social regulation and technical regulation, where required, should be applied symmetrically and should be applied through laws of general application, as distinct from sector-specific regulation, whenever possible. It is also consistent with guiding principle 7, economic regulation must be imposed symmetrically so as not to distort the efficient choice of either service provider or technological platform.

407. Many of the recommendations in this submission implicitly promote symmetric regulation. With the widespread adoption of broadband internet access, services can be provided directly to end-users by non-traditional entities. Many "over the top" applications are provided by entities that do not own or operate facilities in Canada. This development creates challenges for communications regulation policy makers and enforcers, as the entities they have traditionally regulated are now competing with other types of entities, often with limited connection to Canada. In particular, policy makers have struggled to determine how to address digital giants, like Facebook, Amazon, Google, and Netflix.

5.4.1. *All Telecommunications Service Providers Should be Subject to the Same Rules*

408. Historically, telecommunications regulatory burdens have been borne disproportionately by the incumbent local exchange carriers and, to a lesser extent, cable carriers, through the form of tariff regulation and indirect regulation of third parties. Industry participants should be regulated consistently, and historical asymmetries should be removed. Even as prescriptive tariff regulation has faded in prominence, these entities were tasked with the indirect enforcement of CRTC regulations. Prior to the enactment of section 24.1 of the *Telecommunications Act*, the CRTC did not have the authority to directly regulate non-carrier service providers. To ensure that regulatory policies were fully implemented for consumers and other stakeholders, the CRTC imposed many obligations indirectly on non-carriers through carriers, that were obligated to include in service contracts terms and conditions that effectively bound the non-carrier to the substance of applicable CRTC decisions.

409. Following the introduction of section 24.1, the CRTC eventually determined that most such safeguards would be imposed directly on non-carriers.[266] However, the CRTC declined to remove the requirement that these obligations be included in service contracts with underlying carriers.[267] Moreover, the CRTC charged carriers with monitoring and reporting to the CRTC non-compliance of non-carriers.[268] Carriers were effectively conscripted into a regulatory enforcement role, in addition to the substantive obligations that apply to other industry players. This form of asymmetric regulation should be removed.

410. A further form of asymmetric regulation is the provision of what are telecommunications services by OTT players. Regulation of OTT providers not based in Canada raises a number of issues, including the CRTC's jurisdiction to regulate these entities if it chooses to, which requires further study. However, consistent with TELUS' guiding principle 6, that economic regulation, where required, should be applied symmetrically so as not to distort the efficient choice of either service provider or technological platform, and consistent with TELUS' proposed guideline (a) (iv) that the CRTC, when relying on regulation, should ensure technological and competitive neutrality to the greatest extent possible. The CRTC should consider telecommunications services by OTT players when conducting relevant market analysis in its inquiries in order to apply symmetric regulation to all participants in the market

411. Additionally, many of the policy questions arising out of the operations of the aforementioned digital giants and other similar lesser players revolve around privacy and security. As noted elsewhere in this submission, these issues are best addressed through laws of general application, such as PIPEDA. To the extent that the CRTC retains powers

266 *Application of regulatory obligations directly to non-carriers offering and providing telecommunications services*, Telecommunications Regulatory Policy CRTC 2017-11.

267 *Application of regulatory obligations directly to non-carriers offering and providing telecommunications services*, Telecommunications Regulatory Policy CRTC 2017-11, para 24, retaining the requirements in a somewhat modified form.

268 See *Application of regulatory obligations directly to non-carriers offering and providing telecommunications services*, Telecommunications Regulatory Policy CRTC 2017-11, para 25 requiring monitoring of a registration requirement, and para 26, indicating that other obligations do not require monitoring or enforcement by carriers, but require the reporting "without delay and known or suspected non-compliance to the Commission."

to address privacy and security in the telecommunications sector, it should only use such powers to address industry-specific issues. General issues, (*e.g.*, tracking of information online, the use of location data from apps, etc.), ought to be addressed generally. Although these issues may have a connection to telecommunications, they are not telecommunications- or broadcasting-specific.

5.5. Subsection 27(2) of the Telecommunications Act Should Be Retained and Expanded to Apply to All Telecommunications Service Providers

412. TELUS recommends that the *Telecommunications Act* provision regarding unjust discrimination (subsection 27(2)) be retained, with minor changes, to ensure that the provision applies to all telecommunications service providers. More specifically, subsection 27(2) should be amended to enable the CRTC to consider allegations concerning the offering of telecommunications services by persons other than "Canadian carriers." As noted elsewhere in this submission, the rationale for this distinction between varying classes of providers (carriers vs non-carriers) is no longer relevant and should be discarded. From an end-customer point of view, it does not matter whether unjust discrimination is at the hands of an owner of transmission facility, a provider who operates only "exempt transmission apparatus," a reseller, or any other type of provider. What matters is the outcome.

413. This core provision has allowed for principled but flexible regulation. In virtually all its forbearance determinations, the CRTC has refrained from forbearing from its powers under subsection 27(2). Accordingly, it has been able to address specific allegations of discriminatory conduct on a case-by-case basis. The structure of this provision has given it the flexibility to be useful in a dynamic environment of forbearance, even though it was a monopoly-era creation.

414. TELUS recommends that section 27(2) remain in the governing telecommunications legislation. TELUS recommends that it be modified to apply to all telecommunications service providers, rather than just carriers, to address the gap addressed above. This is consistent with the comments elsewhere in this submission that regulation should be

applied symmetrically to all providers of telecommunications services, not just those who own or operate certain types of equipment.

5.5.1. *Recommended Legislative Changes*

> 27(2) No telecommunications service provider shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

5.6. Support Regulatory Independence By Eliminating Cabinet Appeals

415. The Governor in Council's power to vary, rescind or refer back CRTC decisions should be repealed.

416. The current legislation does not strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way.

417. TELUS has commissioned Professor Richard Schultz, Professor of Political Science at McGill University in Montreal, to provide the Legislative Review Panel with an historical overview of the Cabinet appeals power and the need for reform. In his report entitled "Controlling the Habit: A Paper Submitted in Support of the TELUS Submission to the Broadcasting and Telecommunications Legislative Review Panel," Professor Schultz provides a retrospective view of various criticisms of this power, most notably its lack of transparency, the fact that political appeals may fail to serve their fundamental purpose of providing policy direction to a regulatory agency because they may not actually result in any real clarification of the policy of the government, the potential to change public policy retroactively with no notice, and the undermining of the integrity of the administrative processes of the independent regulatory agency. Professor Schultz's expert report may be found in Appendix 9 to TELUS' submission.

418. In addition to Professor Schultz's cogent analysis, as explained by the Telecommunications Policy Review Panel in its 2006 Final Report, although Federal Cabinet has used its review power relatively infrequently since 1993, there have been frequent petitions to use it by

parties who were dissatisfied with CRTC decisions.[269] As the Panel observed, each time a petition to review a CRTC decision is filed, significant resources are consumed in considering these petitions, uncertainty is created and certain constituents may be at a disadvantage to participate in the process.

419. Clarifying the statutory objectives as recommended by TELUS, coupled with a policy direction power would go a long way to establishing the appropriate policy balance between the government and the regulatory agency, and if these changes are made, TELUS recommends removing the power granted to the government to review and vary or rescind CRTC regulatory decisions under both the *Broadcasting Act* and the *Telecommunications Act*.

420. Although the preceding commentary supports TELUS's submission that the appeal provision should be removed, there is an alternative that TELUS would support, in the event that either the Broadcasting and Telecommunications Legislative Review Panel and/or the Government of Canada do not support such a recommendation. This is a proposal that was made in the original *Telecommunications Act (Bill C-43)*, which was given First Reading, March 22, 1977. The paper proposed that, while the power to vary or rescind a decision should be abolished, the power to send back decisions for review, similar to the existing power in the *Broadcasting Act*, should be continued subject to both a sixty day time limit and the requirement that any request for a review be accompanied by a justification based on policy issues or, alternatively, a policy direction pertinent to the decision.

5.7. <u>The Organization of the CRTC Should Be Revised to Separate Advocacy, Enforcement and Adjudicative (review) Functions</u>

421. As a further recommendation for institutional reform, TELUS recommends that Parliament should consider establishing an arm's length tribunal to carry out adjudicative functions, including applications to review and vary CRTC decisions and hearings to determine

269 For a comprehensive overview of the Governor in Council's use of this power, see *Executive Control of Administrative Action: 'Cabinet Appeals' and the CRTC*, Michael Ryan, MHRyan Law, April 14, 2014, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403402

whether to impose large administrative monetary penalties that exceed a monetary threshold (or where the tribunal grants leave). While studying the option of a fully separate tribunal, an interim form of tribunal could reside within the CRTC but rely on walled staff and legal counsel as appropriate.

422. At present, the CRTC acts as policymaker, advocate, prosecutor, and adjudicator. This creates a reasonable apprehension of bias that can be solved through structural separation. A similar precedent already exists in the separation of the Competition Bureau from the Competition Tribunal. The CRTC may already take some measures on a voluntary basis to separate its various functions. However, this legislative review process affords Parliament the opportunity to codify existing best practices and to conduct a thorough review of the CRTC's practices as they relate to its mandate, which has been modified over time and may well change again through this process.

423. The regulatory structure set up by the *Telecommunications Act* creates a reasonable apprehension of institutional bias in at least two instances. First, in the case of applications to review and vary CRTC decisions, the same Commissioners and CRTC staff that contributed to and decided a decision under review are tasked with adjudicating an internal appeal of that decision. Second, in the cases of administrative monetary penalties levied for breaches of the *Telecommunications Act*, the same Commissioners and CRTC staff are able to both investigate and prosecute alleged breaches, to adjudicate whether a breach has occurred, and to determine the appropriate remedy, if any. Both of these cases violate the maxim "*nemo judex in sua causa*"—nobody should be a judge in his own case. While overlapping jurisdiction in violation of administrative law principles may be permissible when authorized by statute, subject to constraints of the constitution, it is nevertheless problematic and can readily be corrected through structural separation of roles within the CRTC.

424. While there is no similar structure in the *Broadcasting Act* that raises the same level of concern in regards to institutional bias, TELUS would urge the Panel to ensure that any

amendments proposed for the *Broadcasting Act* are in keeping with the principles set out below.

5.7.1. *Administrative Law and Institutional Bias*

425. All administrative regulatory bodies owe a duty of fairness to the parties that they regulate.[270] While the content of the duty of fairness changes depending on a number of factors, "an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness, the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias."[271]

426. Bias, or an appearance of bias, can occur both on an individual level (for example, if a decision-maker has a pecuniary interest in the outcome of proceedings) and on an institutional level. With respect to institutional bias, the Supreme Court of Canada has held that "whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met."[272] The test for institutional impartiality is the same as the test for institutional independence: "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude."[273]

427. Institutional bias can occur where administrative officials perform overlapping functions. For example, in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, the Supreme Court of Canada addressed the institutional impartiality of the Quebec Régie des permis d'alcool. The Court ruled that a structural overlap of roles created a reasonable apprehension of bias in two respects. First, in-house counsel to the Régie both made submissions to the directors *and* advised on the appropriate disposition of the case. Second,

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270 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at para 21 ["Newfoundland Telephone"]. See also Charkaoui *v*. Canada (Citizenship and Immigration), 2007 SCC 9 at para 32.

271 *Newfoundland Telephone* at para 21.

272 *R. v. Lippé*, [1991] 2 S.C.R. 114 at para 51 ["*Lippé*"].

273 *Lippé* at para 57, citing *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, adapting the test for institutional independence (as opposed to impartiality) set out in *R. v. Valente*, [1985] 2 S.C.R. 673.

the Chairman of the Régie was authorized to initiate an investigation, decide to hold a hearing, and hear the case him or herself, and directors may have both made the decision to initiate an investigation and adjudicated the same case on the merits.[274]

428. That said, the mere existence of a reasonable apprehension of bias arising as a result of overlapping functions will not always give rise to a reasonable apprehension of bias. As the Supreme Court of Canada has held, "Some boards will have a function that is investigative, prosecutorial and adjudicative. It is only boards with these three powers that can be expected to regulate adequately complex or monopolistic industries that supply essential services."[275] Instead, the degree to which a reasonable apprehension of bias will violate principles of administrative law will depend upon the role of the tribunal in any given proceeding:

> Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient […] Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.[276]

274 *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at paras. 54-60.

275 *Newfoundland Telephone* at para 18. See also *Ocean Port* at para 41: "The overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role."

276 *Newfoundland Telephone* at para 27. See also *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 at para 22: "To say that tribunals span the divide between the executive and the judicial branches of government is not to imply that there are only two types of tribunals — those that are quasi-judicial and require the full panoply of procedural protections, and those that are quasi-executive and require much less. A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain government policies are furthered."

429. Finally, although institutional bias is never desirable, courts will not ordinarily intervene where the institutional bias is authorized by statute. The Supreme Court of Canada made clear in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* that "absent constitutional constraints, it is always open to the legislature to authorize an overlapping of functions that would otherwise contravene the rule against bias."[277] Thus, to the extent the *Telecommunications Act* can be read to permit institutional bias, legislative intervention is of paramount importance, precisely because courts will not ordinarily intervene.[278]

5.7.2. *Institutional Bias, the CRTC, and the Telecommunications Act*

430. As the jurisprudence above demonstrates, administrative decisionmakers can fill multiple roles, and so does the CRTC. At times, it is primarily a policymaking body, soliciting views of a wide range of stakeholders to formulate policy that fulfils the objectives of the *Telecommunications Act.* Institutional bias in these proceedings—though still troubling—is nevertheless of a lesser concern, especially with respect to the principles of administrative law. At other times, however, the Commission fills a more adjudicative role. Examples of such occasions are when the CRTC hears applications to review and vary its own decisions, when it considers imposing administrative monetary penalties, and when it adjudicates disputes *inter partes* under Part 1 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*.[279]

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277 Ocean Port at para 42. See also Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour), 2003 SCC 29 at para 117.

278 See also Brosseau v. Alberta (Securities Commission) [1989] 1 S.C.R. 301. In that case, the Supreme Court of Canada addressed an allegation of institutional bias with respect to the Alberta Securities Commission, where the Chairman participated in the investigation of a regulated party and later in the adjudication of the hearing of that party. The Court ruled at paras 20-21 that "[o]ne exception to the 'nemo judex' principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue." Thus, the Court determined that it would only disqualify the Commission from hearing the matter if the Commission exceeded the scope of its statutory authority. In turn, the Court held that "[i]t is clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that certain activities which might otherwise be considered 'biased' form an integral part of its operations." Accordingly, the enabling legislation of the Commission ousted the common law requirement of institutional impartiality.

279 SOR/2010-277.

431. To be clear, there should be no problem with the CRTC, as an institution, undertaking overlapping roles. And indeed, there is not necessarily any need to create a new commission to fill the CRTC's adjudicative function. However, the *Telecommunications Act*, at present, provides insufficient structural separation within the CRTC to avoid institutional bias. An appropriate remedy would be to ensure that these functions, while residing within the CRTC, are sufficiently structurally separate and independent from each other to avoid a reasonable apprehension of bias.

5.7.3. *Section 62 Applications to Review and Vary CRTC Decisions*

432. Section 62 of the *Telecommunications Act* provides that "Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision" (emphasis added). This provision is treated by the CRTC as an internal appeal. The relevant CRTC guidelines provide as follows:

> In order for the Commission to exercise its discretion pursuant to section 62 of the Act, applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to
>
> (i) an error in law or in fact;
>
> (ii) a fundamental change in circumstances or facts since the decision;
>
> (iii) a failure to consider a basic principle which had been raised in the original proceeding; or
>
> (iv) a new principle which has arisen as a result of the decision.[280]

433. The problem at present with the exercise of this power is that applications to review and vary a CRTC decision further to an allegation of an error of fact or law are *potentially heard by the very commissioners that decided the matter under review*. In fact, CRTC by-laws at present actually ***prevent*** such applications from being heard by only a subcommittee of commissioners. Specifically, By-law 10 establishes a Telecommunications Committee,

280 *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, at para 5.

comprised of all members of the Commission and delegates to the Telecommunications Committee, with a quorum of three members, to "inquire into and dispose of" certain applications. However, By-law 10 excludes from this delegation applications that "seek to stay or review or vary a Commission decision pursuant to section 62 of the *Telecommunications Act*."[281]

434. This feature of the *Telecommunications Act* also differs from the telecommunications administrative structure set out in the *National Transportation Act, 1967*, which applied to proceedings before the Canadian Transport Commission ("CTC"), including formerly telecommunications proceedings, until jurisdiction was moved to the CRTC for telecommunications in 1976. That act provided that where an operator objected to an order, rule or direction made by a committee of the CTC, "the Commission shall, otherwise than by that committee of the Commission, review the order, rule or direction … and shall confirm, rescind, change, alter or vary the order, rule or direction or re-hear the matter thereof."[282] No such language is found within the *Telecommunications Act*.

435. At present, however, the *Telecommunications Act* permits Commissioners to sit in appeal of their own decisions and further makes no provision for the structural separation of staff that advise the Commissioners on these matters. This institutional structure is analogous to the institutional structures set out in the case law above and raises a reasonable apprehension of bias. Precisely because certain elements of institutional bias may be permissible where authorized by statute, this shortcoming should be corrected by legislative amendment.

5.7.4. *Proceedings to Impose Administrative Monetary Penalties*

436. The *Telecommunications Act* vests in the Commission the power to impose administrative monetary penalties under two distinct regimes.

281 By-Law No. 10, cl. (c)(3).
282 *National Transportation Act, 1967*, S.C. 1966-67, c. 69, s. 17(1), repealed S.C. 1987, c. 34, s.305.

437. First, sections 72.001 to 72.0093 of the *Telecommunications Act* create a regime whereby the CRTC can impose administrative monetary penalties for breaches of most sections of the *Telecommunications Act* and regulations or decisions made pursuant to the *Telecommunications Act*. The maximum such penalty the CRTC may impose (other than against an individual) is $10,000,000 for a first contravention and $15,000,000 for a second contravention.[283] The *Telecommunications Act* sets out the steps pursuant to which a penalty can be imposed. The CRTC may designate a person to issue a notice of violation.[284] The party receiving the notice then has 30 days to either pay the penalty or make representations with respect to the violation and the penalty.[285] The CRTC then decides on a balance of probabilities whether the party committed the violation and whether to impose the penalty.[286] Additionally, the CRTC may impose a penalty in the course of a proceeding where it finds that there has been a contravention of an applicable section.[287]

438. Second, sections 72.01 to 72.13 create a similar regime whereby the CRTC can impose administrative monetary penalties for breaches of regulations with respect to unsolicited telecommunications. The maximum such penalty the CRTC may impose (other than against an individual) is $15,000.[288] The *Act* then sets out a similar scheme under which a designate of the CRTC will issue a notice of violation, a party may make representations and the CRTC decides, on a balance of probabilities if a violation has occurred and whether to impose the penalty.[289]

5.7.4.1. The Institutional Framework Should Be Amended to Be Consistent with More Recently Updated Federal Frameworks

439. The transparency of the institutional framework with respect to the potential imposition of a $10 million general administrative monetary penalty is out of step and out of date when compared with similar federal schemes. For example, under the *Competition Act*, the

283 S.72.001.
284 S.72.005(1).
285 S. 72.005(2)(b).
286 S.72.007(2).
287 S.72.003.
288 S.72.01.
289 Ss.72.07-72.08.

deceptive marketing practices regime includes liability for an administrative monetary penalty against a corporation for a first violation of up to $10 million.[290] In contrast with the *Telecommunications Act* model, the *Competition Act* forum for the determination of liability uses an optional combination of the Competition Tribunal, the Federal Court or the superior court of a province.[291] The Competition Tribunal consists of a combination of judges from the Federal Court and subject matter experts.[292]

440. The *Competition Act* is a relevant basis for comparison since it has been applied in the telecommunications context. For example, the Competition Tribunal approved of an administrative monetary penalty of $10 million imposed against Bell Canada entities where the Competition Commissioner had concluded that marketing representations created the general impression that consumers need only pay the advertised monthly price plus applicable taxes, fees imposed by government on consumers, and optional fees for the services in question, when in fact consumers were not able to purchase those services at the advertised prices.[293] Another example is the decision of Justice Marrocco imposing an administrative monetary penalty in the Chatr wireless case.[294] TELUS has been the subject of consent agreements filed with the Competition Tribunal.[295]

441. The Competition Tribunal is a quasi-judicial body which has its own rules of procedure that include document discovery on the basis of relevance, which is a fitting standard for the imposition of a $10 million administrative monetary penalty.[296]

442. By contrast with the *Competition Act* model, the *Telecommunications Act* monetary penalty regimes provide no structural separation with respect to the CRTC's investigative, prosecutorial, and adjudicative roles. There is no legislative provision that the same

290 *Competition Act,* Section 74.1 (1) (c).
291 *Competition Act,* 74.09.
292 Competition Tribunal Act (R.S.C., 1985, c. 19 (2nd Supp.)) section 3(2).
293 https://www.ct-tc.gc.ca/CMFiles/CT-2011-005_Consent%20Agreement_1_45_6-28-2011_7559.pdf.
294 Canada (Commissioner of Competition) v. Chatr Wireless Inc. (2014), 2014 CarswellOnt 1961, 238 A.C.W.S. (3d) 334, 2014 ONSC 1146 (Ont. S.C.J.).
295 https://www.ct-tc.gc.ca/CMFiles/CT-2015-015_Registered%20Consent%20Agreement_2_38_12-30-2015_9250.pdf.
296 Competition Tribunal Rules, SOR/2008-141 section 60(2)(a).

Commission staff do not investigate, issue notices of violation, and advise the Commissioners on whether or not to impose a penalty after reviewing submissions from a party served with a notice of violation (although presumably this does not occur as a matter of good practice). While the legislation contemplates that the CRTC may designate persons with authority to issue notices of violations,[297] it does not express any direction on the degree of independence such persons must have from the CRTC. Whatever independence exists is left for the CRTC to establish voluntarily. Moreover, we note that in the case of general administrative monetary penalties, the use of a notice of violation process is currently optional for the CRTC.[298] As such, whatever institutional separation may be implied in the current legislation in respect of notices of violation would not be extended to penalties assessed through other processes, such as in the course of a CRTC proceeding.

443. Furthermore, as presently constituted, the Chairman and Chief Executive Officer of the Commission could commence an investigation against a party, determine that a notice of violation should be issued, and then potentially adjudicate whether or not to impose a penalty. This is an obvious potential conflict of interest and again should be remedied by legislative amendment. By way of contrast with the *Competition Act* model, the CRTC procedures in relation to administrative monetary penalties are not subject to formal rules of procedure but rather the subject of comment in a guideline.[299]

5.7.4.2. A Separate Tribunal Is Most Needed for Large Penalties

444. As noted above, the Supreme Court of Canada in the *Ocean Port* decision has permitted overlapping jurisdictions in the context of enforcement of administrative schemes.[300] Indeed, with respect to administrative monetary penalties *at the lower end* of the monetary scale, there is academic support for an integrated model such as the legislative scheme in the *Telecommunications Act*. At this lower level, the advantages of integration include

297 *Telecommunications Act,* s 72.004.
298 *Telecommunications Act,* s 72.003.
299 https://crtc.gc.ca/eng/archive/2015/2015-111.pdf.
300 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch) 2001),* 2001 CarswellBC 1877, 204 D.L.R. (4th) 33, [2001] 2 S.C.R. 781 (S.C.C.), remitted (2002), 2002 CarswellBC 1068, 213 D.L.R. (4th) 273, 40 Admin. L.R. (3d) 103 (B.C. C.A.), most recently cited *in Walter v. British Columbia (Attorney General)*2018 CarswellBC 2068, 2.

reduction of transaction costs, specialization, and fast track intervention.[301] However, in *Ocean Port*, the issue was a two day licence suspension, a far cry from a $10 million dollar penalty. The insertion of multi-million dollar administrative monetary penalties changes the *Ocean Port* analysis, as these very large administrative monetary penalties were not around when *Ocean Port* was argued.

445. A formal separation of powers for the higher level of administrative monetary penalties has academic and judicial support. An analysis prepared by the Osborne Report for the Ontario Securities Commission (the "OSC") suggests that independence of the prosecution branch is a prudent principle when the stakes are higher. The Osborne Report strongly advised the OSC to take steps to separate its adjudicative function from the OSC. While the analysis specific to the OSC, one of the major factors cited was the increase in penalties, such as the $1,000,000 administrative monetary penalty.

> We are satisfied that the nature of the apprehension of bias has become sufficiently acute as to not only undermine the Commission's adjudicative process, but also the integrity of the Commission as a whole among the many constituencies that we interviewed. Matters of institutional loyalty, the involvement of the Chair in the major cases, the increased penalties, the sense that the "cards are stacked against them", the home-court advantage, the lengthy criminal law-like trials, and the Commission's aggressive enforcement stance, which likely will only increase over time, all combine to make a compelling case for a separate adjudicative body.[302]

446. While an integrated model may have some benefits, it also has costs. Academics studying the issue have written:

> We have identified the relevant benefits and costs that should be considered when designing investigation and prosecution processes and structures. As regards benefits, we have focused on the reduction of transaction costs, the gains from specialisation, the possibility of fast track interventions, and the advantages of

301 Nuno Garoupa, Anthony Ogus and Andrew Sanders, "The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?" (2011), 70:1 Cambridge L.J. 229 at 253-255.

302 Hon. C.A. Osborne, D.J. Mullan and B. Finlay, "Report of the Fairness Committee to the Ontario Securities Commission" (March 5, 2004), at p. 32.

> "monopoly power" in the context of negotiated compliance. With respect to costs, we have discussed error costs, the consequences of weak accountability, and the problems posed by behavioural effects.[303]

447. Scholars such as Justice Richard Posner have identified the potential for an agency to have some bias in assessing penalties that may justify the agency's own existence. Agencies have a statutory goal or agenda, such as preventing the deception of consumers. A sector may change with time such that the agency in question ought to play a less intrusive role. The problem, according to Justice Posner, is that an administrative agency that would dismiss the majority of complaints before it would be "inviting its liquidation by Congress."[304]

448. This issue is particularly acute in the context of the *Telecommunications Act* general administrative monetary regime, since it allows for the imposition of a penalty for any contravention of a CRTC regulation or decision (except for those promulgated under the unsolicited telecommunications powers).[305] The CRTC is not a neutral third-party when assessing compliance *with its own decisions*. As a rule-making and policy-creating regulator, the CRTC has a mandate and interest in achieving certain objectives. For example, the CRTC describes how it will engage in public consultation to "ensure that Canadians are connected to world-class communications services," among numerous other objectives.[306] Compliance and enforcement is listed amongst these other objectives. This creates a conflict of interest.

449. In particular, the threshold question of whether a contravention has occurred is fraught with conflict. There are often disputes over the interpretation of a regulation or decision, and whether or not a contravention has actually occurred. The party resolving that dispute must be neutral: it must consider whether there has been a contravention of the rule, *as written*. But the CRTC is not neutral, since the decision or regulation was created by it for some other policy purpose. The CRTC will be tempted to interpret its own decisions through the

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303 Nuno Garoupa, Anthony Ogus and Andrew Sanders, "The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?" (2011), 70:1 Cambridge L.J. 229 at 258.

304 Richard Posner, The Economic Analysis of Law, 6th ed. (New York: Aspen Publishers, 2003), at p. 642.

305 *Telecommunications Act*, s 72.001.

306 See Departmental Plan 2018-2019, https://crtc.gc.ca/eng/publications/reports/dp2018/dp2018.htm.

lens of the policy goal it would like to see achieved, rather than interpreting the plain meaning of the text that it created.

450. The lack of institutional fairness undermines the statutory purpose of the general administrative monetary penalty regime. The purpose of these penalties is to promote compliance with the *Telecommunications Act* and CRTC regulations and decisions.[307] There is every chance that the CRTC could use an administrative monetary penalty process to further another competing objective, such as the animating purpose behind the decision establishing the rule in question. Creative interpretation to address a gap in the drafting of the rule does not promote *compliance*. Instead, it simply promotes saving the CRTC the effort of amending the substantive rule and disappointment or embarrassment over gaps in the original drafting.

451. Archibald and Jull[308] recommend that where the stakes are higher, the type of independent model used by the Competition Tribunal ought to be used.

452. TELUS therefore recommends that:

(i) Consideration be given to the creation of a separate enforcement tribunal, similar to the Competition Tribunal, for the enforcement of administrative monetary penalties at the higher monetary levels; and

(ii) A study be commissioned to identify the costs and benefits within the telecommunications sector of an integrated model and to identify the higher monetary levels at which the new enforcement tribunal would operate.

5.7.5. ***Recommended Legislative Changes***

453. The strongest and clearest way to remove any reasonable apprehension of institutional bias is to create structural separation within the CRTC by establishing a new CRTC tribunal to carry out adjudicative functions, including applications to review and vary Commission

307 *Telecommunications Act*, s 72.002(2).

308 Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance,* (2018) Student Edition, 15:70:70 ("Archibald and Jull").

decisions and hearings to determine whether to impose an administrative monetary penalty. Such a tribunal could reside within the Commission but would be structurally separate and rely on walled staff and legal counsel as appropriate.

454. The institutional framework of the Competition Tribunal provides a good starting point for considering the role of an independent CRTC adjudicative tribunal. The Competition Tribunal is a specialist tribunal with jurisdiction to adjudicate proceedings under certain parts of the *Competition Act*.[309] Thus, the policymaking and investigative competition regulation functions are generally performed by the Competition Bureau, but the adjudicative function is administered separately by an independent tribunal.

455. The Competition Tribunal also benefits from expertise both in competition regulation *and* in law and adjudication. Unlike the CRTC, panels of the Competition Tribunal are generally comprised both of lay members, who have expertise in competition regulation, and a judge of the Federal Court, who may lack expertise in competition policy but will have expertise in adjudication and law.[310] The workload of the Tribunal is divided accordingly: questions of law are determined exclusively by judicial members of the Tribunal, and questions of fact and mixed law and fact are determined by the full panel.[311]

309 *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 8(1): "The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the Competition Act and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act."

310 *CTA*, s.3(2).

311 *CTA*, s.12(1). See *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para 53: "Clearly it was Parliament's view that questions of competition law are not altogether beyond the ken of judges. However, one of the principal roles of the judicial members is to decide such questions of pure law as may arise before the Tribunal. Over those questions they have exclusive jurisdiction. … But over questions of fact and of mixed law and fact, the judicial members share their jurisdiction with the lay members. … Thus, while judges are able to pronounce on questions of the latter kind, they may do so only together with the lay members; and, in a typically constituted panel, such as the one that sat in this case, the lay members outnumber the judicial ones, so that in the event of a disagreement between the two camps, the lay members as a group will prevail. This makes sense because, as I have observed, the expertise of the lay members is invaluable in the application of the principles of competition law."

456. A separate CRTC adjudicative tribunal could be constituted by adapting with necessary modifications the *Competition Tribunal Act* and granting the new tribunal exclusive jurisdiction to hear adjudicative matters, as opposed to policymaking matters.

5.8. The General Administrative Monetary Penalty Regime Should be Modified

457. The general administrative monetary penalty regime in the *Telecommunications Act* should be modified such that:

- large penalties are administered by a separate body (or a walled-off division within the CRTC);
- all penalties be issued through a stand-alone notice of violation process that recognizes that no liability attaches until the matter is considered on its merits or there is a consent agreement;
- higher level administrative monetary penalties engage a right to an oral hearing, rather than the restriction to written representations;
- a course of conduct is a single violation rather than multiple individual violations, similar to provisions under the *Competition Act*; and
- communications industry administrative monetary penalty regimes are consistent.

458. The general administrative monetary penalty regime requires amendment to ensure that industry participants are afforded procedural fairness and to ensure that penalties are imposed for their stated purpose of encouraging compliance. The regime should also be amended to specify that a course of action that may lead to many individual contraventions is treated as a single violation to ensure that penalty amounts are effectively limited to the quantum stated in the legislation and in accordance with the criteria for penalty listed in the legislation.

459. In 2014, Parliament amended the *Telecommunications Act* to establish a general administrative monetary penalty regime.[312] This amendment was an historically significant and fundamental change to Canadian telecommunications law enforcement. However,

312 *Telecommunications Act*, s 72.001 through 72.0093.

despite its importance, the introduction of the general administrative monetary penalty regime was not accompanied by consequential changes to the institutional and procedural framework necessary to ensure that administrative monetary penalties are employed fairly and predictably. In more than four years since the general administrative monetary penalty powers were introduced, industry participants have been provided very little additional guidance. To date, the CRTC has published only a brief and unspecific set of non-binding guidelines setting out a general approach for the use of administrative monetary penalties.[313] Neither is there any guidance from precedents, as no administrative monetary penalties have been assessed under these provisions (although the CRTC has expressly decided not to impose administrative monetary penalties in certain cases).[314] Accordingly, there is a need to resolve the lingering uncertainty through an amendment to the legislative provisions.

460. Telecommunications service providers operate in competitive, dynamic conditions. To succeed in these conditions, telecommunications service providers must make significant investments and develop innovative products and service offerings. This is precisely what is required for Canada's digital future: innovation, investment, and dynamic competition. However, providers need clearly articulated obligations and fairly enforced rules to invest and innovate. Without this certainty and predictability, regulatory risks unduly limit investment and innovation. Relatively modest amendments to the general administrative monetary penalty regime can help remedy this problem.

461. Two types of change are required: procedural and institutional changes and changes to the quantum of potential administrative monetary penalties.

313 Compliance and Enforcement and Telecom Compliance Bulletin CRTC 2015-111.

314 See, for example, *Frontier Networks Inc. – Application regarding the refusal of Eastlink to allow Frontier to resell high-speed access services,* Telecom Decision CRTC 2018-458.

5.8.1. *Procedural and Institutional Changes Are Required for Telecommunications Regulation to Be Consistent with the Rule of Law*

462. To operate fairly, the general *Telecommunications* Act general administrative monetary penalty regime requires institutional change. TELUS recommendations in this regard are set out in detail in Section 5.7 of this submission.

463. A second procedural fairness problem arises out of the vagueness of the hearing process. The legislative text contemplates that persons subject to a proposed administrative monetary penalty be provided a notice of violation, which then triggers a series of procedural steps, including providing the person with an opportunity to make representations.[315] However, the *Telecommunications Act* is clear that this is only one avenue in which the CRTC may issue an AMP: the CRTC is expressly empowered to issue penalties in the course of any proceeding occurring before it under the *Telecommunications Act*.[316]

464. In this connection, TELUS notes that the CRTC holds very many proceedings, on a variety of matters. Notices of consultation, and even disputes between parties, are typically polycentric: they address numerous substantive matters, involve numerous stakeholders, and engage numerous CRTC roles (adjudicative, policy making, etc.). An allegation of non-compliance may be a part of this mixture.[317] But when an administrative monetary penalty is proposed by some party or raised as a possibility by the CRTC, the party targeted by the proposal does not have the benefit of a specific finding of non-compliance or the quantum of administrative monetary penalty sought. How can the party properly challenge an administrative monetary penalty in such a context? It makes little sense for a party to address the type and magnitude of penalty when the question of whether or not there has

315 *Telecommunications Act*, s 72.005(2).

316 *Telecommunications Act*, s 72.003.

317 See, for example, Telecom Decision CRTC 2018-458, concerning a dispute over the interpretation of a wholesale tariffed service. The applicant requested that AMPs be imposed on the carrier. The CRTC considered this request, ultimately declining to issue AMPs, among numerous interpretive findings and policy considerations.

even been a contravention has not been determined, and the decision maker is considering that question along with many other matters.

465. Accordingly, TELUS recommends that the general administrative monetary penalty regime be amended to require that the notice of violation process be used in all cases where an administrative monetary penalty is proposed. This fully preserves the CRTC's ability to use administrative monetary penalties for legitimate compliance purposes but eliminates the significant procedural fairness concerns and uncertainty discussed above.

466. Moreover, it would be impossible for an administrative monetary penalty imposed in the course of a CRTC proceeding to respect the institutional division of responsibility we have recommended in this submission. Accordingly, this proposed procedural change is necessary to effect the institutional change we believe to be necessary.

467. Finally, this approach is consistent with the CRTC's existing administrative monetary penalty powers in respect of unsolicited telecommunications,[318] and CASL,[319] both of which require a notice of violation process. This is also consistent with administrative monetary penalty powers under the *Radiocommunication Act*.[320] Therefore, requiring a notice of violation process for *Telecommunication Act* general administrative monetary penalties will ensure consistency between the communications sector administrative monetary penalty regimes.

468. While TELUS does not support the extension of administrative monetary penalties into the *Broadcasting Act*, if Parliament ultimately elects to do so, we recommend that the regime be consistent with the *Telecommunications Act* general administrative monetary penalty regime, amended as recommended in this submission.

318 *Telecommunications Act,* s 72.04-72.07.
319 CASL, s 22.
320 *Radiocommunication Act*, s 15.14.

5.8.2. *Parties Should Have the Right to an Oral Hearing for Larger Penalties*

469. In March of 2015 the CRTC issued Guidelines[321] regarding the general administrative monetary penalty regime under the *Telecommunications Act*. This document states as follows:

> The person served with the Notice of Violation has 30 days to either (i) pay the AMP, or (ii) make ***written representations*** to the Commission regarding whether the violation has occurred, the amount of the AMP, or both. However, the Commission may specify a longer period if it so chooses. [emphasis added].[322]

470. Archibald and Jull argue that procedural fairness requires that for higher level administrative monetary penalties, there should be a corresponding right to an oral hearing, rather than the restriction to written representations:

> The present rules set out in CRTC guidelines which only permit written submissions on liability or penalty could be described as a "one size fits all" model for the entire range of potential administrative monetary penalties. The CRTC Guidelines regarding the general regime have not yet been subject to administrative challenge. The courts will be required in the future to characterize the nature of a specific administrative monetary penalty along a spectrum of impact, which will then provide guidance as to the level of procedural protections that fairness requires. We are of the view that a "one size fits all" model may fall short of the high requirement of procedural fairness as the penalties escalate and may also trigger constitutional review.[323]

471. Archibald and Jull further note that

> The restriction to written representations contrasts with the robust appeal remedies referred to in *Guindon*. The unanswered question is whether the restriction to written representations in relation to a potential $10 million administrative monetary penalty rises to a level of constitutional challenge. This would only be relevant if the

321 Compliance and Enforcement and Telecom Information Bulletin CRTC 2015-111 (March 27, 2015).
322 *Ibid*, at paragraph 22.
323 Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance,* (2018) Student Edition, INT:20:50 at p INT-54.

scheme qualified as creating punitive offences under the *Guindon* balancing test.[324]

5.8.3. *Amendments to the Quantum of Maximum Penalties Are Required*

472. The present *Telecommunications Act* administrative monetary penalty regime establishes very significant maximum penalties: for a corporation, up to $10 million for a violation, or $15 million for subsequent violations. Maximum penalties of this magnitude are not unreasonable. However, the legislation provides no clear guidance on how to determine *how many* violations occur in a given circumstance. To illustrate this, consider the following example: a wireless service provider, which has never been assessed an administrative monetary penalty, establishes a promotional wireless plan. 1,000 customers subscribe to this plan during the promotional period. A year later, a complaint is lodged, and it is determined by the CRTC that some aspect of the plan is inconsistent with the Wireless Code. What is the maximum administrative monetary penalty liability for the wireless service provider? Is it $10 million, for the violation of designing a non-compliant plan? Or did the service provider violate the Code each time a customer signed up for a plan? In which case, the maximum potential liability would be nearly $15 billion. Or, is it a separate violation each time the service provider billed a customer, in this case 12,000 violations, which would amount to a maximum potential exposure of nearly $180 billion?

473. Clearly, a $180 billion administrative monetary penalty in this context would be absurd. One would not expect the CRTC to issue such a fine. However, simply handing limitless power to law enforcement and relying on them to exercise it reasonably is not sound policy. Even the current requirement that the quantum of penalty must take into account the ability of the person to pay is not helpful,[325] since a) it is only one factor, among many, and b) does not necessarily prevent the imposition of an insolvency-inducing administrative monetary penalty. Companies cannot effectively innovate, or invest to support those innovations, if any misstep, no matter how small, could engender existentially ruinous fines.

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324 Archibald, Jull at INT-56.

325 *Telecommunications Act*, s 72.002(1)(d).

474. The imposition of an extremely high administrative monetary penalty would be the subject of a constitutional challenge. Archibald and Jull observe that:

> The door is still open for constitutional challenges to administrative monetary schemes if they fall within the "punitive paradigm". In *Guindon*, the Supreme Court articulated a balancing test to determine whether an outcome is punitive:
>
> Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty.[326]

475. Archibald and Jull observe that the *Income Tax Act*, which was the subject of the leading decision on the constitutionality of AMPs in the Supreme Court decision in *Guindon,*[327] may be distinguished from other legislative schemes such as set out in the *Telecommunications Act*:

> Applied to s. 163.2 of the Act, the balancing test led to the conclusion that the penalty in question was administrative in nature and not punitive. An important factor was that s. 163.2 utilizes a somewhat mechanical formula for the assessment of the penalty. By way of contrast, other administrative regimes identify relevant factors in a manner that is far more similar to relying on principles used in criminal sentencing. Those other regimes will be open to constitutional challenges in the future.
>
> The Supreme Court in *Guindon* noted that even though traditional constitutional protections under s. 11 of the Charter are not engaged by s. 163.2 of the Act, those against whom penalties are assessed are not left without recourse or protection. They have a full right of appeal to the Tax Court of Canada and have access to other potential administrative remedies. This reference to appeal rights and other remedies sets a high bar for comparing the regime in issue in *Guindon* with other AMPs regimes.[328]

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326 Archibald and Jull, INT -53, citing *Guindon* at paragraph 76.

327 *Guindon v. Canada*, (2015), 2015 CarswellNat 3231, 327 C.C.C. (3d) 308, 2015 SCC 41 (S.C.C.) ("*Guindon*").

328 Archibald and Jull, INT-53.

476. To remedy this, TELUS recommends that the *Telecommunications Act* be amended to specify that a violation is a single decision or course of conduct, not each manifestation of it. For a parallel, the *Competition Act* uses the following test: "[w]here, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person,…"[329]

5.8.4. *Communications Statutes Should be Consistent Where Possible*

477. Finally, TELUS notes that the *Broadcasting Act* does not presently include an administrative monetary penalty regime. While TELUS does not propose that such a regime be established, if Parliament decides to do so, TELUS recommends it made consistent with the proposals and recommendations herein.

478. With respect to the administrative monetary penalties available under the *Radicommunication Act*, TELUS notes that they already require a notice of violation process. The changes TELUS is recommending to the *Telecommunications Act* in this regard will therefore create consistency between the statutes. TELUS' recommendation to specify that a course of conduct is a single violation applies equally to the *Radiocommunication Act*.

5.8.5. *Recommendations for Legislative Changes*

479. TELUS recommends the following proposed amendments to the *Telecommunications Act*. TELUS recommends that these changes also be applied to the *Radiocommunication Act* and the *Broadcasting Act*, in the event that administrative monetary penalties are considered for inclusion in the *Broadcasting Act*, which TELUS does not recommend. Other changes may be required to the *CRTC Act* to effect the institutional structure we have recommended herein.

329 *Competition Act*, section 74.1(1).

General Administrative Monetary Penalties Scheme

Commission of violation

72.001 (1) Every contravention of a provision of this Act, other than section 17 or 69.2, and every contravention of a regulation or decision made by the Commission under this Act, other than a prohibition or a requirement of the Commission made under section 41, constitutes a violation and the person who commits the violation is liable

(a) in the case of an individual, to an administrative monetary penalty not exceeding $25,000 and, for a subsequent contravention, a penalty not exceeding $50,000; or

(b) in any other case, to an administrative monetary penalty not exceeding $10,000,000 and, for a subsequent contravention, a penalty not exceeding $15,000,000.

(2) For purposes of subsection 1, a course of conduct leading to multiple individual contraventions shall be treated as a single violation.

Criteria for penalty

72.002 (1) The amount of the penalty is to be determined by taking into account the following factors:

(a) the nature and scope of the violation;

(b) the history of compliance with this Act, the regulations or the decisions made by the Commission under this Act, by the person who committed the violation;

(c) any benefit that the person obtained from the commission of the violation;

(d) the person's ability to pay the penalty;

(e) any factors established by any regulations; and

(f) any other relevant factor.

Purpose of penalty

(2) The purpose of the penalty is to promote compliance with this Act, the regulations or the decisions made by the Commission under this Act, and not to punish.

Procedures

Delete ~~**72.003** Despite subsection 72.005(1), the Commission may impose a penalty in a decision in the course of a proceeding before it under this Act in which it finds that there has been a contravention of a provision, a regulation or a decision referred to in section 72.001.~~

Power of Commission — violation

72.004 The Commission may

(a) designate a person, or class of persons, that is authorized to issue notices of violation or accept an undertaking; and

(b) establish, in respect of each violation, a short-form description to be used in notices of violation.

5.9. The Telecommunications Act and the Broadcasting Act Should Be Amended to Ensure CRTC Decisions Are Reviewed on a Court-Like Standard

480. The *Telecommunications Act* should be amended as follows:

1. Repeal subsection 52(1), which currently provides that "[t]he Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive."

2. Amend subsection 64 to read as follows: 64 (1) An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court, **as if it were a judgment of the Federal Court**.

481. The *Broadcasting Act* should be amended as follows:

1. Amend subsection 31(2) to read as follows: "An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court, **as if it were a judgment of the Federal Court,** on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows."

482. The *Telecommunications Act* vests in the CRTC broad powers traditionally exercised by superior courts. Moreover, section 64 *Telecommunications Act* also provides a right of appeal, with leave, to the Federal Court of Appeal on questions of law or jurisdiction. Despite the fact that the legislation provides a right of appeal, courts have consistently treated appeals from CRTC decisions as judicial reviews and accordingly have accorded significant deference to the CRTC, including on questions of law. The current statutory language is inconsistent with the CRTC's powers and functions and should be amended with language similar to that used in the *Competition Tribunal Act* in order to signal to courts that CRTC decisions should be treated with a similar degree of deference accorded to courts when they exercise similar powers.

483. TELUS's recommendations will help to ensure that CRTC decisions are reviewable by the courts to ensure compliance with the statute, consistent with TELUS' proposed principle 10.

5.9.1. *The Judicial Powers of the Commission and the Treatment of CRTC Decisions on Appeal*

484. Although an administrative tribunal, the CRTC has many powers traditionally reserved for courts. For example, section 55 of the *Telecommunications Act* provides as follows:

> The Commission has the powers of a superior court with respect to
>
> (a) the attendance and examination of witnesses;
>
> (b) the production and examination of any document, information or thing;
>
> (c) the enforcement of its decisions;
>
> (d) the entry on and inspection of property; and
>
> (e) the doing of anything else necessary for the exercise of its powers and the performance of its duties.

485. Section 63(1) of the *Telecommunications Act* in turn provides that any "decision of the Commission may be made an order of the Federal Court or of a superior court of a province

and may be enforced in the same manner as an order of that court as if it had been an order of that court on the date of the decision."

486. The CRTC also has significant inspection and punitive powers, also traditionally the domain of courts. Section 71(4) of the *Telecommunications Act* permits the Commission to engage in warrantless inspections of any place other than dwelling-houses. The general administrative monetary penalty regime set out in sections 72.001 and following permits the Commission to levy administrative monetary of up to $15,000,000 per offence. Finally, section 56 provides that the Commission may award interim and final costs, also functions traditionally vested in courts.

487. With respect to the *Broadcasting Act*, although there is of yet no power for the Commission to issue administrative monetary penalties, the Commission is similarly given many of the powers of a superior court with respect to hearings[330] and can enforce orders as though they were orders of the Federal Court.[331] The same arguments therefore apply with equal force to the *Broadcasting Act*.

488. The *Telecommunications Act* and *Broadcasting Act* recognize the broad nature of these powers at least in part by creating a right of appeal, with leave, directly to the Federal Court of Appeal. However, despite the fact that a statutory right of appeal is a "factor suggesting a more searching standard of review,"[332] courts have repeatedly interpreted recent jurisprudence, including *Dunsmuir v. New Brunswick*,[333] such that where leave is granted under section 64, "both factual and legal issues will likely be reviewed on a reasonableness

330 *Broadcasting Act*, s.16.
331 *Broadcasting Act*, s.13(1).
332 *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28 at para 11. See also *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para 38, holding that courts must review an administrative law decision "on the basis of administrative law principles … regardless of whether the review is conducted in the context of an application for judicial review or a statutory appeal."
333 2008 SCC 9.

standard."[334] Also, the *Telecommunications Act* and *Broadcasting Act* both presently contain privative clauses, suggesting a higher degree of deference.[335]

489. As a consequence of the existing administrative law jurisprudence, as well as the existence of a privative clause, a tribunal with broad court-like powers is be subject to a less stringent review process. However, this is a problem that is readily corrected by statute, and there is an easily adaptable precedent in the *Competition Tribunal Act* ("*CTA*").

490. The *CTA*, as its name implies, is the constituting statute of the Competition Tribunal. Like the CRTC, the Competition Tribunal has broad, court-like powers. For example, similarly to section 55 of the *Telecommunications Act* set out above, subsection 8(1) of the *CTA* provides that the "Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record." And similarly to section 72.001 of the *Telecommunications Act* set out above, subsection 74.1(1) of the *Competition Act* grants the Competition Tribunal the authority to levy administrative monetary penalties of up to $15,000,000 per offence. However, unlike the *Telecommunications Act*, nothing in the *CTA* or the *Competition Act* grants the Tribunal the authority to order the inspection of any place or property, with or without a warrant. The text of these provisions is set out in Appendix 10 to TELUS' submission.

491. Despite the similarity in powers between the two statutes—and indeed the *Telecommunications Act* arguably grants the CRTC broader powers than the *CTA* grants to the Tribunal—only the *CTA* makes clear that appeals to the Federal Court of Appeal are to be reviewed in the same manner as appeals from a court of first instance. Section 13 of the *CTA* provides as follows:

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334 *Public Mobile Inc. v. Canada (Attorney General)*, 2011 FCA 194 at para 26.

335 *Telecommunications Act* Subsection 52(1): "The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive." *Broadcasting Act*, s.31(1): "Except as provided in this Part, every decision and order of the Commission is final and conclusive."

> 13 (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court. (Emphasis added)
>
> (2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

492. The Supreme Court of Canada has ruled that the phrase "as if it were a judgment of the Federal Court" mandates that a reviewing court apply a lesser degree of deference:

> The appeal provision in the *Competition Tribunal Act* evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness. The presumption that questions of law arising under the home statute should be reviewed for reasonableness is rebutted here.[336]

493. Given the broad and court-like powers accorded to the CRTC and Parliament's decision to create a right of appeal, with leave, to the Federal Court of Appeal, the *Telecommunications Act* should be adapted to reflect modern jurisprudence and signal that questions of law will be reviewed on a standard of correctness. To do this, the *Telecommunications Act* should be amended to remove the privative clause and revise section 64 with language mirroring subsection 13(1) of the *Competition Tribunal Act.*

5.10. Reforming the Telecommunications Act Investigation and Enforcement Powers to Align with the Purpose of Legislation and Modern Investigative Practices

494. The *Telecommunications Act* should be amended to establish judicial oversight of CRTC investigations and to permit entities subject to investigation to challenge the scope of requests from investigators in most circumstances. Investigative powers should be made consistent with those established under Canada's anti-spam legislation[337] ("CASL").

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336 *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para 39.

337 *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (S.C. 2010, c. 23), ss 15-19.

495. Although entities operating in a regulated industry have lower expectation of privacy than private individuals, the *Telecommunications Act* investigative powers are lacking in procedural protections when compared to those employed in other regulatory regimes with similar aims to modern telecommunications regulations. Moreover, investigations undertaken pursuant to the existing powers may even be vulnerable to challenge under the *Charter of Rights and Freedoms* in certain cases. The amendments TELUS suggests will bring telecommunications regulation into alignment with modern approaches to regulatory investigations, while ensuring that law enforcement agencies have the ability to carry out their mandates.

496. The *Telecommunications Act* establishes very broad investigatory powers, mistakenly described as "inspection" powers.[338] The Act relies on an outdated dual track system whereby contraventions of the *Telecommunications Act* may be enforced by administrative sanctions or alternatively by way of more serious offence provisions.[339] These powers are no longer sufficiently detailed or circumscribed for today's regulatory environment, characterized by competition, forbearance, and broad behavioural regulation, rather than prescriptive technical regulation.

5.10.1. ***Judicial Oversight of Investigations Is Required***

497. The *Telecommunication Act*'s primary investigative powers are established by section 71.[340] This section allows for warrantless access to places of business, warrantless access to computer systems and documents, and production orders that are not subject to judicial supervision. The only apparent limitation is where an inspector seeks access to a dwelling-house, in which case a warrant is required. Aside from this one scenario, the

338 The CRTC does not use these powers to simply conduct inspections, but to investigate suspected violations of the *Telecommunications Act*. See *Show cause proceeding and call for comments: Failure of Topline Air Duct Cleaning Inc. and Mr. Naveed Raza to respond to a request for information letter and to provide information to the Commission as required*, Compliance and Enforcement Notice of Consultation CRTC 2017-281, para 1.

339 Archibald, Jull and Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Thomson Reuters updated annually) at 15:20:20.40 Multiple Track AMPS.

340 Additional investigative or production powers are given with respect to unsolicited telecommunications (s 41.2(c)), and the CRTC may require carriers to submit information required for the administration of the *Telecommunications Act*, in periodic reports or such other form determined by the Commission (s 37(1)(b)).

Telecommunications Act does not subject investigators to any judicial oversight, nor does it establish other procedural safeguards for persons subject to investigation (e.g., a process to challenge a production order).[341] The documents and data obtained through the conduct of these searches may be used against an individual or corporation in a subsequent prosecution or notice of violation process.

498. Even in a regulated context, investigations undertaken in the manner permitted by the *Telecommunications Act* may well violate one or more sections of the *Charter*. Accordingly, amendments are required to ensure that industry participants are not subject to unlawful investigations. Such amendments will also bring the *Telecommunications Act* in line with modern legislative practices to extend procedural protections in the context of regulatory investigations and will better reflect the nature of telecommunications regulation in Canada in the 21st century.

499. The recommendations in this section must be viewed in parallel to our recommendations for institutional division of powers articulated in Section 5.7. With the CRTC's many overlapping objectives and roles, the lines between a compliance inspection or investigation and a policy proceeding or dispute resolution matter, are completely blurred. Separating the enforcement function from other CRTC functions would assist in ensuring that investigations and inspections are carried out for their compliance purpose, and that regulated entities understand the purpose for which information is being sought.[342]

5.10.2. *The Nature of Telecommunications Regulation Calls for More Specific Investigatory Powers*

500. Investigative powers supporting other regulatory requirements now frequently provide superior procedural protections to those under the *Telecommunications Act.* In particular,

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341 See Gover Report, *Review of Section 11 of the Competition Act*: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02709.html.

342 The *Telecommunications Act* contemplates inspections by either the CRTC, regarding the sections of the legislation for which the CRTC is responsible (s 71(1)), or by the Minister, regarding the sections of the legislation for which the Minister is responsible (s 71(2)). TELUS' recommendations apply to both. However, the CRTC inspection powers are a more glaring issue, given that the scope of the CRTC's activities and functions is much broader than the Minister's.

TELUS notes that investigations under the *Competition Act* and investigations under provincial consumer protection legislation are subject to judicial oversight. These comparisons are directly relevant, since contemporary telecommunications regulation covers similar substantive ground as do those other regimes. Regulation of this type does not lend itself well to compliance audits. The "inspection" provisions under the *Telecommunications Act* are the sort of powers that enable precisely this type of audit, and are consequently unaligned with the measures they support. Accordingly, TELUS recommends that the *Telecommunications Act* investigative powers be amended to model the procedural protections offered in other, similar, contexts.

501. Assessment of whether a telecommunications service provider has complied with its obligations often requires detailed analysis and weighing of evidence: statutory interpretation, findings of facts or law, balancing of interests, and so on.

502. Determining compliance with measures of this nature is an inherently adversarial process: regulators and regulated entities will often disagree on the meaning and scope of requirements. Compliance cannot be assessed by simply checking items off a list, as might be possible in other regulatory environments.

503. Under the *Competition Act*, numerous provisions allow for the civil review of behaviours.[343] These sections are roughly analogous to industry-specific provisions of the *Telecommunications Act* (for example, section 27(2) which prohibits, *inter alia*, unjust discrimination by carriers) . However, unlike the *Telecommunications Act*, the *Competition Act* ensures that parties being investigated are afforded a degree of protection, for example, orders to produce documents or give oral evidence require court orders.[344] Similarly, entry onto premises for an investigation require warrants.[345] To be clear, these protections

343 See Part VIII of the *Competition Act*, addressing matters such as refusal to deal (s 75), abuse of dominant position (s 78), and others.
344 *Competition Act*, s 11.
345 *Competition Act*, s 15.

expressly apply whether the matter being investigated is criminal in nature *or* a reviewable practice.

504. Provincial consumer protections laws apply to non-federally regulated businesses, and govern similar subject matter, such as contract terms, rights of rescission, etc. Those laws provide substantially more protections to an entity under investigation, even if they also retain inspection powers with lesser protections. For example, Ontario's *Consumer Protection Act* requires that investigators obtain a warrant prior to conducting searches where there are reasonable grounds for suspecting a violation has occurred.[346] Similarly, under the *Alberta Consumer Protection Act*, where investigators believe an offence has occurred, they may only enter premises or obtain documents with the consent of the investigated party, failing which they must obtain judicial authorization.[347] Both Acts also include a form of inspection power, for use when violations are not suspected. The *Telecommunications Act* contains no such distinction, and as noted above, the CRTC uses the inspection powers to investigate suspected violations.

505. Regulators may conduct compliance audits which are not intended to uncover a breach of the *Telecommunications Act* but are for the purpose of protecting the public.[348] However, Canadian businesses and individuals have an expectation that law enforcement officials may not enter their premises or search their persons or belongings for purposes of investigating suspected non-compliance without robust judicial oversight and other

346 S 107(1)(b).

347 S 147-148.

348 *Comité Paritaire de l'Industrie de la Chemise v. Potash; Comité Paritaire de l'Industrie de la Chemise v. Sélection Milton.* 1994 CarswellQue 113, [1994] 2 S.C.R. 406 *sub nom. R. v. Potash; R. v. Sélection Milton*. La Forest J. held that the scope of the constitutional guarantee afforded by s. 8 may vary depending on whether a search or inspection is involved. At p. 417, he adopted the following passage distinguishing an inspection from a search:

> [TRANSLATION] An inspection is characterized by a visit to determine whether there is compliance with a given statute. The basic intent is not to uncover a breach of the Act: the purpose is rather to protect the public. On the other hand, if the inspector enters the establishment because he has reasonable grounds to believe that there has been a breach of the Act, this is no longer an inspection but a search, as the intent is then essentially to see if those reasonable grounds are justified and to seize anything which may serve as proof of the offence.

procedural protections. However, none of these protections are contemplated in the current *Telecommunications Act*. Instead, only broad "inspection" powers are granted.

5.10.3. ***Investigations may constitute unreasonable search or seizure***

506. Section 8 of the *Charter* guarantees the right not to be subjected to unreasonable search or seizure. Searches for regulatory purposes may be subject to less stringent standards than those conducted for criminal law purposes.[349] However, where a search is for a criminal law purpose, it must comport with the *Charter.* At a minimum, once an investigator has reasonable grounds to believe that an offence has been committed, the search must be carried out under stricter criminal law standards.[350] Officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the regulated entity and the state.[351]

507. While the *Telecommunications Act* is mostly a regulatory statute, there are several ways in which investigations and proceedings under the *Telecommunications Act* may trigger the application of the *Charter*. First, violations of the *Telecommunications Act* and CRTC determinations are offences punishable by summary conviction and fines.[352]. Section 11 of the *Charter* provides that "[a]ny person charged with ***an offence*** has the right…" (emphasis added) to a series of enumerated rights. Summary conviction offences trigger the application of this section.

508. Second, the imposition of administrative monetary penalties *may* also trigger Charter protections. Generally, administrative monetary penalties are intended to promote compliance rather than punish, and, in many cases, administrative monetary penalties

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349 *Goodwin v British Columbia (Superintendent of Motor Vehicles)* [2015] 3 SCR 250, para 60.

350 *R v Potash; R v Selection Milton,* [1994] 2 SCR 406, para 29.

351 In *R. v. Jarvis,* 2002 CarswellAlta 1440, [2002] 3 S.C.R. 757, the Supreme Court stated: "In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry" (para 88).

352 *Telecommunications Act,* s 73.

proceedings will not engage *Charter* protections. However, administrative monetary penalties may cross a boundary into the punitive realm, at which point the Charter applies. In particular, where the amount of the penalty is out of proportion to the regulatory purpose, it may have a true penal consequence.[353] This outcome is all the more likely in the context of the *Telecommunications Act*, where rights of appeal are quite limited (as discussed elsewhere in this submission), and entities subject to administrative monetary penalties are deprived of this procedural protection.[354]

509. In the specific case of the *Telecommunications Act*, while the notional purpose of the administrative monetary penalty is to promote compliance and not to punish,[355] the *Telecommunications Act* nevertheless creates the possibility of high administrative monetary penalties, as discussed elsewhere in this submission.

510. This does not mean that the *Telecommunications Act*'s general administrative monetary penalties regime is inherently penal, always triggering *Charter* protections. However, it does mean that a given AMP may cross a line, after which point *Charter* protection is engaged. The line is not yet well defined and may well be the subject of future disputes between the regulated entities and the regulator.

511. Entities subject to investigation under the *Telecommunications Act* may be subject to criminal sanction, in the form of summary convictions or administrative monetary penalties with a true penal consequence. Given all these factors, an investigator may unwittingly cross into territory where the regulated entity is guaranteed certain procedural rights that are not contemplated in the *Telecommunications Act*. The entire process would, at that point, become vulnerable to challenge. Amending the *Telecommunications Act* to provide

353 *Guindon, supra,* at para 77. An important factor in *Guindon* was that the *Income Tax Act* utilizes a somewhat mechanical formula for the assessment of the penalty. By way of contrast, the *Telecommunications Act* AMPs provisions list relevant factors in a manner that is far more similar to relying on principles used in criminal sentencing.

354 The presence of full right of appeal was noted by the Supreme Court in its disposition of *Guindon, supra,* at para 90 – while *Charter* rights did not extend to the situation considered in that appeal, "those against whom penalties are assessed are not left without recourse or protection." By contrast, those against whom penalties are assessed under the *Telecommunications Act* would have no such right of full appeal.

355 *Telecommunications Act,* s 72.002(2).

more structure and oversight to the investigatory process would help avoid this outcome. It would also afford entities with a measure of protection of their privacy interests.[356]

512. Even in those cases where there is no criminal law investigation or purpose, and the case is purely administrative, section 8 Charter rights may still apply if there is a search or seizure that is unreasonable.[357]

5.10.4. ***Recommended Legislative Changes***

513. In view of the above, the *Telecommunications Act* should be amended to establish judicial oversight of investigations and to permit entities subject to investigation to challenge the scope of requests from investigators in appropriate circumstances. There is a simple, elegant solution available to resolve the tensions addressed above. The CRTC acts as the enforcer of more than one piece of legislation. In addition to exercising powers under the *Telecommunications Act* and the *Broadcasting Act*, the Commission also has investigation and enforcement powers under CASL, specifically set out in section 15-19 thereof. Similar to the *Telecommunications Act*, CASL provides for summary conviction offences as well as the possibility of significantly high administrative monetary penalties.[358] The investigative and enforcement powers of CASL better balance the privacy interests of the entity being investigated with the purposes of the legislation. They also have the benefit of being familiar to the CRTC and will streamline processes in use by the CRTC's enforcement division.

514. Moreover, TELUS recommends that the reference to investigations related to unsolicited telecommunications in section 41.2 be amended to note that any such investigations be undertaken pursuant to the new investigative powers we are suggesting. Finally, section 37

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356 Certain provisions of the *Criminal Code* will apply to investigation of offences under the *Telecommunications Act*, see *Interpretation Act*, s 34(2). But given that compliance under the *Telecommunications Act* is rarely pursued through the offence provisions, it is unlikely that CRTC investigations would be guided by those provisions. As such, the CRTC may find itself unable to pursue convictions in appropriate cases because the investigation did not comply with the *Criminal Code*.

357 Shea Coulson "Case Comment on Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 CarswellBC 2938, 2015 SCC 46: Reviewing the Consequences of a Search or Seizure in Administrative Regimes"(2017), 50 U.B.C. L. Rev. 37-48.

358 CASL, ss 20, 42-43, 46. The maximum penalty for a single violation is $10,000,000 (s 20(4)).

should be amended to clarify that these document production powers do not apply to investigations. If a form of inspection power is to be retained alongside new investigatory powers, the provision should specify that inspections are only applicable where violations are not suspected, and that they should be proportional to their purpose.

5.10.5. *Changes to the Broadcasting Act May Require a Consideration of Investigative Powers in the Broadcasting Context*

515. The *Broadcasting Act* does not contain investigative powers akin to those discussed above in relation to the *Telecommunications Act*, and it would be unnecessary to introduce such investigative powers into the regulation of broadcasting. However, to the extent that the introduction of an administrative monetary penalty regime into the *Broadcasting Act* may be contemplated as a result of this legislative review, TELUS notes that it would trigger all of the above-noted procedural considerations, which should be addressed by way of statute.

5.11. Other Suggestions to Improve the Effectiveness of the CRTC

516. In this section, TELUS suggests various reforms that would enhance the effectiveness of the CRTC, including reducing the number of Commissioners, providing budget for expert staff, the establishment of a new Office of Economics and Analytics, publication of a code of consolidated CRTC regulatory rules, and reforming the existing CRTC costs award process.

517. Although the Broadcasting and Telecommunications Legislative Review Panel is calling for reforms to update the three principal statutes of communications legislation, the following proposed ancillary changes to the CRTC would improve the regulatory functioning of the tribunal

5.11.1. *Reducing the Number of CRTC Commissioners*

518. Under the *CRTC Act*, thirteen full-time commissioners may be appointed to the CRTC.[359] As noted in the 2006 Telecommunications Policy Review Panel Final Report, this is an

[359] *CRTC Act*, section 3(1).

exceptionally large number of compared to other OECD countries. This is the case even despite recent reform where the position of part-time commissioner was abolished.[360]

519. As noted in the 2006 Final Report, the large number of CRTC commissioners can complicate and delay the decision-making process and result in lowest common denominator consensus decisions.[361] Based on the experience of other countries, it is not necessary to have more than five commissioners,[362] who would undertake both telecommunications and broadcasting functions, and the CRTC's new responsibilities for spectrum management pursuant to TELUS recommendation to transfer responsibility for spectrum management from ISED to the CRTC as outlined elsewhere in this submission (see Section 5.2).

520. As noted by the Telecommunications Policy Review Panel in its Final Report, the recruitment process and compensation levels may also have to be revisited to facilitate a reduced number of commissioners and their expert staff.[363]

5.11.2. ***Providing Budget for Expert Staff***

521. As further noted by the Telecommunications Policy Review Panel, from time to time the CRTC will require specialize professional expertise not available in-house. As that Panel noted, timely recourse to outside consulting expertise would assist the CRTC in making decisions on complex files. TELUS concurs with Panel's recommendation that the CRTC should be granted clear authority and sufficient budget to retain outside expert consultant at market rates when required.[364] Additionally, TELUS recommends that the CRTC have the authority and budget to develop and maintain in-house expertise.

360 Formerly up to six part-time commissioners could be appointed, which was repealed pursuant to (R.S.C. 2010, c. 12, s. 1701.
361 2006 Telecommunications Policy Review Panel Final Report, pp 9-21.
362 2006 Telecommunications Policy Review Panel Final Report, Recommendation 9-6, pp 9-22.
363 Pursuant to Recommendations 9-7 and 9-8.
364 2006 Telecommunications Policy Review Panel Final Report, Recommendation 9-10, pp 9-25 and 26.

5.11.3. *New Office of Economics and Analytics*

522. Consistent with the preceding recommendation to provide budget for expert staff, TELUS further recommends that the Legislative Review Panel also consider the establishment of a new Office of Economics and Analytics in the CRTC, similar to the office of that name maintained by the Federal Communications Commission.[365]

523. TELUS recommends the establishment of such an office to ensure regulatory decisions are consistent with the economic objectives of the *Telecommunications Act* and to better facilitate the integration of economic analysis into the CRTC's decision-making process.

524. The FCC's Office of economics an Analytics includes four divisions:

- The Economic Analysis Division, which provides analytical and quantitative support for rulemakings, transactions, reviews, adjudications, and other matters.
- The Industry Analysis Division, which designs and administers significant, economically-relevant data collections.
- The Auctions Division, which leads auction design and implementation issues, including for spectrum and universal service auctions.
- The Data Division, which develops and implements best practices, processes, and standards for data management.[366]

525. The creation of such a new office, either through the FCC's organizational structure or one adapted to the CRTC's current structure, could contribute significantly to the work of the CRTC, including its existing functions and facilitating its new role as project manager for the CRTC's new broadband fund with respect to mapping and other data requirements. Such an office would also facilitate a new role for the CRTC for spectrum management as recommended by TELUS in Section 5.2.

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365 FCC Opens Office of Economics and Analytics, FCC News Release, December 11, 2018: https://docs.fcc.gov/public/attachments/DOC-355488A1.pdf .

366 *Ibid*.

5.11.4. ***Publishing a Consolidation of CRTC Regulatory Rules***

526. Following on the recommendation of the 2006 Telecommunications Policy Review Panel Final Report, in order to facilitate greater regulatory transparency and compliance, TELUS recommends that the CRTC establish a consolidated regulatory code of rules which would be easily accessible on the CRTC website and updated regularly. The relevant recommendation is as follows:

> Recommendation 9-23
>
> The CRTC should establish a single code of the regulatory rules that apply to telecommunications markets by consolidating and updating rules now contained in various decisions, orders, rules, regulations, public notices, circulars and other documents. This consolidated approach to rule making should be applied prospectively in the case of new CRTC rules. In the case of the CRTC's existing rules, the consolidation should be completed within three years.[367]

527. Although the above recommendation was made in the context of telecommunications matters, TELUS proposes that a consolidated regulatory code be established for both telecommunications and broadcasting rules. The codes would contain only current rules and indicate when prior documents have been amended or replaced by a subsequent document. As the Telecommunications Policy Review Panel noted, a consolidated code would make regulatory compliance less time-consuming and lest costly and improve the transparency of the regulatory framework.[368]

528. In 2018, the CRTC celebrated its fiftieth year of operation, that began with the regulation of broadcasting in 1968 and the assumption of regulatory oversight for telecommunications from the Canadian Transport Commission in 1976. The CRTC's regulatory framework has evolved and changed significantly over the past decades, including a significant review of its telecommunications regulatory framework in the late 2000s following the release of the Policy Direction. A consolidation of the CRTC's vast rule-making history is long past

367 2006 Telecommunications Policy Review Panel Final Report, Recommendation 9-23, pp 9-46 and 48.
368 2006 Telecommunications Policy Review Panel Final Report, Recommendation 9-23, pp 9-47.

due, and would be welcome now, as an aid for industry, other stakeholders, and the CRTC itself.

5.11.5. ***Reform of the CRTC Costs Awards Function***

529. TELUS also recommends that section 56 of the *Telecommunications Act*, which establishes the costs awards regime, be abolished and that funding for participation in CRTC proceedings come from the federal government. In this regard, TELUS urges the CRTC to adopt Recommendation 9-30 from the 2006 Telecommunications Policy Review Panel Final Report which is as follows:

> Recommendation 9-30
>
> The government should review the issue of public interest group participation in telecommunications regulatory proceedings. Funding for such participation should come from a multi-year commitment by government to subsidize such participation, rather than costs awards imposed by the CRTC on individual telecommunications service providers.

530. The CRTC has authority to award costs pursuant to section 56 of the *Telecommunications Act*. Under the guise of this authority, the CRTC has established procedures for the award of costs pursuant to the *Canadian Radio-television and Telecommunications Rules of Practice and Procedure* (the "Rules")[369] and has also established guidelines for the award of costs which were substantially updated in 2010.[370]

531. Despite this elaborate regime, the award of costs has become increasingly contentious in recent years. In many situations, multiple groups purporting to represent the public interest participate, often raising substantially the same concerns, leading to superfluous submissions. Also, Larger and more frequent costs awards have resulted in acrimonious disputes between consumer groups and other interested parties whose aim is to further the

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369 Rules, Part 4, sections 60-70.

370 *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, and attached *Guidelines for the Assessment of Costs*, December 23, 2010. See also *Guidance for costs award applicants regarding representation of a group or a class of subscribers* Telecom Information Bulletin 2016-188.

public interest on the one hand, and those required to pay these costs in the telecommunications industry on the other hand. Costs awards now involve significant amounts of money due to more frequent proceedings, which often involve complex matters dealt with in proceedings which occur over long periods of time.

532. The current costs award process is flawed. It is a legacy from the monopoly era when the incumbent local exchange carriers were assessed costs which they could recover from their regulated rate of return, a form of regulation now long gone. This is no longer the case in a competitive industry where the incumbents are no longer subject to rate of return regulation but rather are subject to price cap regulation for the services which are still regulated. This means that all cost respondents must pay cost awards out of their operating revenues, which means that there is no recovery for these costs and marketplace profitability is affected by cost claims.

533. Despite recent reforms, the current situation is untenable to the extent that it pits consumer groups that in many cases rely significantly on costs awards against an industry that must pay for these costs from their bottom line. Timeliness of payments, when costs are ultimately awarded, is also an issue for consumer groups which frequently must continue operations for long periods of time without payment.

534. As noted by the Telecommunications Policy Review Panel, the problems of the current costs awards regime can be remedied by making funding available as a subsidy directly from the federal government. In this regard, TELUS notes that ISED has provided funding to consumer groups in the past for research that has been used in CRTC proceedings. The TELUS recommendation to provide cost award funding directly from the federal government would simply reinforce the federal government's current commitment to protecting the consumer interest.

535. In summary, the TELUS recommendation to reform the costs award process has several benefits including reaffirming the federal government's commitment to the consumer interest, eliminating time-consuming costs awards disputes that require extensive time and resources for consumer groups, the industry, and the regulator to resolve, creating more

certainty of funding for participating groups, and relieving the industry from the payment of increasing costs awards that they can no longer afford.[371]

371 Further in this regard, TELUS notes that the industry is also responsible for paying telecommunications fees, contribution fees, spectrum fees and numerous other fees which amount to hundreds of millions of dollars a year.

6.0 Responses to Questions in the Government of Canada's Terms of Reference to the Broadcasting and Telecommunications Legislative Review Panel

Universal Access and Deployment

1.1 Are the right legislative tools in place to further the objective of affordable high quality access for all Canadians, including those in rural, remote and Indigenous communities?

TELUS Response:

536. TELUS is proposing a new set of Canadian telecommunications policy objectives to replace the existing objectives, including objective 7(b) which is cited in the question. TELUS recommends new objectives that emphasizes the importance of competition, innovation and investment to facilitate affordable, high quality access for all Canadians, including those in rural, remote and Indigenous communities. In those cases where market forces are insufficient to provide access, the CRTC has sufficient legislative tools with respect to subsidies to achieve this result, which should be considered in concert with other government subsidies to address access.

1.2 ***Given the importance of passive infrastructure for network deployment and the expected growth of 5G wireless, are the right provisions in place for governance of these assets?***

TELUS Response

537. TELUS makes several recommendations for legislative changes required to ensure the timely deployment of network facilities, including those for wireline and wireless 5G networks. TELUS suggests changes to the *Telecommunications Act* to ensure that carriers have access to public lands and assets. TELUS also suggests various changes to the *Radiocommunication Act* ensure timely deployment for passive network infrastructure, including that the site approval processes for wireless equipment installation does not unduly hinder deployment. These amendments are discussed above in Section 2.6.

Competition, Innovation, and Affordability

2.1 ***Are legislative changes warranted to be better promoted competition, innovation, and affordability?***

TELUS Response

538. Competition and innovation and investment should be recognized as key Canadian telecommunications policy objectives of the new legislative framework.

539. There is no trade-off between competition, innovation and affordability. The goal of affordable telecommunications services will be accomplished as a result of a focus on the economic concept of dynamic efficiency which emphasizes investment, innovation and facilities-based competition. Issues of income and affordability cannot be solved with the limited tools at the disposal of a sector-specific regulator and are best dealt with by other government departments. TELUS elaborates on these matters in Sections 2.2 through 2.5.

Net Neutrality

3.1 ***Are current legislative provisions well-positioned to protect net neutrality principles in the future?***

TELUS Response

540. Yes, the current legislative provisions are sufficient to protect net neutrality principles in the future. Sections 27(2) and 36 of the *Telecommunications Act* are sufficiently flexible to enable the CRTC to develop and modify a net neutrality framework. They continue to be sufficient to address any future concerns. However, TELUS further recommends that the CRTC exercise greater flexibility with respect to the implementation of its current regulatory policy pertaining to net neutrality pursuant to its existing statutory powers.

541. TELUS' position is set in more detail in Section 4.5.

Consumer Protection, Rights, and Accessibility

4.1 Are further improvements pertaining to consumer protection, rights, and accessibility required in legislation?

TELUS Response

542. There are no legislative changes required pertaining to consumer protection and rights in the *Telecommunications Act.* The CRTC already has jurisdiction over consumer protection and rights for telecommunications services and has exercised this jurisdiction by establishing numerous consumer protection measures through the terms of tariffs and binding conditions of services, including codes of conduct.

543. Regarding accessibility, the CRTC already has jurisdiction to implement rules about accessibility of telecommunications services, and has done so in many past decisions. TELUS' position on these issues is set in more detail in Section 4.3.

Safety, Security and Privacy

5.1 Keeping in mind the broader legislative framework, to what extent should the concepts of safety and security be included in the Telecommunications Act/Radiocommunication Act?

TELUS Response

544. The legislative framework is already sufficient to address concepts of safety and security. However, TELUS suggests that both concepts could be included in the policy objectives.

Safety

545. TELUS recommends that one of the revised Canadian telecommunications policy objectives should be "to enhance the social well-being of Canadians and the inclusiveness of Canadian society by…maintaining public safety and security, including limiting public nuisance through telecommunications."

546. This new policy objective simply recognizes and reinforces the role of telecommunications in enhancing public safety, and takes into account existing rules that the CRTC has put in

place for telecommunications service providers to enhance public safety for Canadians. Recent examples include the CRTC's determinations that all wireless service providers are to participate in the national public emergency alert system[372] and that the current 911 system be upgraded to "next-generation" 911 services.[373] These are ongoing mandates for wireless and wireline telecommunications providers that further public safety for Canadians. TELUS expects and acknowledges that these types of mandates will continue as part of any revised *Telecommunications Act*.

Security

547. TELUS' proposed telecommunications policy objective noted above includes security, in addition to public safety. The inclusion of security as an objective recognizes that the CRTC has, and continues, to carry out a number of functions addressing this important public policy issue.

548. In this regard, the Commission has issued decisions with respect to telemarketing activities, instituted the National Do Not Call List in 2008, has an active role in CASL enforcement activities and is taking measures to deal with nuisance telephone calls, pursuant to its powers under section 41 of the *Telecommunications Act*.

549. However, TELUS notes that security is a multi-dimensional issue which goes beyond the purview of the CRTC. In this regard, TELUS further notes that the Government of Canada recently renewed its national policies for public safety and cyber security, including the *National Cyber Security Strategy, and the National Strategy and Action Plan for Critical Infrastructure.* These initiatives confirm the Government's commitment to a collaborative and cross-sectoral approach to public safety and security.

550. Within the ICT sector, the Canadian Security Telecommunications Advisory Council (CSTAC) has been an effective senior level forum to collaboratively discuss emerging

372 *Implementation of the National Public Alerting System by wireless service providers to protect Canadians*, Telecom Regulatory Policy CRTC 2017-91.

373 Next-generation 9-1-1 – Modernizing 9-1-1 networks to meet the public safety needs of Canadians, Telecom Regulatory Policy CRTC 2017-182.

security problems and solutions. This dialogue has been the foundation for a number of meaningful and productive initiatives on telecommunications security best practices, and has not raised any gaps or impasses that suggest legislative reform is required.

551. TELUS' experience suggests that the CRTC requires no additional substantive powers with respect to security. Legislation and regulation are not ideal tools to keep pace with security challenges from new technology, because cyber threats and infrastructure will have changed by the time they can be enacted or revised, and security challenges and solutions tend to be specific to groups of people and businesses.

552. The challenges and way forward for children and youth are different than those for small business owners. Blockchain and cryptocurrencies mean different things to the financial sector than they do to the energy sector. Telecommunications policy is too blunt an instrument to accommodate these differences and safety or security improvements will involve many non-regulated stakeholders.

553. Due to the oversight of security by other Canadian, federal and provincial, legislation and bodies, TELUS recommends that beyond recognition of the fact that security is part of the CRTC's activities by formally incorporating it as a Canadian telecommunications policy objective, no other changes to the *Telecommunications Act* are required with respect to this issue. While including security among the policy objectives found in section 7 recognizes this important concern for Canadians, the CRTC needs no new legislative powers to fulfill this policy objective for the reasons outlined above. Stakeholders are adequately served by the Government's current collaborative and cross-sector approach to security.

Effective Spectrum Regulation

6.1 Are the right legislative tools in place to balance the need for flexibility to rapidly introduce new wireless technologies with the need to ensure devices can be used safely, securely, and free of interference?

554. The current legislative tools do not strike the right balance on "the need for flexibility to rapidly introduce new wireless technologies with the need to ensure devices can be used safely, securely, and free of interference." As explained to Section 5.2, to ensure

radiocommunication are regulated with the utmost of integrity, fairness and transparency, TELUS recommends the transfer of the responsibility for spectrum regulation from the Minister of Innovation, Science, and Economic Development to the CRTC. TELUS notes that making this change will deliver several key benefits, notably by providing for more stable regulatory processes, and the avoidance of political pressures.

555. TELUS also recommends that for regulations to be effective, they must be efficient, flexible and timely, based on current market conditions. Moreover, spectrum management must extend beyond a traditional prescriptive model towards offering licensees tangible spectrum usage rights and a competitively neutral environment through the introduction of class licences to better regulate the burgeoning use of licence-exempt apparatus under more effective regulation. Further details are provided in Section 5.2.

Governance and Effective Administration

7.1 Is the current allocation of responsibilities among the CRTC and other government departments appropriate in the modern context and able to support competition in the telecommunications market?

TELUS Response

556. The current allocation of responsibilities among the CRTC and other governments is no longer appropriate in the modern context and should be reformed to better support competition in the telecommunications market. In this regard, TELUS recommends numerous reforms, including changing the institutional roles for ISED, the Governor in Council and the CRTC.

557. TELUS' recommendations pertaining to a changed role for ISED are found in Section 5.2.

558. TELUS' recommendations pertaining to the role of the Governor in Council are found in Section 5.6.

559. TELUS proposes numerous recommendations for institutional reform for the CRTC. These include changes to its organizational structure to separate its advocacy, enforcement

and adjudicative functions to ensure fairness in its decision-making, various legislative reforms under the *Telecommunications Act* to better define, refine and constrain the CRTC's existing powers under that legislation, and other reforms to the CRTC's operations and functioning that would require in certain cases changes to the *Canadian Radio-television and Telecommunications Act.*

560. TELUS' full response to this question is found under Theme D in various, including Section 5.1, Section 5.7, Section 5.3, Section 5.4, Section 5.8, Section 5.9, Section 5.10, Section 5.11, as well as Section 4.6 under Theme C.

561. TELUS also recommends combining the *Telecommunications Act* and the *Radiocommunication Act* under a single statute, further details concerning which may be found under Section 5.2.

7.2 Does the legislation strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?

TELUS Response

562. The current *Telecommunications Act* does not strike the right balance "between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way." As explained in Section 5.2, TELUS recommends in particular that the objectives set out in the current legislation are fundamentally flawed and need to be replaced. TELUS also recommends that, assuming that amended legislation would also continue to include the current policy direction power, the existing political appeal power (Governor in Council power to vary, rescind or refer back CRTC decisions) should be eliminated, or as a distinct second-best alternative, be revised to limit the Governor in Council to sending back CRTC decisions for reconsideration or setting them aside, which is the existing provision governing appeals on broadcasting decisions.

563. TELUS' full response to this question is found under Theme D, including Section 5.2, Section 5.6, and the expert evidence of Professor Richard Schultz, Professor of Political Science, McGill University entitled "Controlling the Habit: A Paper Submitted in Support

of the TELUS Submission to the Broadcasting and Telecommunications Legislative Review Panel" (Appendix 9 to TELUS' submission).

Broadcasting Definition

8.1 How can the concept of broadcasting remain relevant in an open and shifting communications landscape?

TELUS Response

564. In order to remain relevant, Canada's broadcasting legislative framework needs to be modernized. In doing so, the federal government must recognize that the broadcasting system's two foundational pillars – (i) a "walled garden" in which consumers must obtain programming through the regulated system, and (ii) a distinct Canadian program rights market – are being eroded due to new technologies that have enabled competition from around the world in the provision of programming services.

565. In TELUS' view, an essential component of any effort to address the challenges facing the Canadian broadcasting system today is a modernized licensing framework that is both flexible enough to ensure that direct competitors within the Canadian broadcasting industry are playing by the same rules, and adaptable enough to accommodate changes in technology and the business models that drive the production and delivery of content.

566. TELUS proposes updating the relevant broadcasting nomenclature to classify market players into two categories:

a. "**Programming service**" would replace "programming undertaking" and "network", and would refer to any entity that exercises control over programming in Canada –whether domestic or foreign.

b. "**Content aggregator**" would capture the concept of the "broadcasting distribution undertaking", and be defined as a service that aggregates content by licensing it on a non-exclusive basis for distribution to consumers.

567. Notably, TELUS recommends that foreign programming services that reach a certain Canadian subscriber threshold also be authorized to operate in the Canadian market by the CRTC, and be required to fulfill certain policy objectives, namely supporting the creation and production of Canadian content.

568. With respect to content aggregators, TELUS submits that licensing requirements should be eliminated, and replaced with (i) pared down and more tightly-focused regulatory obligations that emphasize measures that support Canada's cultural sector, rather than regulating what is best left to market forces, and (ii) concomitant privileges that help offset any burdens associated with the cultural support measures that content aggregators assume. Furthermore, TELUS submits that foreign content aggregators should be allowed to compete in the Canadian market.

569. While TELUS favours streamlining the policy objectives relevant to private market players, the objectives of Canada's public broadcaster, CBC/Radio Canada, should be more extensive and address a variety of social and cultural goals that cannot be fulfilled via market forces alone.

570. TELUS's proposal for a modernized broadcasting legislative and regulatory framework can be found at sections 3.1 (new definitions and concepts), 3.2 (redefining the "elements" of the Canadian broadcasting system) and 3.3 (new policy objectives) of this submission.

8.2 How can legislation promote access to Canadian voices on the Internet, in both official languages, and on all platforms?

TELUS Response

571. As noted in Section 3.3, private commercial Canadian companies now compete with global content providers operating within the broadcasting system. It is unsustainable to expect Canadian private companies to continue to contribute in the same manner to the Canadian broadcasting system as they did when they operated in a "walled-garden" protected from external competition. The creation and production of Canadian content should remain a requirement for private Canadian programming services; however, a more open and

flexible regulatory approach is needed to ensure that the pursuit of commercial success, domestically and globally, is a priority for private broadcasters. A new regulatory approach must empower private programming services to innovate and take risks, whether in the types of programs they create, the business models they pursue, or otherwise.

572. Accordingly, private broadcasters should not be burdened by obligations to meet extensive social and cultural objectives that may hinder the pursuit of commercial success. They should be required merely to produce home-grown content using a percentage of their revenues. There should be no qualitative requirements as to the "Canadian-ness" of the programming created, nor any prescriptions as to the type of programming to be created.

573. In exchange for this relief, private programming services should no longer expect support, financial or otherwise, from the rest of the broadcasting system. This would ensure their full commitment to the success of the programming they create, and prevent innovation from being hindered by an excessive reliance on support mechanisms.

574. Other more specific social and cultural goals should be ascribed to the public element of the Canadian broadcasting system.

575. Moreover, the foreign element should also be held accountable for making some contributions to the Canadian broadcasting system commensurate with their access to the Canadian market.

Broadcasting Policy Objectives

9.1 How can the objectives of the Broadcasting Act be adapted to ensure that they are relevant in today's more open, global, and competitive environment?

TELUS Response

576. As noted in Section 3.3, TELUS submits that new *Broadcasting Act* policy objectives should be divided into three categories, corresponding to the three proposed "elements" of Canada's broadcasting system: private, public and foreign.

577. The policy objectives affecting private market players should be limited in number, and primarily focus on the creation and production of home-grown programming for the purposes of commercial success, domestically and globally. These objectives should be reasonable and attainable without the current guaranteed internal revenue streams, which are no longer sustainable in a global market. Proposed objectives for programming undertakings can be found at Section 3.3.1, while proposed objectives for content aggregators can be found at Section 3.3.2.

578. Because a re-imagined framework would provide greater flexibility to the private sector to pursue commercial success, domestically and globally, the achievement of important social and cultural goals would need to be met through the public broadcasting element. Indeed, CBC/Radio-Canada should be entrusted with distributing culturally important, but perhaps otherwise commercially unviable programming. The expansion of the public broadcaster's mandate should be met with a commitment to provide the necessary funding to fulfil these objectives (see Section 3.3.3).

579. Finally, certain policy objectives would be targeted at foreign programming services and content aggregators, and aim to ensure that these players bear regulatory obligations that are commensurate with their access to the Canadian market (see Section 3.3.4).

9.2 Should certain objectives be prioritized? If so, which ones? What should be added?

TELUS Response

580. As noted above, TELUS believes that Canada's broadcasting policy objectives should be streamlined, and divided into three categories, *i.e.*, those to be fulfilled by the private, public and foreign elements. Particular attention should be given to the policy objectives for private sector market players, which should focus on supporting a competitive industry rather than relying on restrictive and heavy-handed policy obligations. It is imperative that Canada's broadcasting sector be allowed to innovate to the maximum extent feasible if it wishes to ensure its continued relevance for years to come.

9.3 What might a new approach to achieving the Act's policy objectives in a modern legislative context look like?

581. Please see our answers to questions 9.1 and 9.2.

TELUS Response

Support for Canadian Content and Creative Industries

10.1 How can we ensure that Canadian and non-Canadian online players play a role in supporting the creation, production and distribution of Canadian content?

TELUS Response

582. As noted in TELUS' answer to question 8.1, TELUS is proposing that, under a new Broadcasting legislative framework, market players be classified into two categories.

583. "Programming service" would replace "programming undertaking" and "network", and would refer to any entity that exercises control over programming in Canada –whether domestic or foreign.

584. "Content aggregator" would capture the concept of the current "broadcasting distribution undertaking", and be defined as a service that aggregates content by licensing it on a non-exclusive basis for distribution to consumers.

585. Under TELUS's proposed framework, programming services would continue to be required to invest in Canadian content, as a quid pro quo for the control they exercise over the availability of programs in Canada. Furthermore, foreign services such as Netflix and Amazon Prime would also qualify as "programming services", as they hold control over programming that is distributed in Canada. Under TELUS' proposed new rules, foreign programming entities that reach a certain Canadian subscriber threshold would need to be authorized to operate in the Canadian market and would be required to fulfil certain policy objectives commensurate with their access to the Canadian market (see Section 3.3.4).

586. As noted in Section 3.3.2, TELUS proposes to abandon the prescriptive and highly burdensome licensing framework for content aggregators in favour of a flexible, incentive-

based regime. Under this regime, content aggregators would be able to register commitments to invest in and distribute Canadian content, in exchange for access to certain privileges that would help offset the effect of those obligations on their ability to compete. Under this new framework, TELUS believes foreign content aggregators should be treated no differently than Canadian content aggregators. Rather, foreign content aggregators should be regulated in the same permissive fashion, and afforded the same opportunity to voluntarily assume obligations that further Canadian cultural goals in exchange for regulatory privileges.

587. Accordingly, TELUS sees the regulatory approach it has proposed as a "win-win" for Canadian broadcasting. It will ensure that foreign programming services that have activities in Canada compete on an even footing with their Canadian competitors.

Democracy, News and Citizenship

11.1 Are current legislative provisions sufficient to ensure the provision of trusted, accurate, and quality news and information?

TELUS Response

588. As noted in Section 4.7, TELUS believes that an informed citizenry is essential to the democratic process, and that the creation of accurate and diverse news should be an objective for public funding. While TELUS agrees with the Panel that the proliferation of false information is a threat Canadian democracy, it would caution the Panel against legislative overreach, and submits that many policies aimed at combating false news – particularly those emanating from social media – fall outside the purview of the *Broadcasting Act.*

589. Government has rightfully recognized that a large part of the answer to this thorny problem is the creation of "good news" to combat the "fake news". To this end, in the 2018 Fall Economic Statement, the Government committed close to $600M over five years to support Canadian journalism in all its forms. The measures to support Canadian journalism consist of three initiatives: allowing non-profit news organizations to act as registered charities,

introducing a new refundable tax credit to support original news content creation, and introducing a new temporary non-refundable tax credit to support subscriptions to Canadian digital news media.[374]

590. TELUS also addresses the need for journalistic integrity principles in the context of addressing concerns relating to the extreme vertical integration of Canada's media industry. As discussed in greater detail in Section 3.4 above, TELUS remains concerned with the way in which the ownership of media assets provides vertically integrated entities with the ability to exert influence on news and informational programming to the benefit of their own corporate interest and the detriment of competitors. It is important for Canadians to access unbiased information, and the ever-rising level of vertical integration in the Canadian media landscape provides certain news programming organizations with the incentive to act in ways benefiting themselves and their shareholders as opposed to consumers. As a result, legislative and regulatory levers must be developed to uphold Canadians' right to access unbiased news, and curb the ability of vertically integrated firms to unduly influence their news programming organizations.

591. Ultimately, in regards to the proliferation of fake news on social media, TELUS notes that much of this content would not be captured by the legislative framework for the the broadcasting system. TELUS nevertheless recognizes that this form of communication raises important concerns that should be addressed by government outside of the broadcasting framework.

592. To this end, TELUS notes the recent Report of the Standing Committee on Access to Information, Policy and Ethnics,[375] and supports the recommendation of the committee with regard to enacting regulation to obligate social media:

- to clearly label content produced automatically or algorithmically (e.g. by 'bots');

374 See references in Section 3.1.1.

375 Report of the Standing Committee on Access to Information, Privacy and Ethnics, "*Democracy under threat: Risks and solutions in the era of disinformation and data monopoly",* December 2018.

- to identify and remove inauthentic and fraudulent accounts impersonating others for malicious reasons;
- to adhere to a code of practices that would forbid deceptive or unfair practices and require prompt responses to reports of harassment, threats and hate speech and require the removal of defamatory, fraudulent, and maliciously manipulated content (e.g. "deep fake" videos); and
- to clearly label paid political or other advertising.[376]

11.2 Are there specific changes that should be made to legislation to ensure the continuing viability of local news?

TELUS Response

593. TELUS believes that no legislative changes are necessary. Market forces may indeed result in the private element increasing its support for local programming as discussed in see Section 3.3.3.1 of this submission. However, to the extent there remain concerns that commercial programming services will not continue to create sufficient local programming, or locally reflective programming, this responsibility should fall on the public broadcaster. See Section 3.3.3.1.

Cultural Diversity

12.1 How can the principle of cultural diversity be addressed in a modern legislative context?

TELUS Response

594. TELUS recognizes that cultural diversity is a growing concern in the digital world. The federal government has made cultural diversity a priority, as exemplified the government's recent issuance of a "Joint Declaration on Cultural Diversity and the Digital Space," signed with the government of France.

376 *Ibid*, at section entitled "Potential Regulatory Solutions".

595. As noted in TELUS's response to Section 3.3.1, in order for Canada's broadcasting system to flourish in the digital era, broadcasting policy objectives for private sector market players must focus on the creation and production of home-grown programming for the purposes of commercial success, domestically and globally. While TELUS believes that successful audiovisual products ought to reflect Canada's cultural diversity, TELUS believes that cultural diversity should not be enshrined as a public policy objective for the "private" element of Canada's broadcasting system. To the extent that cultural diversity is not sufficiently reflected in Canada's audiovisual productions, then a cultural diversity objective targeted towards the public broadcaster could be considered.

National Public Broadcaster

13.1 How should the mandate of the national public broadcaster be updated in light of the more open, global, and competitive communications environment?

TELUS Response

596. A more open, global, and competitive communications environment has led to fragmentation in the broadcasting market, as broadcasters must now compete with new platforms and sources of content from around the world for the attention of Canadian viewers. This new environment requires some adjustment to the role of public and private broadcasters in Canada.

597. As mentioned above at Section 3.3, private broadcasters should continue to be required to invest in Canadian content. However, their contribution to Canadian content should focus on the production of content that can compete for the attention of audiences and attain commercial success, both domestically and globally.

598. Concomitantly, the mandate for the national public broadcaster should be updated to include those important cultural goals that cannot be met through reliance on market forces. Where a competitive free market cannot support the production of programming of national interest, the public broadcaster should receive the necessary funding to create high quality programming to fill that gap.

13.2 Through what mechanisms can government enhance the independence and stability of CBC/Radio-Canada?

TELUS Response

599. The independence and stability of the national public broadcaster requires, at a minimum, stable and predictable funding for program production, which should be provided either from general taxation revenues or from a dedicated levy payable by all Canadians (similar to the "television licence fee" that helps support the U.K. public broadcaster).

600. In assessing possible means for support, Government should reject any calls to shift the burden of funding Canadian content to telecommunications providers, aka an "ISP tax". A fulsome discussion on why such a tax would constitute bad public policy is provided in Section 3.5.

13.3 How can CBC/Radio Canada play a role as a leader among cultural and news organizations and in showcasing Canadian content including local news?

TELUS Response

601. TELUS believes that the measures outlined above will ensure that CBC/Radio-Canada plays a role as a leader among cultural and news organizations and in showcasing Canadian content, including local news. In particular:

- it is important to expand the mandate of the public broadcaster to include responsibility for culturally important but commercially unviable programming, which may include local news programming;
- it is important to ensure that our public broadcaster has the funding necessary to produce programming of high quality when fulfilling its mandate, and that this funding is both stable and predictable;
- the public broadcaster must have the independence to make programming decisions without political interference; and

- the public broadcaster must be accountable to Canadians in the fulfilment of its mandate, which can be accomplished at least in part through oversight of its performance in this area by an independent regulator such as the CRTC.

13.4 How can CBC/Radio-Canada promote Canadian culture and voices to the world including on the Internet?

TELUS Response

602. TELUS believes that the distribution and financing partnerships entered into by CBC/Radio-Canada in recent years demonstrate its high potential for promoting Canadian culture and voices to the world. For example, with limited second-window distribution opportunities due to its lack of entertainment-based specialty TV channels, CBC/Radio-Canada turned to Netflix not long after its launch in Canada to essentially be its "second-viewing" or catch-up viewing platform. That relationship evolved to being co-financers of high-quality and big-budget drama series such as *Anne* and *Alias Grace*. Both of these productions are broadcast on CBC/Radio-Canada and available on-demand on CBC.ca, and streamed globally on Netflix outside of Canada.

603. TELUS submits that with appropriate, *i.e.* higher and more stable, levels of funding, CBC/Radio-Canada will be empowered to continue making the investments necessary to produce high quality Canadian programming, without needing to trade away the rights to global distribution of that programming. In this respect, TELUS takes note of an initiative described by CBC/Radio-Canada in its submission in support of the Government's Creative Canada public consultation, in which it stated:[377]

> We are currently involved in discussions and partnerships with other public broadcasters like Australia's ABC and France Télévision to create a global digital Business to Business (B2B) marketplace that will allow us to reach each other's content and distribution platforms. We have already shown, with our successful public broadcaster's global conference in Montreal this September, that we

[377] CBC/Radio-Canada, *A Creative Canada: Strengthening Canadian Culture in a Digital World*, November 2016, at p. 28; submission made to the Minister of Heritage in the Canadian Content in a Digital World Consultation.

> can play a leadership role within this community. We are a natural bridge between Canadian producers and creators and an international network of broadcasters who share a set of values around quality, distinctiveness and public service.

13.5 How can CBC/Radio-Canada support and protect the vitality of Canada's official languages and official language minority communities?

TELUS Response

604. As discussed above, the public element of the Canadian broadcasting system should be entrusted with social and cultural public policy goals which are not met by a private element which is focussed on commercial success.

605. CBC/Radio-Canada can and does play an important role in the telling of Indigenous stories by Indigenous Peoples, and in contributing to reconciliation with Indigenous Peoples. For example, CBC/Radio-Canada's current contributions in this area include providing unique programming in at least eight Indigenous languages,[378] reporting on the alleged abuse of Indigenous women at the hands of the police (for which it won the highest journalism award for public service journalism),[379] and through the work of its business unit dedicated to Indigenous issues in connection with the unsolved cases of missing and murdered Indigenous women, which included the creation of multi-platform content such as interactive digital sites for each missing woman.[380]

606. Ensuring proper funding and a strong mandate that includes the creation of such programming of national interest is the best way to ensure that CBC/Radio-Canada can maintain and expand upon the important role it plays in contributing to reconciliation with Indigenous Peoples and to the telling of Indigenous stories by Indigenous Peoples.

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378 *Ibid.* at p 7.
379 *Ibid.* at p 10.
380 *Ibid.*

13.6 How can CBC/Radio-Canada support and protect the vitality of Canada's official languages and official minority communities?

TELUS Response

607. As discussed above, the public element of the Canadian broadcasting system should be entrusted with social and cultural public policy goals which are not met by a private element which is focussed on commercial success.

608. Accordingly, it should be made an expectation of the CBC that it support and protect the vitality of Canada's official languages and official language minority communities. Ensuring proper funding and a strong mandate that includes the creation of such programming of national interest is the best way to ensure that CBC/Radio-Canada can maintain and expand upon the important role in the achievement of Canada's broadcasting policy objectives.

Governance and Effective Administration

14.1 Does the Broadcasting Act strike the right balance between enabling government to set over policy direction while maintaining regulatory independence in an efficient and effective way?

TELUS Response

609. See TELUS' comments in Section 5, Theme D.

14.2 What is the appropriate level of government oversight of CRTC broadcasting licencing and policy decisions?

TELUS Response

610. See Sections 5.6 and 5.9.

14.3 How can a modernized Broadcasting Act improve the functioning and efficiency of the CRTC and the regulatory framework?

TELUS Response

611. See Section 5.11.

14.4 Are there tools that the CRTC does not have in the Broadcasting Act that it should?

TELUS Response

612. As set forth in Section 3.4, TELUS recommends that the CRTC be granted new powers to address the negative implications of vertical integration on Canada's broadcasting market. Vertically integrated Canadian communications companies have incentives to undermine certain broadcasting policy objectives in order to maximize the profitability of their more lucrative network operations. These incentives can stifle innovation and foreclose competition from both (1) competing content providers by disadvantaging carriage on their own networks; and (2) competing content aggregators/BDUs by refusing to negotiate commercially reasonable carriage rights for the content they control.

613. The CRTC has, over the years, imposed various safeguards on vertically integrated firms. However many of these safeguards have been challenged in court by vertically integrated firms – notably the Wholesale Code, which the Federal Court of Appeal recently deemed could not be implemented via an order pursuant to section 9(1)(h) of the *Broadcasting Act*.

614. TELUS believes it is more important than ever for the CRTC to enforce the safeguards that seek to protect the accessible, affordable and competitive distribution of diverse programming in Canada. A renewed *Broadcasting Act* must provide powers for the CRTC to make regulations and to impose licensing conditions on vertically integrated entities in order to address these concerns.

14.5 How can accountability and transparency in the availability and discovery of digital cultural content be enabled, notably with access to local content.

TELUS Response

615. As noted in section 3.3.2 of this submission, TELUS's new proposed framework would significantly reduce the regulatory burden affecting BDUs/content aggregators, in order to allow these players to better compete in the Canadian market. A notable feature of this new framework would be the elimination of licensing requirements for content aggregators, and their replacement by an incentive-based regime.

616. Under such an incentive-based regime, content aggregators would be able to register with the CRTC their commitment, for example, by way of a service agreement, to meet a number of obligations, such as agreeing to distribute culturally important programming services such as the public broadcasters.

617. In exchange, content aggregators would be permitted to access certain privileges that help offset the effect of those obligations on their ability to compete. The privileges of registered content aggregators would include, for example, the right to access to the *Copyright Act*'s compulsory licensing regime for retransmission of over-the-air radio and television signals, and access rights to licensed Canadian programming services on commercially reasonable terms.

618. TELUS firmly believes that letting market forces play a prominent role the development of a content aggregation industry will allow Canada to have the best of both worlds – a robust market that offers Canadians ample choice in terms of services or business models that meet their preferences, and support for the Canadian broadcasting objectives.

619. A relaxed regulatory framework would nevertheless incorporate incentives for content aggregators to contribute to Canada's cultural sector, while providing the flexibility for different market players to adopt different business models. For instance, in exchange for distributing the public broadcaster's channels and implementing discoverability and promotional measures in relation to Canadian content, or contributing to the creation and

production of Canadian content, certain privileges would be secured. These privileges could include access to the retransmission regime under the *Copyright Act* and access to dispute resolution services of the CRTC to ensure commercially reasonable terms of distribution of licensed programming services.

* * * End of document * * *

Appendix 1: Guiding Principles for the Telecommunications Recommendations

To assist with the development of its recommendations regarding telecommunications legislation, TELUS relied on a series of **11 guiding principles**. Those principles are as follows:

Principle 1: The key premise underlying Canada's approach to telecommunications regulation should be that market forces should be relied upon to the greatest extent possible to achieve Canada's policy goals for the telecommunications policy sector.

Principle 2: The presumption should be that market forces are capable of providing the requisite level of discipline and regulation should only be applied when it is credibly demonstrated that market forces alone cannot be relied upon to achieve the stated policy goals, and that regulation can be expected to deliver a superior outcome.

Principle 3 Economic regulation should only be applied to essential services and then only where providers of those services possess non-transitory market power.

Principle 4 Economic regulation, where required, should neither exclude efficient competitive entry nor promote competitive entry artificially.

Principle 5 Where economic regulation is deemed necessary, the regulated companies must be provided a reasonable opportunity to recover their not imprudently incurred costs of providing the regulated services.

Principle 6 Social regulation and technical regulation, where required, should be applied symmetrically and should be applied through laws of general application, as distinct from sector-specific regulation, whenever possible.

Principle 7 Where economic regulation is required, it should be applied symmetrically so as not to distort the efficient choice of either service provider or technological platform.

Principle 8 Regulation, where applied, should be both justified, in the sense that the benefits of regulation outweigh the cost of regulation and proportionate, in the sense that it is the least-intrusive form of regulation consistent with achieving the stated policy objectives.

Principle 9 Once it is credibly demonstrated that regulation is required, some form of *ex post* regulation should be adopted as a default. If and only if it is credibly

demonstrated that *ex post* regulation fails to achieve the stated objectives should some form of *ex ante* regulation be considered.

Principle 10 Regulatory decisions are reviewable by the courts to ensure compliance with the statute.

Principle 11 The optimal regulatory policy should recognize the trade-off between static and dynamic efficiency and its implications for consumer welfare.

Appendix 2: Amendments to the 1993 Telecommunications Act - Annotated Highlights

Year	Sections	Highlights
1998	2, 16, 16.1-16.4, 19, 22, 46.1-46.5, 67, 73, 74.1	Implementation of WTO/GATS obligations These amendments implemented Canada's obligations to liberalize basic international telecommunications services under the Fourth Protocol to the World Trade Organization ("WTO") General Agreement on Trade in Services ("GATS"). Consistent with these obligations, the amendments to the *Telecommunications Act:* (a) authorized the CRTC to establish a licensing regime for telecommunications service providers and to administer telecommunications numbering resources and other activities, including establishing the contribution subsidy regime, related to telecommunications; and (b) augmented the existing regime for the certification and inspection of telecommunications equipment in Canada.
2005	41.1-41.7, 72.01-72.15	Unsolicited telecommunications The 2005 amendments to the *Telecommunications Act* included the addition of new sections 41. To 41.7, to permit the CRTC to administer databases for the purpose of its power under section 41, namely the power to prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression. Administrative Monetary Penalties Further amendments established an administrative monetary penalty for the contravention of prohibitions or requirements of the CRTC under new sections 72.01-72.15.
2010	16(1), 16(5), 39(2), 39(5.1), Section 41 (various subsections)	Canadian ownership and control Amendments to section 16 exempted satellites from Canadian ownership and control requirements. Amendments pertaining to CASL legislation Amendments to section 39 pertained to the passage of CASL legislation. Amendments to section 41 also pertained to the passage of CASL legislation and included amendments "not yet in force."

Year	Sections	Highlights
2012	16(1) – 16(9), 41	Canadian ownership and control Amendments to section 16 remove Canadian ownership rules on telecommunications common carriers if the carrier and all of its affiliates have total annual telecommunications revenue that represent less than 10% of total Canadian telecommunications revenues, as determined by the CRTC. If foreign-controlled carriers subsequently increase their revenues above the 10% threshold, they will continue to be exempt provided that the growth in revenues is not the result of either (i) the acquisition of control of another Canadian carrier or (ii) the acquisition of the assets of another Canadian carrier used to provided telecommunications services. To monitor this, the CRTC must be notified when any carrier operating pursuant to the 10% exception acquires control of another Canadian carrier or acquires assets used by another Canadian carrier to provide telecommunications services. In order to facilitate these measures, a new definition of "entity" was introduced to include not only corporations but also partnerships, trusts and joint ventures. The term "voting interest" was also introduced. Telemarketing – National Do Not Call List Amendments to section 41 pertained to telemarketing rules and the National Do No Call List (NDCL), giving the CRTC the explicit power to conduct investigations to determine whether there has been a contravention of any order made by the CRTC with respect to its telemarketing rules, and clarifying the CRTC's power to set fees for the use of the NDCL and similar databases.
2014	24.1, 27.2, 39(3)-(5), 69.2, 69.3 (1) (a) to (d), (f) and (g), 69.3 (2) and (3), 69.4(1)(c) and (d), 71(1) and (2), 71(4) preamble and subsections (a)-(d), 71(5) and (6), 71(8), 72.001-72.009, Heading before section 72.01, 72.08(4), 72.14-72.19, 72.2, 73(2)(d), 73(4)	There were three sets of amendments to the *Telecommunications Act* in 2014 as follows: (i) Inspection/Civil Liability: The *Telecommunications Act* was amended to create new offences under sections 71 and 72 relating to voter contact calling services and to allow the CRTC to use the inspection and investigation regime in the *Telecommunications Act* to administer and enforce part of the voter contact calling services regime in the *Canada Elections Act*. (ii) Roaming: A new section 27.1 (Roaming) was added which set a maximum amount that a Canadian carrier can charge to another Canadian carrier for certain roaming services. This section was subsequently repealed.

Year	Sections	Highlights
		(iii) A third set of amendments amended the *Telecommunications Act* in several respects, including the following: Extension of Jurisdiction - conditions for resellers: Section 24.1 was added to provide the CRTC with the authority to impose certain conditions concerning the offering and provision of services on providers of telecommunications services that are not telecommunications carriers (resellers); Paper bills: A new section 27.2 was added to prohibit providers of telecommunications services from charging subscribers for the provision of paper bills; Sharing confidential information: Section 39 was amended to allow for the sharing of information between the CRTC and the Competition Bureau (sub-sections 39(3)-(5)); Administrative Monetary Penalties: Amendments were made to provide the CRTC with enhanced authority to impose administrative monetary penalties (AMPs) for violations of the *Telecommunications Act*, CRTC decisions and regulations; Telecommunications apparatus: Amendments were made to provide the Minister of Industry with the authority to establish a registration system and update other processes relating to telecommunications apparatus in order to assess conformity with technical requirements (section 69), and to update inspection powers for ensuring compliance (section 71); and Coordinating amendments: These amendments included coordinating amendments with the *Fair Elections Act*.

Competition Bureau Canada
Market Study Notice: Competition in Broadband Services

Expert Report of Dr. Robert W. Crandall

I. Introduction and Qualifications

My name is Robert W. Crandall. I am an economist specializing in industrial organization, regulation, and competition policy. I was a Senior Fellow in Economic Studies at the Brookings Institution in Washington, DC, for thirty-nine years, where I authored or co-authored 16 books and numerous articles. Previously, I taught at the Massachusetts Institute of Technology, the University of Maryland, and George Washington University. I also taught a course in antitrust policy with Professor Phillip Areeda at the Harvard Law School. I am currently and Non-Resident Senior Fellow at the Technology Policy Institute in Washington, DC. I received my MA and PhD in Economics from Northwestern University.

In recent years, I have concentrated on regulatory policy and competition policy in the communications sector. I have written numerous books and journal articles on the effects of regulation and competition policy in telecommunications. I have provided consulting services to the Antitrust Division of the U.S. Department of Justice, the Federal Trade Commission, the Federal Communications Commission, and the Canadian Competition Bureau. In addition, I have consulted for several U.S. and Canadian companies on matters involving competition policy and economic regulation. A copy of my CV is attached to this report.

I have been asked by TELUS to prepare a report that responds to the Competition Bureau's (The Bureau's) Market Study Notice on Competition in Broadband Services. Specifically, my report will provide an analysis of the implicit assumptions in the Notice's "Purpose of the study" and respond to questions c) and d) in the Notice's "Scope of the study."

II. The Market Study

The Bureau's Market Study appears to be based on an assumption that the Canadian residential broadband "market" is comprised of just two wireline facilities-based carriers and a number of independent resellers and that, as result, Canadians may suffer from high prices for broadband Internet connections.[1] Given the data on wireless usage and the prospects for further expansion of wireless access as 5G technology is deployed, the Bureau should reexamine both of these assumptions as it proceeds with this Market Study. As I shall show, the relevant market for consumer broadband Internet services in Canada includes more than just broadband wireline

[1] Competition Bureau Canada, Market Study Notice: Competition in Broadband Services, §2.

services, and the prices of these broadband services are reasonable, particularly in a country of such low population density.

A. Market Definition

The Notice begins by observing that "[T]he Canadian Radio-television and Telecommunications Commission (CRTC) has historically taken action to increase the level of competition in Canadian broadband *markets* by allowing independent resellers to use existing telephone and cable networks to provide internet services to Canadians" and that "Most Canadian homes are served by two networks capable of providing broadband internet services: one owned by the local telephone company and the other owned by the local cable company." Finally, the Notice asserts that "The purpose of this Study is to better understand these *market* outcomes and the competitive dynamics of Canadian broadband markets more generally."[2] (emphasis added)

Taken together, these statements imply that the Bureau views the broadband market as comprised solely of fixed wireline broadband services. It would be inappropriate for the Bureau to proceed with any analysis of competitive dynamics of Canadian broadband markets without first justifying carefully considering whether this is an appropriate market definition. Given the incredible growth in the use of wireless devices to access the Internet, it is unlikely that the Bureau could support a conclusion that wireline broadband services are in a separate market from wireless broadband services.

1. The Identification of a Relevant Market

Conventional antitrust analyses of market power begin with the definition of the relevant market. Carlton and Perloff provide a succinct definition of the extent of a product market in their textbook, *Modern Industrial Organization.* They note that:

> "A proper definition of the product definition of a market should include all those products that are close demand or supply substitutes. Product B is a *demand substitute* for A if an increase in the price of A causes consumers to use B instead. Product B is a *supply substitute* for B if, in response to an increase in the price of A, firms that are producing B switch some of their production to the production of A."[3]

The determination of the relevant product market for the purposes of competition policy often involves using the "hypothetical monopolist test" advanced in the *Merger Enforcement Guidelines* developed by the Competition Bureau:

[2] Market Study Notice, §4-7.
[3] Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization.* Addison Wesley, 2000, p. 612.

> "Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger."[4]

If this hypothetical monopolist of a given product or service could raise price profitably because customers would not or could not shift sufficiently to substitute products or services to make the price increase unprofitable, this product or service would constitute an antitrust market. On the other hand, if customers shifted to other products or services in sufficient numbers to render such a price increase unprofitable, these substitutes would have to be added to the market definition.[5]

In practice, defining an antitrust market requires estimates of the price elasticity of demand for the product or service or of estimates of the *cross-price* elasticities of demand among products or services.[6] One common approach is to specify the "critical elasticity" of demand (Ɛ) above which it would be unprofitable for the hypothetical monopolist to increase its price:

$$Ɛ = 1/ (m + \Delta P/P)$$[7]

where m is the profit margin and ΔP/P is a small, but significant price increase. For example, if the industry profit margin for incremental subscribers to the broadband network is, say, 0.75 – because the network is largely built – and the small, but significant hypothetical price increase is

[4] Competition Bureau Canada, *Merger Enforcement Guidelines*, 2011, §4.3. This approach is also cited in the Bureau's, *Abuse of Dominance Enforcement Guidelines*, Draft for Public Consultation, March 2018, pp.8-9. "Typically, the initial candidate market considered is a product in respect of which the alleged abuse of dominance has occurred or is occurring and its closest substitute. If a hypothetical monopolist could not impose a small but significant and non-transitory price increase above the benchmark, assuming the terms of sale of all other products remained constant, the candidate market is expanded to include the next-best substitute (which could include the products of other firms). The analysis is repeated until the point at which the hypothetical monopolist would profitably impose and sustain such a price increase over the candidate market. Alternatively, the abuse of dominance may have impacts in several different product markets. If competitive conditions are similar across several product markets, the Bureau may aggregate them for analytical purposes. . ." fn. 9.
[5] *Id.*, §4.4.
[6] For a concise discussion of these concepts, see Daniel Rubinfeld, "Product Market Definition," University of California, Berkeley, Department of Economics, Class Notes, available at https://www.law.berkeley.edu/wp-content/uploads/2015/04/Market-Definition-Notes.pdf.
[7] *Id.*

0.05, the critical elasticity is 1.25. If the price elasticity of demand for the service is greater than 1.25 (in absolute value), the proposed market is too narrow to be a relevant antitrust market.

Unfortunately, I am unaware of any published econometric studies of the demand elasticity for broadband Internet services based on recent data. Older studies of the demand for broadband do not reflect the modern realities of smartphones, laptops, tablets with wireless capabilities, the availability of 4G LTE wireless service, and the proliferation of Wi-Fi hotspots. Nor could they reflect the pending availability of wireless services delivered over new 5G networks. Thus, determining the relevant market definition for broadband services must depend on more indirect evidence of consumers' willingness to use substitute services.

2. Substitutability of Wireless and Wireline Broadband Services among Canadian Consumers

The 2017 *Communications Monitoring Report* issued by the CRTC concludes that:

> "Canada's wireless networks enable Canadians to access services that are comparable to wireline services. Wireless service providers (WSPs) provide voice, data, *Internet*, and video services. The differentiating factors for these services tend to be mobility and price. Based on MTM's [Media Technology Monitor's] 2016 statistics, the three most popular activities by Canadian smartphone owners were text messages, *Internet access*, and email."[8] (emphasis added)

Furthermore, the CRTC published data on the number of Canadian households subscribing to wireline only and wireless only services over the years 2004-16. (Table 1) These data show that Canadians are dropping wireline services rapidly and gravitating towards wireless. In just 12 years, the number of residential wireline subscribers per 100 households has declined by more than 30 percent while the number of mobile wireless service subscribers has increased by nearly 50 percent. Notably, fully 32.5 percent of households had only wireless service in 2016, while just 11.4 percent relied solely on wireline service.[9]

The data in Table 1 could simply reflect the substitution of wireless voice services for traditional wireline voice services, but more recent data suggest otherwise. Evidence of the substitution of wireless for wireline broadband access in Canada may be found in a 2018 report published by Deloitte, which finds that 25 percent of Canadian homes relied solely on cellular wireless for access to data over the Internet in 2017.[10] Moreover, Deloitte predicts that by 2022, an estimated 30-40 percent of all households in the seven countries it surveyed will rely solely on

[8] CRTC, *Communications Monitoring Report 2017*, p. 294.
[9] The share of "wireless-only" households in the United Sates is now over 52 percent. (National Center for Health Statistics, "Wireless substitution: Early release of estimates from the National Health Interview Survey," January–June 2017. December 2017. Available from: https://www.cdc.gov/nchs/nhis.htm.
[10] Deloitte, "TMT Predictions 2018: The future is here," p.56, available at https://www2.deloitte.com/ca/en/pages/technology-media-and-telecommunications/articles/tmt-predictions-2018.html.

fixed or cellular wireless services for access to data over the Internet. Since Canada had the second highest share of wireless-only households in its seven-country sample, this suggests that an even larger share of Canadian households will be wireless only by 2022. Deloitte stresses that this means that "These people will have no active wired data connection to their home –no coaxial cable, fiber-optic connection or copper DSL line. Instead, *they rely on radio technology for their entire home internet usage.*"[11] (emphasis added) This suggests that wireline and wireless broadband services are clearly substitutes.

Table 1
Canadian Landline and Mobile Service Subscribers per 100 Households

Year	Landline	Mobile	Landline and/or mobile	Landline only	Mobile only
2004	96.2	58.9	98.9	40.0	2.7
2005	94.0	62.9	98.8	36.0	4.8
2006	93.6	66.8	98.6	31.8	5.0
2007	92.5	71.9	98.8	26.9	6.3
2008	91.1	74.3	99.1	24.8	8.0
2009	89.3	77.2	99.3	22.1	10.0
2010	89.3	78.1	99.4	21.3	10.1
2011	86.6	79.1	99.3	20.2	12.7
2012	83.8	81.3	99.2	17.9	15.4
2013	79.1	84.7	99.3	14.6	20.2
2014	75.5	85.6	99.2	13.6	23.7
2015	71.9	86.1	99.3	13.2	27.5
2016	66.8	87.9	99.3	11.4	32.5

Source: CRTC, *Communications Monitoring Report 2018, Communications Services in Canadian Households: Subscriptions and Expenditures 2012-2016*, Table 1.1.

One of the major reasons for the continuing shift from wireline to wireless broadband will be the deployment of 5G millimeter wave technology, using much higher frequencies than those currently used in cellular networks. These new 5G technologies will permit carriers to deploy small digital antennas on the outside of homes, which will allow the homes to connect by line of sight to small microcell transmitters a few hundred meters away. These technologies are now beginning to be deployed and are likely to constitute a major new source of home Internet access within a few years.[12]

[11] *Id.*
[12] *Id.* at p. 61. See the 2017 TELUS Annual Report, p. 84 and 94, for a discussion of TELUS' view of the potential benefits of 5G technology. Note that these benefits will depend crucially on the Government of Canada's decision to make spectrum available for 5G.

At this juncture, it is very difficult to predict how the new 5G technologies will affect the manner in which consumers connect to the internet. It is likely that the proliferation of access points – currently described as "hot spots" – will dramatically change consumer options and, consequently, the prices available to consumers. As 5G is deployed, the distinction between wireless and wireline services may begin to disappear.

The current evidence thus shows that a large number of Canadian consumers find wireless and wireline access to be substitutes. Given the improvement in satellite technology, consumers in many areas of Canada can choose between satellite, wireline, and wireless broadband Internet access. Equally important, subscribers with both a wireless subscription and a wireline – or a satellite – subscription can choose between these services to access the Internet for various purposes. For these reasons, the most appropriate relevant market for consumer access to the Internet includes wireless, wireline, and satellite broadband service.

B. Canadian Wireline Broadband Prices

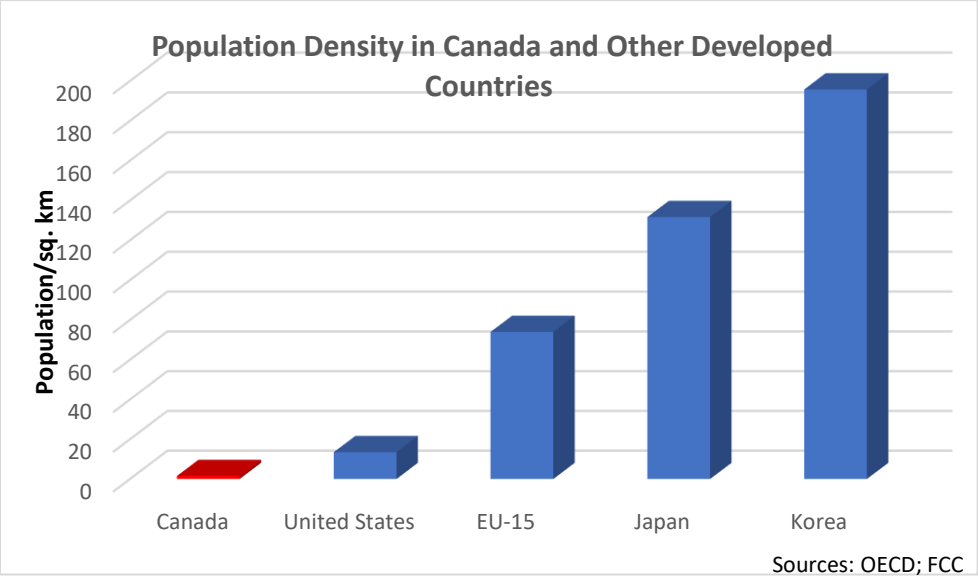
Any analysis of the Canadian wireline broadband sector should begin by acknowledging a fundamental difference between Canada and most other developed countries, namely, Canada's extremely low population density. Providing fixed-wire or wireless broadband services requires carriers to deploy expensive networks comprised of copper wires, coaxial cable, fiber-optic cables, or a combination of these transmission media, and wireless towers. These networks must be deployed over pole lines, through underground ducts, or by interconnected wireless transmission facilities. For these technologies, the cost of serving customers rises substantially as the population density of the covered area declines.

1. Canada's Low Population Density

As Figure 1 shows, Canada's average population density is far below that of the United States and even farther below the population densities found in Europe,[13] Japan, and Korea, countries whose broadband markets are routinely compared with Canada's. Furthermore, even in urban areas Canada is less densely populated than most other developed countries.

[13] For most of this report, data for Europe will include only the EU-15 countries, the more developed, Western European countries that comprised the European Union before its 2004 expansion into Eastern Europe, Cyprus, and Malta or for a subset of these 15 countries if data are unavailable for one or more of them. The Western European countries have higher incomes per capita and more developed communications systems.

Figure 1

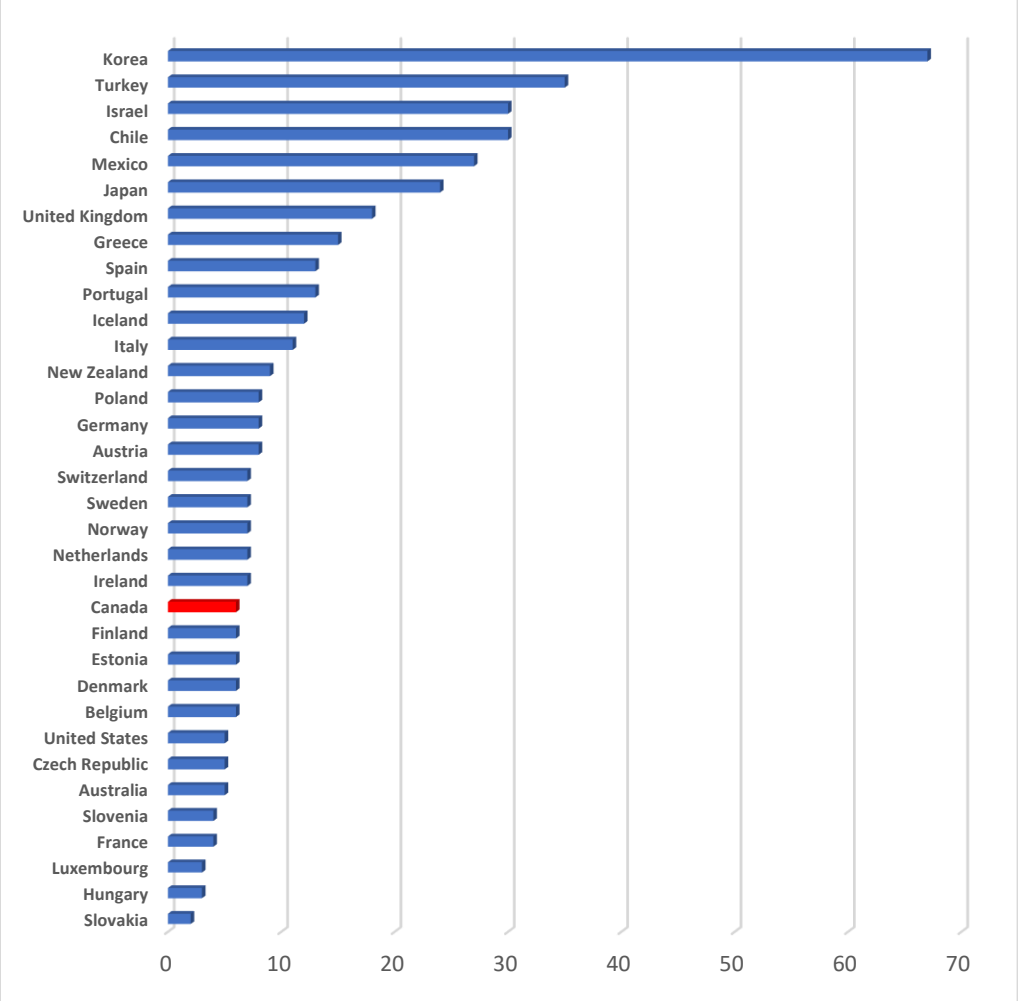


The Information Technology and Innovation Foundation has calculated an index of "urbanicity" that is equal to the share of population in urban areas multiplied by the population density in those urban areas.[14] (Figure 2) This index places Canada at 13th among 34 OECD countries; *i.e.*, Canada has lower urban population concentration than all but 12 of the 34 most developed countries in the world, and its concentration is far below the urban concentration in countries such as the United Kingdom, Japan, and Korea. The Canadian population is simply less concentrated in large urban areas than is the population of most other developed countries.

[14] Richard Bennet, Luke A. Stewart, and Robert D. Atkinson, *The Whole Picture: Where America's Broadband Networks Really Stand*, The Information Technology & Innovation Foundation, Washington, DC, 2013.

Figure 2

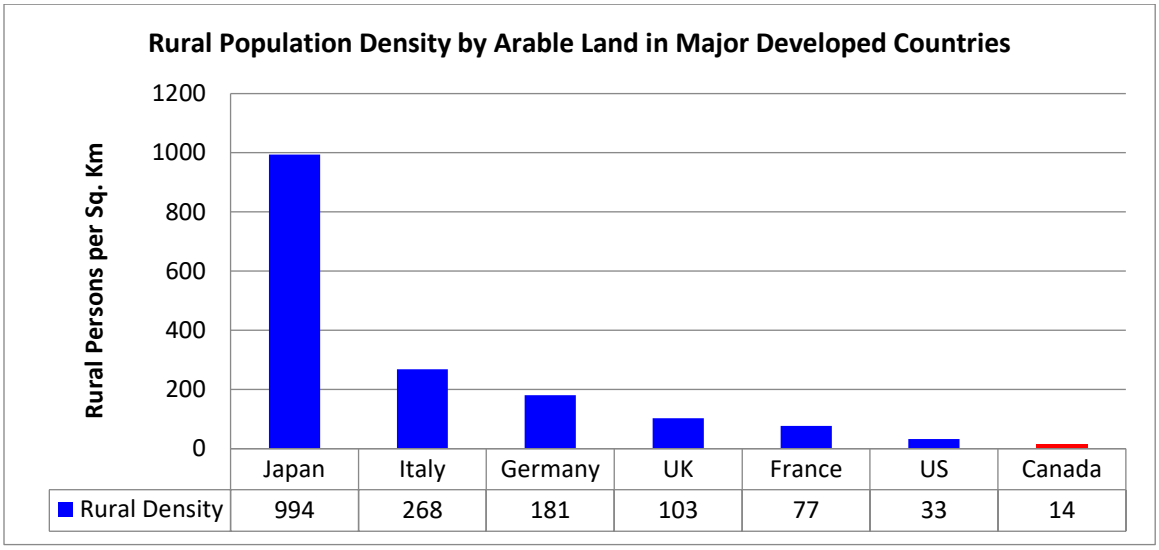
The "Urbanicity" of Developed (OECD) Countries



Source: The Information Technology & Innovation Foundation (2013)

In addition, Canada's rural areas have much lower population density than the rural areas in the United States and the larger European countries, as Figure 3 shows. Thus, even in rural areas, Canada has a cost disadvantage relative to other major developed countries. Given the economics of network deployment, this low population concentration means that it simply costs more to serve broadband subscribers in Canada than in most other developed countries.

Figure 3



Source: Richard Bennett, *G-7 Broadband Dynamics: How Policy Affects Broadband Quality in Powerhouse Nations.* American Enterprise Institute, 2014

2. Canadian Broadband Prices

International comparisons of high-speed broadband prices are often misleading for a number of reasons. First, fixed-wire broadband service is often purchased in a bundle with television, voice, and even mobile services. These other components of the bundle vary substantially across countries. For example, the bundle of television channels offered can include a few channels of local original content, channels that offer reruns of old television series or movies, public-affairs programming, and a variety of sports offerings.[15] Canadian and U.S. programming services typically include a substantial amount of sports programming, but the European television services generally offer far fewer major sports channels. Correcting for the

[15] It is impossible to know the number and quality of basic cable channels included in each country's bundled price plans that are included in the various analyses cited in the next three footnotes. However, in their study of broadband prices, Scott Wallsten and James Riso ("Residential and Business Broadband Prices, Part 1: An Empirical Analysis of Metering and Other Price Determinants," Technology Policy Institute, November 2010) show that the median number of video channels in U.S. and Canadian triple-play bundled service plans were 160 and 116, respectively, more than any other country in their 30-country sample. Most triple-play bundles offered by carriers in member countries in the European Union contained between 30 and 60 channels. (See Table 4 of their study.)

differences in the quality of these bundles across countries would be very difficult and, in fact, is not even attempted by most statistical sources.[16] For instance, the annual study on fixed broadband prices in Europe, published by the European Commission, makes no effort to adjust for differences in the quality of bundles used in their analysis.[17] Nor does the Wall/Nordicity Report prepared periodically for Canada's CRTC and Industry Canada.[18] Thus, these comparisons of bundled prices are generally meaningless.

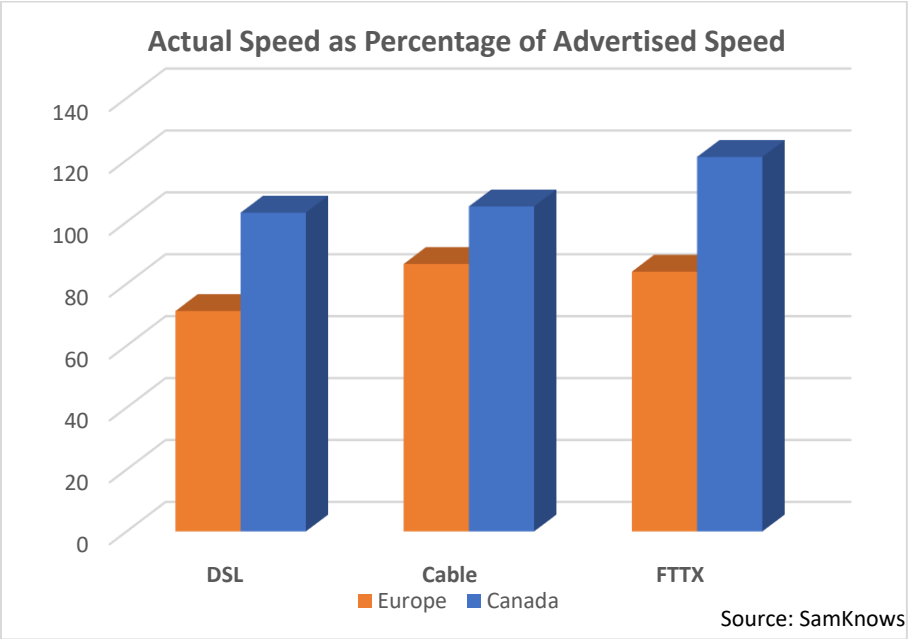
Second, given the competitive rivalry in communications markets – particularly, in Canada – standalone Internet service or bundled services are often offered at competitive discounts. Most statistical reports of broadband prices, such as the European Commission Report, the Wall/Nordicity Reports, or the U.S. Federal Communications Commission's annual International Broadband Reports,[19] generally rely on list prices and may therefore overstate actual prices paid by consumers.[20]

Third, broadband prices are generally reported for advertised download and upload speeds, but actual speeds often diverge substantially from these advertised speeds. Indeed, actual speeds throughout Europe are generally below, and often far below advertised speeds, while actual speeds in Canada are much closer to their advertised levels.[21] (See Figure 4) Thus, it is

[16] The Federal Communications Commission's *Sixth International Broadband Data Report*, 2018, offers an attempt to adjust prices through a "hedonic regression" approach that includes several service-quality variables. (Appendix C, §29-32) Unfortunately, it uses *advertised* prices and broadband speeds, not transaction prices and measured (actual) speeds in this analysis, rendering the results extremely unreliable.
[17] European Commission, *Fixed Broadband Prices in Europe, 2016* (and earlier reports).
[18] The latest of these reports is NGL Nordicity Group Ltd., *2017 Price Comparison Study of Telecommunications Services in Canada and Select Foreign Jurisdictions*, October 2017, prepared for Innovation, Science and Economic Development Canada.
[19] Federal Communications Commission, *International Broadband Data Report*, International Comparison Requirements Pursuant to the Broadband Data Improvement Act, annually.
[20] The 2017 Nordicity Report (fn. 18 above) states that "The price data collected for this Study were drawn from the surveyed service providers' websites . . . The price data reflect currently advertised prices that are available to new customers or customers changing service plans." (p. 23) The FCC's latest (sixth) *International Broadband Data Report* states at §12 that: "We examine *advertised* broadband prices for both fixed and mobile service plans in the United States and up to 28 comparison countries depending on data availability (for a total of up to 29 countries)." The European Commission's *Fixed Broadband Prices in Europe, 2016* explained its methodology as follows: *"*Where prices differ by payment method, the most easily and *publicly accessible* price is recorded, regardless of the payment or billing method specified. Discounts were recorded which applied to all customers, and applied on the first day of the Price Reference Period." (emphasis added)
[21] SamKnows, *Quality of Broadband Services in the EU*, October 2014; SamKnows, *Quality of Broadband Performance in Canada*, March and April, 2016. More recent data for the United Kingdom, showing that actual ADSL speeds are far below advertised speeds, may be found in Ofcom, *UK Home Broadband Performance*, 12 April 2017, available at

very misleading to make cross-country comparisons of the prices or other attributes of services that advertise a given advertised download speed of, say, 30 Mbps or 50 Mbps, since subscribers in various countries may in reality be receiving very different services for any advertised speed.

Figure 4



Finally, statistical reporting services routinely report the list prices offered by small and large carriers alike in each country and then construct average or median of prices from these list prices. But many small carriers offer service only in low-cost, high-density urban areas, and their prices surely reflect these lower costs. This is particularly true for cable and fiber-optic lines in Europe. For example, in France cable systems offering broadband services passed only 27.9 percent of households and fiber-optic based services – were only offered to 20.8 percent of homes in 2016.[22] In Italy, there are no cable systems offering broadband and just 18.8 percent of households had access to fiber-optic based services in 2016.[23] Canadian cable systems pass 85 percent of homes with broadband services with download speeds of at least 5 Mbps across the country, and fiber-based broadband is available to 28 percent of Canadian homes.[24] If cable were only deployed in Toronto, Montreal, and Vancouver, for example, they would still serve a larger share of the population than the French cable systems serve, and their costs and prices would

https://www.ofcom.org.uk/__data/assets/pdf_file/0015/100761/UK-home-broadband-performance,-November-2016-Technical-report.pdf

[22] European Commission, *Broadband Coverage in Europe 2016: Mapping progress towards the coverage objectives of the Digital Agenda*, 2017.

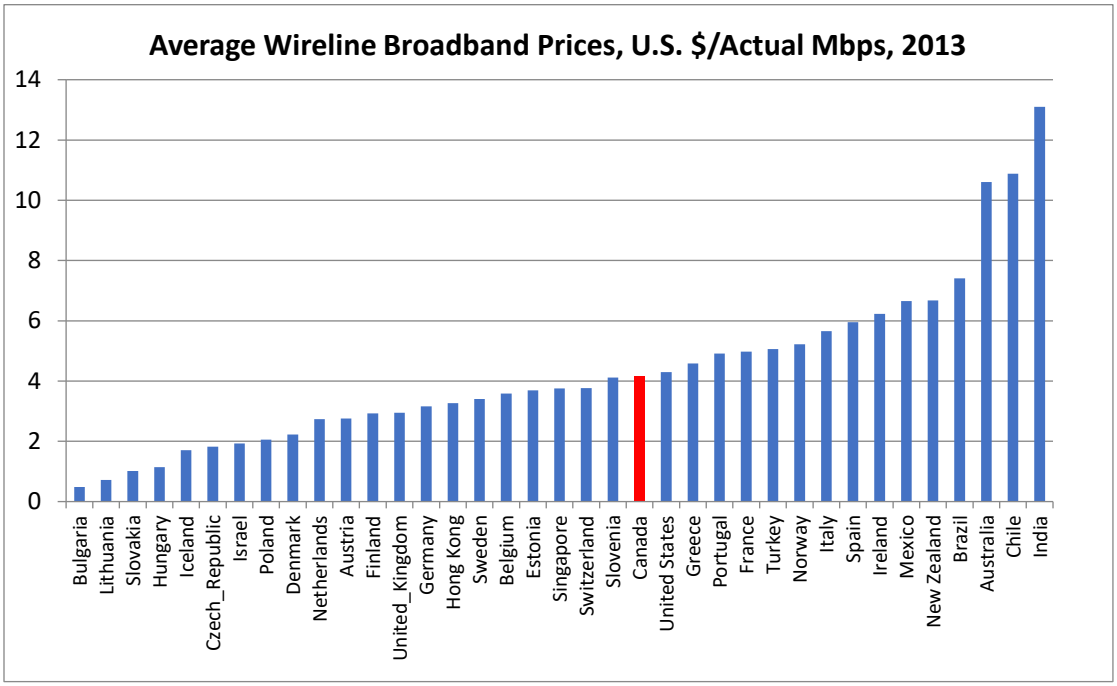
[23] *Id.*

[24] CRTC, *2017 Communications Monitoring Report*, Figure 5.3.15.

likely be much lower. Thus, comparing French and Canadian cable Internet rates is misleading at best.

One source of wireline broadband prices that uses *actual* speeds is provided by Ookla. In its 2015 *International Broadband Report*, the U.S. Federal Communications Commission (FCC) reported the median price per Mbps for 37 countries based on Ookla's speed tests and consumer surveys of prices paid for broadband service.[25] The results for all 37 countries are displayed in Figure 5.

Figure 5



Source: Federal Communications Commission, *Fourth International Broadband Report*, February 4, 2015.

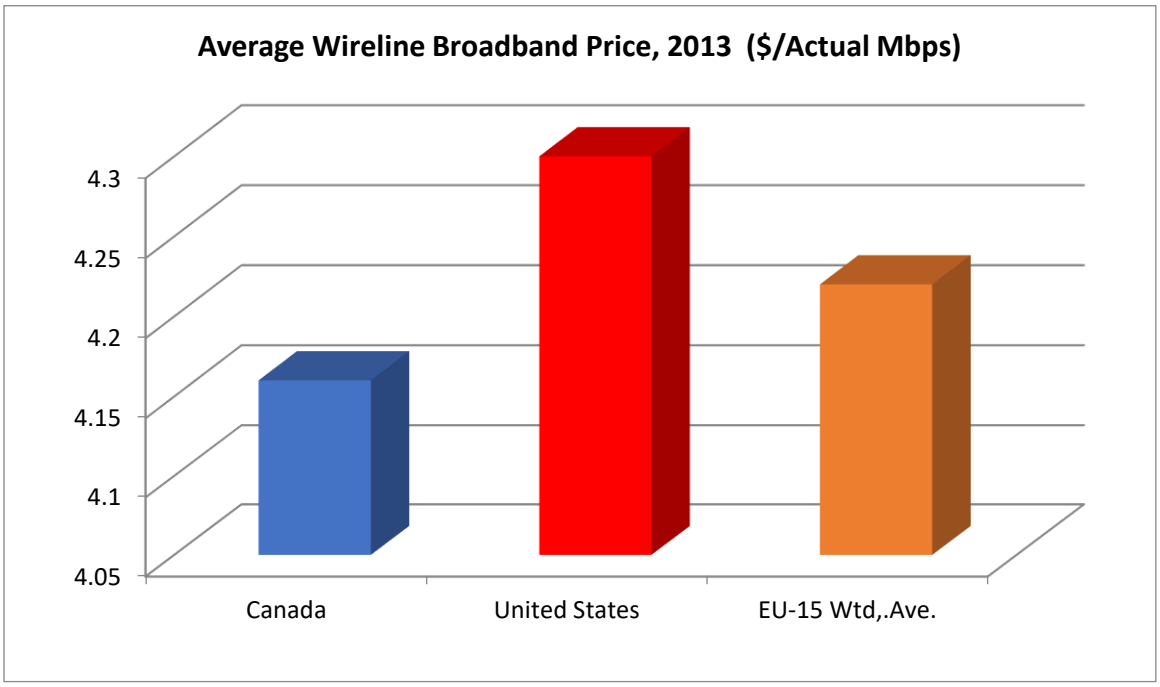
Canada's median price per actual Mbps delivered is near the middle of the distribution, but even this observation is misleading because the sample includes countries with demographics, network deployment, and population density that are very different from Canada's. Clearly, Hong Kong, Singapore, and Israel are countries with much greater population density and, therefore, much lower network costs. In addition, many of the countries with the lowest prices per Mbps are Eastern European countries that began to deploy advanced networks rather recently and therefore have more households passed by FTTx relative to DSL over traditional copper networks. Finally, it is inappropriate to compare Canadian prices with those in Brazil, Chile, India or Mexico, given their much lower level of economic development. These

[25] FCC, *Fourth International Broadband Report*, February 4, 2015, pp. 11-12 and Appendix C, Table 5. More recent *International Broadband Reports* do not include price comparisons based on actual measured broadband download speeds.

countries are unlikely to have rural high-speed services comparable to those in Canada.[26] Thus, the measure of $/Mbps in these countries is likely to come only from densely-populated urban areas while Canada's measure is more likely derived from a mix of rural and urban services.

A more valid comparison of prices would therefore focus on countries with demographics that are similar to those in Canada, namely those in Western Europe and North America. Such a comparison is displayed in Figure 6, which shows the average price per actual Mbps in Canada, the U.S., and a weighted average of EU-15 countries.[27]

Figure 6



Source: Federal Communications Commission, *Fourth International Broadband Report*, February 4, 2015, Table 5.

Canada had lower average wireline broadband prices per actual Mbps delivered in 2013 than the EU-15 and the United States. Given that these countries had similar average actual download speeds across broadband subscribers, this conclusion would not appear to be related to a disproportionate sampling of extremely high- or low-speed plans. Moreover, these countries have similar demographic conditions that drive broadband demand. Thus, the best data available allow one to conclude that Canadian consumers face wireline broadband prices that are slightly

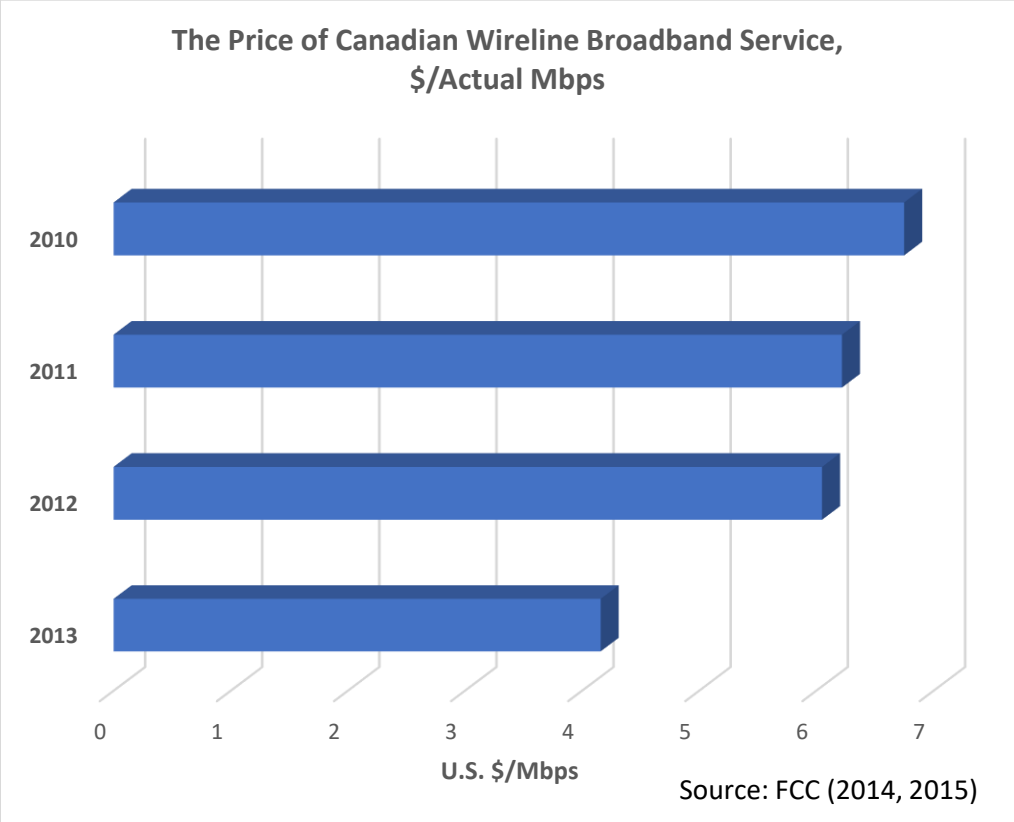
[26] For evidence that many of these less developed countries have much less broadband availability, see The Economist Intelligence Unit, *The Inclusive Internet Index: Bridging Internet Divides*, 2017.

[27] There is no observation for Luxembourg; therefore, the EU-15 average is actually for EU-14.

lower than those in similar countries throughout the world despite Canada's obvious topographical disadvantages.

Not only are Canadian wireline broadband prices modest when compared to prices in the U.S. and Western Europe, but they have also been declining. The U.S. Federal Communications Commission data on international prices per Mbps of download speed, from which Figures 5 and 6 are derived, show a substantial decline in Canadian prices between 2010 and 2013.[28] This decline is exhibited in Figure 7.

Figure 7



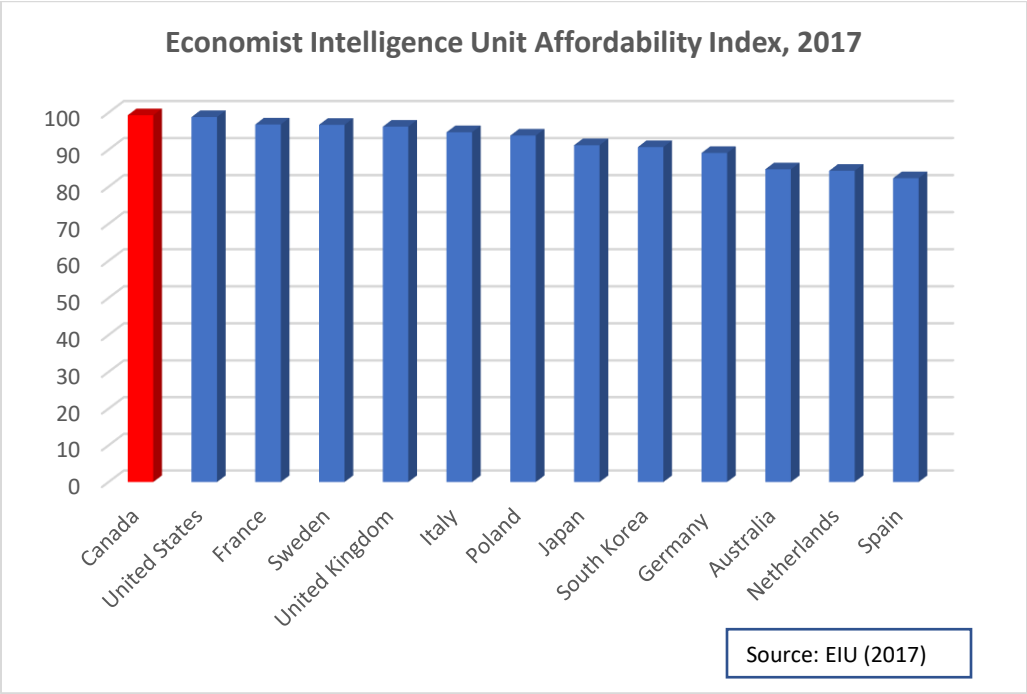
Source: FCC, *Fourth International Broadband Report*, February 4, 2015, Table 5.

Confirmation of the relative affordability of Canadian high-speed broadband services is also provided by the Economist Intelligence Unit's (EIU's) recent 2017 *Inclusive Internet Index* report.[29] Canada is ranked highest among the 75 countries it sampled in terms of affordability of broadband according to the EIU. Because of their greater per-capita incomes, the developed

[28] Earlier or later data are not available in these FCC *International Broadband Reports*.
[29] The Economist Intelligence Unit, *The Inclusive Internet Index: Bridging Internet Divides*, 2017.

countries in the EIU study have higher Affordability Indexes than the lower-income countries in their sample. In part, this is due to the greater competition present in developed countries' broadband markets, particularly in Canada. But Canada outranks all of the other (thirteen) developed OECD countries in their sample in terms of affordability, as Figure 8 shows.

Figure 8



Based on the available recent evidence, one must conclude that Canadians are able to subscribe to high-speed wireline Internet services at very reasonable prices. As shown below, these prices reflect a Canadian policy environment that has stressed platform competition and thereby encouraged network investment to overcome the difficulties posed by Canada's low population density.

I now turn to responses to the Bureau's questions, all of which are directed at wireline broadband services in Canada and not a definitive notion of the overall broadband services *market* in Canada.

III. The Market Study Notice's Questions

The Notice invites responses to four questions concerning the activities and effectiveness of resellers and policy issues surrounding resale. TELUS has asked me to provide responses for only the last two of these questions.

Question c.) How does regulation in this industry affect the economic behavior of broadband suppliers?

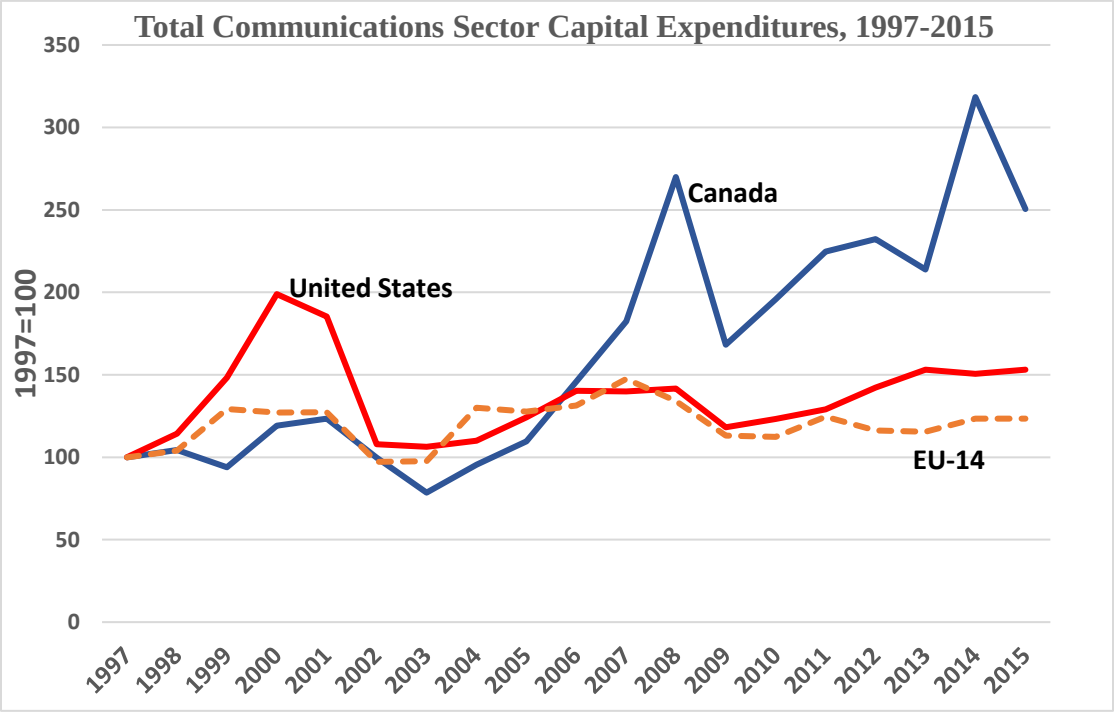
Answer.

In Canada, as in the United States, regulators have promoted *platform* competition among incumbent telecommunications companies, cable systems, satellite companies, and wireless carriers.[30] In contrast, the European Union and many other jurisdictions require their carriers to provide access to their facilities to competitors at very low monthly wholesale rates to encourage *service* competition.[31] These latter policies permit entrants to compete without making comparable investments in their own platforms, thereby discouraging investment by incumbents and entrants alike in new facilities to improve service quality and to extend broadband into underserved areas.[32] The investment disincentives created by a reliance on service competition lead to less rural access to broadband and far lower broadband speeds in these areas.

Canada's reliance on platform competition was strongly confirmed by the government's 2006 Telecommunications Policy Review.[33] The years following this policy review witnessed an acceleration in capital spending in the Canadian communications sector, as shown in Figure 9. The U.S. had a milder acceleration after 2005 when it chose to deregulate broadband offered by telecommunications carriers.[34] Since 2006, Canada's capital spending has continued to be very strong compared with both the United States and the EU-14[35]. Canada has relied principally on competition between telecommunications platforms, as has the United States. The EU, on the other hand, has relied on service competition. The result of these very different policies has been quite predictable – greater access to higher and higher speeds for Canadian consumers.

[30] The CRTC's decision, *Telecom Regulatory Policy CRTC 2015-326: Review of wholesale wireline services and associated policies* (22 July, 2015) is an exception to this general policy direction.
[31] The most recent data for the European Union show that nearly half of all DSL subscriber connections are provided by non-incumbent carriers using unbundled or bitstream access to incumbent facilities. See European Commission, *Connectivity: Broadband Market Developments in the EU* (Digital Economy and Society Index Report: Connectivity), 2018.
[32] See the discussion below of the differences in telecommunications capital spending between Canada and the European Union.
[33] Telecommunications Policy Review Panel, *Final* Report, 2006, available at https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/$FILE/tprp-final-report-2006.pdf.
[34] Broadband services offered by U.S. cable television carriers were never subject to federal regulation.
[35] Data for Sweden are not available for the early years of this chart.

Figure 9

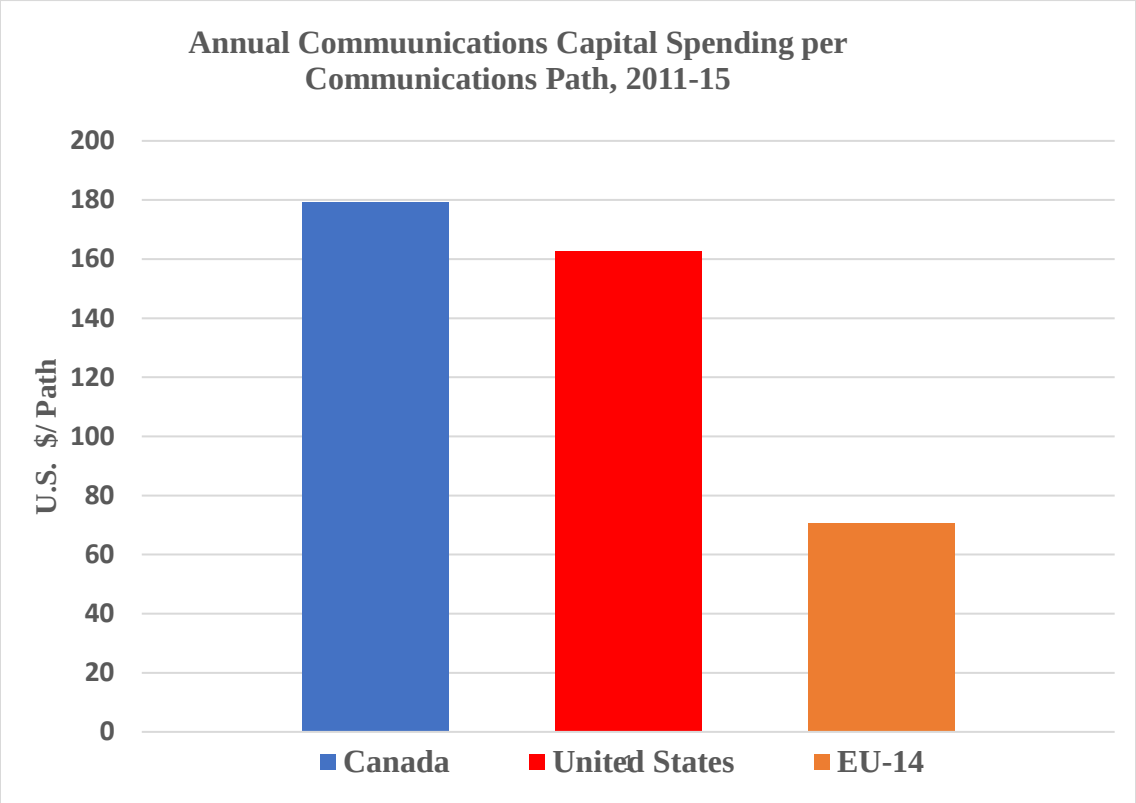


Source: OECD, *Digital Economy Outlook, 2017, online tables.*

Capital spending by Canadian and U.S. carriers has greatly exceeded capital spending in Europe over recent years., as Figure 10 shows. The data in Figure 10 are drawn from the OECD's most recent estimates of total communications sector capital spending in each country for 2011-15, divided by the total communications paths – telephone lines, cable television subscriptions, and wireless (cellular) connections – in each country.[36] It is quite clear that Canadian and U.S. carriers have been spending far more than their counterparts in Europe in recent years. Such spending has allowed North American carriers to provide much greater access to very high-speed services than is now available in Europe, a fact that is clearly recognized in Europe as the European Commission struggles to develop policies to induce greater network investment.[37]

[36] OECD, *Digital Economy Outlook, 2017, online tables*, available at http://www.oecd.org/internet/ieconomy/deo2017data/deo-tab.les-2017.htm
[37] See European Commission, *Commission Staff Document: A Digital Single Market Strategy for Europe - Analysis and Evidence*, June 5, 2015.

Figure 10



Source: OECD, *Digital Economy Outlook, 2017*, *online tables.*

Unlike Canada and the United States, whose regulators promote platform competition, the European Union is unable to stimulate sufficient private investment to obtain its goal of universal access to 30 Mbps across the continent by 2020. It now envisions filling the gap through government expenditures of 21 billion euros ($30 billion Cdn.) of the total 34 billion euros required through 2020.[38] This is clearly a concession that its regulatory policies of network sharing have failed to generate sufficient private investment in broadband platforms and, therefore, lagging deployment of higher speed broadband services, particularly in rural areas – a warning to anyone who would suggest that Canada adopt similar policies.

The empirical research on the effects of regulation on broadband investment and subscriber penetration is extensive and conclusive, corroborating the conclusions drawn above. Crandall, Eisenach and Ingraham (2013) provide a literature review and their own results on the effects of access regulation – *i.e.*, the regulation underlying service competition – on subscriber

[38] European Commission, *Commission Staff Document: A Digital Single Market Strategy for Europe - Analysis and Evidence*, June 5, 2015, p. 85.

penetration.[39] Using data from 28 countries for the decade 2001-2010, they find that network access regulation in the form of mandated unbundling at regulated wholesale prices reduces subscriber penetration.[40] These results are largely consistent with other recent studies.[41]

Given the importance of innovation and investment in modern networks, equally important research involves the effect of access regulation on network investment. An early literature review by Cambini and Jiang (2009) concludes that network unbundling generally discourages network investment by broadband incumbents and entrants.[42] More recent research strongly confirms this conclusion. A paper by Briglauer, Gugler and Haximusa (2016) finds that platform competition encourages network investment, but service competition (through resale or network unbundling) has negative effects on investment in the later stages of liberalization in the European Union.[43] A 2015 study commissioned by the United Kingdom's regulator, Ofcom, concludes that platform competition is the most important driver of investment in new super-fast broadband networks. This study concludes that countries with limited platform competition which are therefore induced into relying on service have lower investment in such networks.[44] These latter two studies confirm the results obtained by Wallsten and Hausladen that network unbundling reduces investment in advanced fiber networks.[45]

The empirical research thus supports the conclusions that can be drawn from the data presented above. Platform competition is superior to service competition in promoting investment in the deployment of broadband networks. Countries that have limited platform competition and have therefore relied upon service competition have lower investment in advanced broadband networks, less rural coverage, and lower broadband speeds.

[39] Robert W. Crandall, Jeffrey A. Eisenach, and Alan T. Ingraham, "The long-run effects of copper-loop unbundling and the implications for fiber," *Telecommunications Policy,* Vol. 37 (2013), pp. 262-81.
[40] *Id.*
[41] *Id.*, Table 1. The exceptions are two early studies whose results cannot be extended to the current broadband environment in advanced countries, one that uses data from a large number of developing countries, and one whose results have been refuted.
[42] Carlo Cambini and Yanyan Jiang, "Broadband regulation and investment: A literature review," *Telecommunications Policy*, Vol. 33 (2009), pp. 559–574.
[43] Wolfgang Briglauer, Klaus Gugler, and Adhurim Haxhimusa, " Facility- and Service-based Competition and Investment in Fixed Broadband Networks: Lessons from a Decade of Access Regulations in the European Union Member States," *Telecommunications Policy*, Vol. 40 (2016), pp. 729-42.
[44] Ilsa Godlovitch, Iris Henseler-Unger, and Ulrich Stumpf, *Competition sand Investment: An Analysis of the Drivers of Superfast Broadband.* WIK study prepared for Ofcom, July 2015.
[45] Scott Wallsten and Stephanie Hausladen, "Net Neutrality, Unbundling, and their Effects on International Investment in Next-Generation Networks," *Review of Network Economics*, Vol. 8, No. 1 (2009), pp. 90-112.

It is also important to note that platform competition is also more conducive to price competition than is service competition. With large investments in built-out platforms – both wireline and wireless – carriers have relatively low marginal costs of serving adding additional subscribers. Thus, they are more likely to compete aggressively for subscribers because the profitability of serving these incremental subscribers is substantial given that a large share of their costs is sunk –that is, they do not vary with the number of subscribers served.[46]

Question d.) How do other countries manage and regulate broadband competition?

Answer.

The differences in communications-sector investment between Canada (and the United States) and the European Union, shown above, are due to the very different regulatory policies pursued by the EU countries and Canada. The EU has chosen to rely heavily on providing entrants with low-cost regulated wholesale access to their incumbents' networks. Canada has relied principally on competition between telecommunications platforms. Similarly, after a series of court reversals of earlier Federal Communications Commission rulemakings, the United States has also relied more heavily on platform competition rather than resale since 2005.

In January 2016, 68 percent of EU wireline broadband subscriptions were to DSL services offered over traditional copper-wire telecom networks, either provided directly by incumbents or resellers.[47] The CRTC *Monitoring Report, 2017,* reports that in 2016 only 38 percent of Canadian residential subscriptions were to a DSL service, while 56 percent were to a cable-provided service.[48] Countries such as Greece and Italy have virtually no cable service. With so little cable, platform competition within the fixed-wire sector is simply not possible in many European countries outside of the major cities in which some fiber to the premises has been deployed. Regulators in Europe have therefore chosen to pursue an aggressive policy of promoting resale and network unbundling despite their attendant depressing effects on network investment. By contrast, Canada has relied principally on platform competition between cable,

[46] See Martin Peitz and Tommaso Valletti, "Reassessing Competition Concerns in Electronic Communications Markets," *Telecommunications Policy,* Vol. 39, (2015), pp. 896-912. They note that "Those who have invested in infrastructure have strong incentives to attract customers and fill existing capacity as additional business can be accommodated at little or no additional cost... [Regulators] may also have to be wary about capacity expansion that discourages investment by competing infrastructure providers, but at the same time acknowledge that in geographic areas or market segments where facilities-based competition exists, concerns about market power should be greatly reduced." (p. 910)

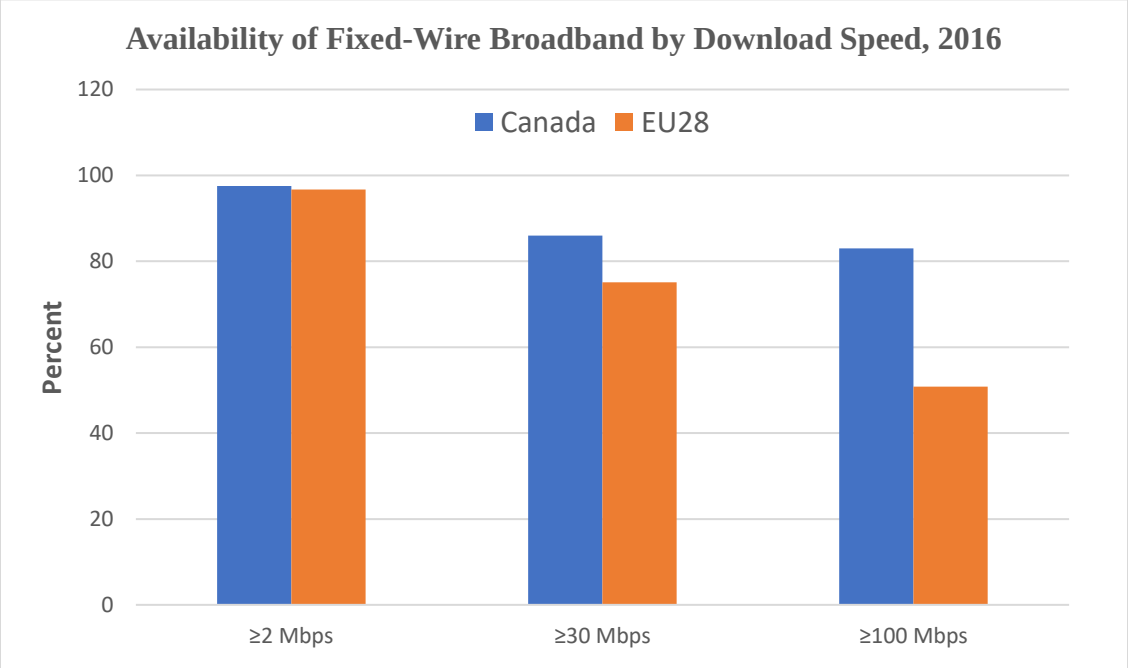
[47] European Commission, *Broadband Access in the EU, Data as of January 2016* (2017), available at https://ec.europa.eu/digital-single-market/en/news/broadband-access-eu-data-january-2016

[48] CRTC, *Communications Monitoring Report, 2017,* Figure 5.3.12.

wireline telecommunications, satellite, and wireless networks, thereby unleashing a torrent of network investment in high-speed networks. The results, discussed below, testify to its success.

The large amounts that Canadian carriers have invested in their platforms have allowed them to deploy high-speed broadband services throughout Canada, not just in large urban areas, despite the country's very low population density. As a result, as Figure 11 shows, Canadian households have far wider access to broadband services with download speeds of 30 Mbps or 100 Mbps than most European countries. For example, while 83 percent of Canadians have access to speeds of 100 Mbps or more, only 34 percent of French households, 19 percent of Italian households, and 24 percent of UK households have access to such speeds. Even Sweden, with its municipally-subsidized fiber networks, has extended 100 Mbps coverage to just 69 percent of its households.[49] Moreover, the CRTC recently concluded that the Canadian wireline broadband network infrastructure is now capable of supporting download and upload speeds of up to 1 Gbps without requiring significant additional investment. [50]

Figure 11



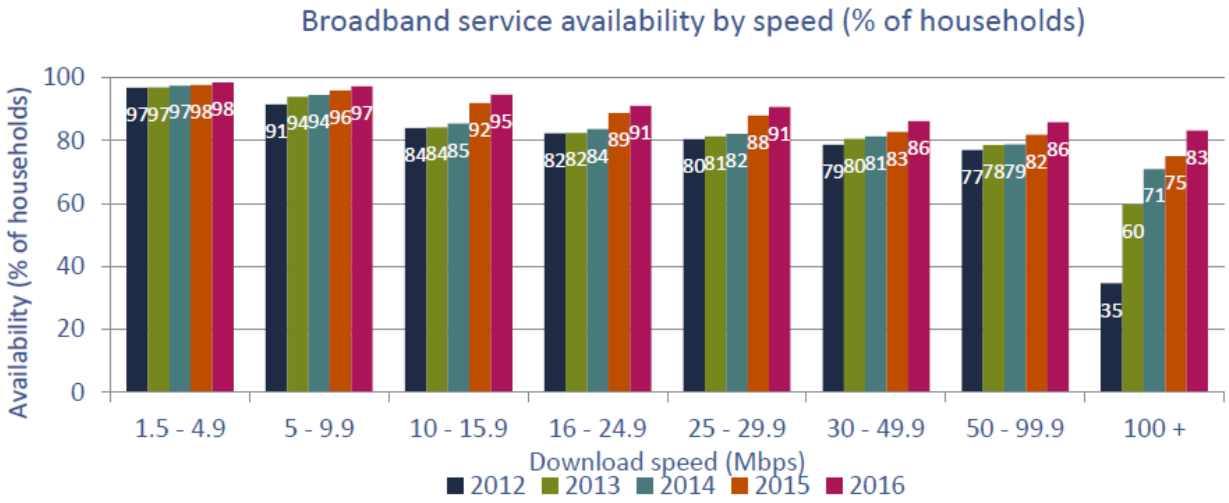
Sources: European Commission, *Broadband Coverage in Europe: Mapping progress towards the coverage objectives of the Digital Agenda*, 2017, Table 4.5.1; CRTC, *Communications Monitoring Report 2017*, Figure 5.3.16.

[49] European Commission (2017).
[50] CRTC, Telecom Regulatory Policy 2016-496*: Modern telecommunications services – The path forward for Canada's digital economy,*21 October, 2016, para.79. In August 20-18, Bell announced that it would begin to offer 1.5 Mbps speeds to customers with fiber connections to its network. See https://business.financialpost.com/telecom/bell-enters-the-fast-lane-as-back-to-school-internet-competition-heats-up.

Canadians generally are able to actually obtain these speeds while the actual speeds available to Europeans are generally substantially below these advertised speeds.[51] (see Figure 4, above) Thus, international comparisons of available *reported* download speeds understate Canada's superiority in actual download speed delivered. And this remarkable availability of actual super-fast broadband for Canadians exists despite the obvious geographic obstacles to broadband network deployment in Canada.

Further evidence of the continuing deployment of high-speed infrastructure by Canadian wireline carriers is the steady increase in the speed of service available to most Canadians. (Figure 12) The 2017 CRTC Monitoring Report finds that – in 2016 – fully 86 percent of households had access to a wireline broadband service with at least a 50 Mbps download speed and 83 percent had access to at least 100 Mbps. The availability of such speeds has been increasing steadily over the past few years. It is a safe bet that in 2018 even more Canadians will have access to super-fast broadband.

Figure 12



Source: CRTC, *Communications Monitoring Report 2017*, Figure 5.3.16

IV. Conclusions

My conclusions on the state of Canadian broadband may be summarized as follows:

- The Canadian broadband market is much broader than that suggested by the Bureau's Notice. Wireless broadband services are rapidly replacing fixed wireline services among Canadian consumers, reflecting their view that

[51] SamKnows, *Quality of Broadband Services in the EU*, October 2014; SamKnows, *Quality of Broadband Performance in Canada*, March and April, 2016

wireless and wireline broadband services are substitutes. The relevant market for consumer broadband services includes wireline, satellite, and wireless services.

- Despite Canada's very low population density, Canadian fixed-wire broadband prices are relatively low. Indeed, one recent major study places Canada first in terms of broadband "affordability" among 75 countries studied.

- **Question c.):** How does regulation in this industry affect the economic behavior of broadband suppliers?

  Answer: Canadian regulators' reliance on platform competition, rather than service competition, has spurred much greater broadband investment than that which results from service competition in other developed countries, particularly in the European Union. This greater investment has resulted in the deployment of very high-speed services throughout Canada, including rural areas, eclipsing the average speeds found in European countries that are more reliant on service competition in regulating broadband.

- **Question d.):** How do other countries manage and regulate broadband competition?

- **Answer:** Canada and the United States stand out as countries that rely heavily on platform competition. The European Union, by contrast, has relied on service competition as its approach to broadband regulation, which suppresses network investment to the detriment of European consumers.

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Appendix 4: An Accurate Price Comparison of Communications Services in Canada and Select Foreign Jurisdictions – by Christian M. Dippon, Ph.D., October 19, 2018

http://www.nera.com/publications/archive/2018/nera-economist-identifies-shortcomings-in-the-wall-nordicity-stu.html

RECENT DEVELOPMENTS IN TELEVISION PROGRAM RIGHTS IN THE CANADIAN MARKET: A SNAPSHOT OF LEGAL OPTIONS AVAILABLE TO CANADIANS TO ACCESS TELEVISION CONTENT

By:
Mario Mota, Boon Dog Professional Services Inc.

For:
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November 2017

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I. Executive Summary

TELUS commissioned Boon Dog Professional Services Inc. to update the report titled "Current Developments in Television Program Rights in the North American Market" written by Paul Gratton in April 2011 (the "Gratton Report") and submitted by Bell Canada as part of its comments to *Broadcasting Notice of Consultation CRTC 2010-783*, Review of the regulatory framework relating to vertical integration.

Given the rapidly changing global media market, there have been some significant changes in the licensing of television content in North America since the Gratton report was written, primarily due to the growth in the number of platforms and players involved in the rights market.

Rights holders, particularly foreign ones, continue to have all the power when it comes to how they license their content to Canadian broadcasters and media companies. Generally speaking, at this time, the traditional "orderly marketplace" for television program rights remains mostly the same as it has always been. Program rights holders carve out rights according to country or territory and by platform and try to maximize the revenue they earn from those rights.

However, the "orderly marketplace" for television program rights is clearly in flux. And it can change completely on a dime. The explosive growth of online video and streaming options in Canada and around the world is changing the rules of the game, and the number of digital content options available to Canadians will only continue to grow in the years ahead. The significant growth in over-the-top (OTT) video streaming options available to Canadians in recent years, with more expected in the future, is an important development in the program rights market as it means there are more players competing for rights.

With the growth of global behemoth video streaming players such as Netflix and Amazon, selling rights on a global basis, rather than by country or territory, is a new option available to rights holders and increasingly seen as a viable and lucrative one.

The traditional business model of Canadian broadcasters/media companies is contingent on having a separate rights market for Canada. In today's evolving program rights market, this can no longer be assured.

The big concern among all Canadian broadcasters and media companies—and the wider Canadian industry including regulators and policymakers—is, at what point will foreign rights holders decide to take their popular television content directly to Canadian consumers? In other words, how close are we to the tipping point of losing a distinct Canadian program rights market?

In our view, the beginning of the tipping point in maintaining the status quo—i.e., in maintaining a separate Canadian rights market for television programming—was the announcement in August 2017 by CBS that it would launch its CBS All Access video streaming service directly to consumers in Canada beginning in 2018.

There's no denying that intense competition for acquiring the rights to great foreign (mainly U.S.) television content is real and growing. But just as the challenges mount for Canadian broadcasters/media companies in acquiring program rights to foreign content, the evolving program rights market has created new opportunities for Canadian programming.

Experimentation, change, contradiction, and disruption appear to be the new normal in the television program rights market. No clear model has yet to emerge as the standard for the future distribution of television rights in North America.

Given everything we know and have seen to date, one thing seems certain—the amount and pace of change in the television program rights market will only accelerate in the years ahead.

II. Introduction

Background and Notes

TELUS commissioned Boon Dog Professional Services Inc.[1] to update the report titled "Current Developments in Television Program Rights in the North American Market" written by Paul Gratton in April 2011 (the "Gratton Report") and submitted by Bell Canada as part of its comments to *Broadcasting Notice of Consultation CRTC 2010-783*, Review of the regulatory framework relating to vertical integration.

The Gratton Report contains extensive background, history, and developments in the evolution of the North American market for television program rights up to April 2011. Rather than duplicate this information, Boon Dog's report simply highlights new developments in program rights specific to the Canadian market and how Canadians can legally access television content since the Gratton Report was written. This report is not meant to provide an exhaustive list of all program rights or television content options that are available in the Canadian market, just general trends and noteworthy developments. Additionally, this report focuses mainly on developments in program rights for television content, and not short video clips or feature films.

Finally, we note that this report does not address unauthorized or illegal ways in which people can consume television content.

A Summary of Some Recent Developments in the Program Rights Market

Given the rapidly changing global media market, it should not surprise anyone that there have been some significant changes in the licensing of television content in North America since the Gratton report was written, primarily due to the growth in the number of platforms and players involved in the rights market.

Before discussing the rights market in Canada specifically, it is important to remind readers of the significant changes that have occurred in the Canadian broadcasting industry in terms of further consolidation of ownership since 2011. This is important because further consolidation has given Canada's largest broadcasting/media companies greater scale to compete with respect to the acquisition of television program rights (and related digital/mobile rights) in an increasingly competitive market for those rights.

While the CRTC has acknowledged the need for scale in approving various broadcasting acquisitions in recent years, it has also balanced that with safeguards to ensure fair business practices, to protect consumers, and to ensure a diversity of voices in the Canadian broadcasting system.[2] For example, in its regulatory policy relating to vertical integration[3] the CRTC determined that programming designed primarily for television cannot be offered on an exclusive basis to a mobile or retail Internet access service.

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[1] See Appendix 1 for information about Boon Dog Professional Services.

[2] See, for example, the CRTC's Diversity of Voices Policy, http://www.crtc.gc.ca/eng/archive/2008/pb2008-4.htm, and its Regulatory framework relating to vertical integration, http://www.crtc.gc.ca/eng/archive/2011/2011-601.htm.

[3] Vertical integration refers to the ownership or control by one entity of both programming services, such as conventional television stations, or pay and specialty TV services, as well as distribution services, such as cable TV systems or direct-to-home (DTH) satellite services. Vertical integration also includes ownership or control by one entity of both programming undertakings and production companies. The main vertically integrated companies in Canada are Rogers Communications Inc., Quebecor Media Inc., Bell Canada, and Shaw Communications Inc.

Since the Gratton report was written in 2011, Bell Media acquired Astral Media and its important staple of specialty and pay TV assets, including The Movie Network (TMN) and HBO Canada. Corus Entertainment solidified its dominance in the children's and youth programming space with the acquisition of the remaining 50% of Teletoon and its related channels that it did not already own, thereby assuming full ownership and control. Later, it bolstered its national reach with the acquisition of the Global TV national conventional TV network and the popular specialty TV channels from Shaw Media, providing a number of synergies in programming assets with ones it already owned (for example, in lifestyle programing). These acquisitions gave Bell Media and Corus Entertainment additional assets and platforms upon which to amortize and monetize the television programming rights they acquire.

Boon Dog notes that the Gratton report made a number of observations and predictions that have in fact materialized in recent years that are worth discussing, and are likely to continue, including the following comments from the report:

- The power lies with the rights holder, who essentially gains the most out of a market by slicing the pie into as many exploitable pieces as possible in order to maximize revenue (at page 23);
- There will be an explosion of multi-platform digital delivery systems over the next few years, and what we have witnessed so far is but the tip of a paradigm changing iceberg (at page 24);
- Foreign over-the-top (OTT) services such as Netflix and others might soon result in "cord-cutting" from Canadian broadcast distributors (at page 25); and
- If this snapshot of what's currently going in the world of rights acquisitions in Canada seems a bit fragmented and chaotic, at times even contradictory, that's because it is. While some aspects of the "orderly marketplace" are still in place, other sectors, such as video-on-demand (VOD) and multi-platform apps, are simply exploding with possibilities (at page 26).

Rights holders are in control

There is no question that rights holders, particularly foreign ones, continue to have all the power when it comes to how they license their content to Canadian broadcasters and media companies. Rights holders continue to carve up rights into as many pieces as possible to maximize revenue. In some cases, rights holders are selling the same shows to similar, competing platforms on a non-exclusive basis.[4]

While it is becoming harder to do so, for the most part, Canadian broadcasters/media companies have to date been able to continue to acquire the rights to popular foreign television content to fill their linear TV channels and online platforms. And some, knowing full well that foreign rights holders could decide to bypass them and distribute their content directly to Canadian consumers at any time, locked up rights under long-term deals to give them several more years of stability.

For example, in March 2015 Corus Entertainment signed a new long-term agreement with Viacom's Nickelodeon division giving it exclusive rights to all of Nickelodeon's English- and French-language content for its linear TV channels in Canada as well as across existing and emerging digital platforms.[5]

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[4] As witnessed, for example, by the fact many TV programs are available for purchase/viewing on the iTunes Store one day after their initial broadcast and in some cases the same titles are available on competing SVOD services, see: http://www.michaelgeist.ca/2015/06/netflix-vs-cravetv-more-than-90-of-cravetv-titles-are-not-available-on-netflix-u-s-or-canada/.

[5] Corus news release, March 31, 2015: "Corus Entertainment secures all programming rights to Nickelodeon content in Canada". http://www.corusent.com/news/corus-entertainment-secures-all-programming-rights-to-nickelodeon-content-in-canada/

Under the terms of the licensing deal, Corus is the sole distributor and rights holder of Nickelodeon's catalogue of current content and library titles in Canada, giving it the ability to exploit Nickelodeon's content across linear and non-linear platforms including OTT, subscription VOD (SVOD), electronic sell-through, games, and mobile apps.

With the rights to Nickelodeon's content securely in hand, Corus later signed a deal with Netflix to stream Nickelodeon content in Canada.[6]

In January 2015 Bell Media announced a long-term, content licensing and trademark agreement with CBS for its premium television channel SHOWTIME in Canada. The exclusive deal brought the SHOWTIME brand to Canada for the first time, with hundreds of hours of past, present, and future SHOWTIME programming being made available across Bell Media's platforms in English and French, including its OTT video streaming service CraveTV, as well as its pay television service TMN.[7] Over the course of the new agreement, CraveTV and TMN will become Canada's exclusive home of SHOWTIME-owned first-run programming as well as almost its entire catalog of scripted and unscripted series, documentaries, and specials.

Going further, Bell Media announced in November 2015 an agreement with Corus Entertainment to take TMN national and become the sole owner and operator of HBO Canada, with Corus winding down operations of its Movie Central and Encore Avenue pay TV services in Western and Northern Canada officially in March 2016 to focus on its core national media brands.

Alongside the announcement, Bell Media revealed an unprecedented agreement in which it became the exclusive Canadian home of all HBO programming on all subscription platforms into the next decade. Bell Media described the agreement with HBO as follows:

> Under the comprehensive, long-term agreement, the first of its kind for HBO in Canada, Bell Media will have the ability to deliver current-season, past-season, and library HBO programming exclusively on its linear, on-demand, and over-the-top (OTT) platforms in English and French. The agreement also marks the first time HBO has granted exclusive subscription video on demand (SVOD) rights for first-run programming throughout Canada. As a result, Bell Media will have the flexibility to provide current HBO content such as GAME OF THRONES, GIRLS, and VEEP over-the-top in Canada on its platforms.[8]

While the exact length of and financial terms of the SHOWTIME and HBO deals were not disclosed, one can imagine that Bell Media paid a premium for the extensive rights outlined above. In so doing, it bought itself several years of the "status quo" in terms of its traditional business model. Of course, Bell Media's (and all broadcasters') traditional business model, if there is such a thing anymore in the evolving global media market, is contingent on having a separate rights market for Canada. And as this report attempts to demonstrate, that can no longer be assured.

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[6] Corus news release, April 13, 2016: "Corus Entertainment lands new deal with Netflix for Nickelodeon content to stream in Canada". http://www.corusent.com/news/corus-entertainment-lands-new-deal-netflix-nickelodeon-content-stream-canada/

[7] Bell Media / CBS news release, January 29, 2015: "Bell Media and CBS Corporation Announce Long-Term Content Licensing and Trademark Agreement for SHOWTIME® in Canada". http://www.bellmedia.ca/pr/press/bell-media-cbs-corporation-announce-long-term-content-licensing-trademark-agreement-showtime-canada/

[8] Bell Media / HBO news release, November 19, 2015: "Bell Media and HBO Sign Historic Agreement Bringing Canadians Unprecedented Access to HBO Programming". http://www.newswire.ca/news-releases/bell-media-and-hbo-sign-historic-agreement-bringing-canadians-unprecedented-access-to-hbo-programming-551893451.html

While noting that so far it has been "reasonably economically viable" to continue to acquire the rights it needs, then-Bell Media President Mary Ann Turcke described Bell's rights acquisition strategy as follows while speaking at a CRTC hearing in November 2016:

> …[F]rom a defensive perspective, entering into deep licensing arrangements with ongoing producers of great foreign content is really important. Obviously, if I have the exclusive rights to HBO and SHOWTIME and Comedy [in Canada], then Netflix, Amazon, Hulu can't have it… and that's been the strategy for a few years now.[9]

In Boon Dog's and other commentators'[10] view, however, the beginning of the tipping point in maintaining the status quo—i.e., in maintaining a separate Canadian rights market for television programming—was the announcement in August 2017 by CBS that it would launch its CBS All Access video streaming service directly to consumers in Canada beginning in 2018.

The news rocked the Canadian broadcasting and media industry.

Representatives from the creative industries used the announcement to warn Canadian broadcasters (and indirectly the CRTC and policymakers) that it was time Canadian broadcasters made Canadian programming their number one priority. The pipeline to relatively affordable, high-quality U.S. television content was about to run dry, they warned.[11]

Canadian broadcasters/media companies were largely silent on the news.

Growth in the number of digital content options

Gratton also predicted an explosion of multi-platform digital delivery systems for content over the next few years. The explosion has not been in delivery systems *per se*, as the Internet *is* the digital delivery system, but in the number of "TV Everywhere" / "GO" apps and OTT services available to Canadians.

TV Everywhere or GO apps from Canadian broadcasters were non-existent in 2011. Today, almost every major Canadian broadcaster offers one for each or most of their channels to allow viewers to watch their content where they want, when they want, on portable devices such as tablets or smartphones.

Moreover, not only has Netflix grown by leaps and bounds in this country since 2011, both in terms of subscribers and in the volume and variety of content it offers, the introduction of CraveTV, Club illico, Amazon Prime Video, and an estimated 20+ niche OTT services in Canada has given Canadians an unprecedented amount of choice for television content.

The number of digital content options available to Canadians will only continue to grow in the years ahead.

"Cord-cutting" is the new reality

The explosion in ways that Canadians can access television content legally in recent years has resulted in "cord-cutting" from traditional subscription TV services (cable TV, IPTV, and satellite TV) in Canada. Boon Dog's own research shows cord-cutting began to surpass new TV subscriptions in late

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[9] Transcript, CRTC Hearing, November 29, 2016, at line 2449. http://crtc.gc.ca/eng/transcripts/2016/tb1129.htm

[10] Cartt.ca, Analysis by Greg O'Brien: "Why CBS All Access moving north is a big deal (corrected)," August 10, 2017. https://cartt.ca/article/analysis-why-cbs-all-access-moving-north-big-deal-corrected

[11] Cartt.ca, Commentary by Maureen Parker: "Canadian broadcasters are on the road to extinction if they don't adapt," August 9, 2017. https://cartt.ca/article/commentary-canadian-broadcasters-are-road-extinction-if-they-don't-adapt

2012 and the number of cord-cutting households has been gradually accelerating since 2014 and hit a record 220,000 households in 2016.[12]

While cord-cutting is on track to slow in 2017, according to Boon Dog's research[13], it will no doubt continue in the years ahead and is the new normal facing traditional TV distributors and the regulated Canadian broadcasting industry as a whole. In other words, in Boon Dog's view, traditional TV distribution is in permanent decline. The only unknown is the pace of that decline.

Other changes

There have been other noteworthy developments in the program rights market since the Gratton Report was written.

The continued growth of VOD services and the emergence, evolution, and growth of digital rental options such as iTunes, Apple TV, Google Play, and others have gutted the DVD rental business in Canada, leaving only limited neighbourhood convenience store options and Quebecor's SuperClub and Jumbo Video chains.

Blockbuster shut down the last of its 400 stores across the country in September 2011 while Rogers Communications stopped offering DVD rentals and sales in its stores in April 2012,[14] leaving SuperClub and Jumbo together as Canada's largest remaining video rental chain.

Zip.ca, the Ottawa-based DVD rental via mail and later kiosk service, closed shop in August 2014[15], while Redbox, operator of DVD rental kiosks across the country, shut down its Canadian operations in February 2015.[16]

Below, we discuss some of the recent developments in television program rights related to specific platforms in more detail.

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[12] Boon Dog news release, March 15, 2017: "'Cord-cutting' in Canadian traditional TV service market reaches new record level in 2016, according to new research". http://www.boondog.ca/News_files/Boon%20Dog%20News%20Release_Record%20TV%20Subcriber%20Decline%20in%202016_March%2015-2017.pdf

[13] Boon Dog news release, August 14, 2017: "TV 'cord-cutting' in Canada bucks the trend, slows in the first half of 2017 compared to the previous year, according to new research". http://www.boondog.ca/News_files/Boon%20Dog%20News%20Release_TV%20Subcriber%20Decline%20Slows%20in%201st%20half%20of%202017_August%2014-2017.pdf

[14] CBC.ca, "Rogers exists video store business; Company to shutter remaining locations," April 17, 2012. http://www.cbc.ca/news/business/rogers-exits-video-store-business-1.1211282

[15] The Ottawa Citizen, "Zip.ca video rental service shuts down," August 18, 2014. http://ottawacitizen.com/business/local-business/zip-ca-video-rental-service-shuts-down

[16] The Globe and Mail, "Redbox shutting down Canadian operation, moving kiosks to U.S.," February 5, 2015. https://www.theglobeandmail.com/report-on-business/redbox-shutting-down-canadian-operation-moving-kiosks-to-us/article22819779/

III. Television Content Distribution Options Available to Canadians

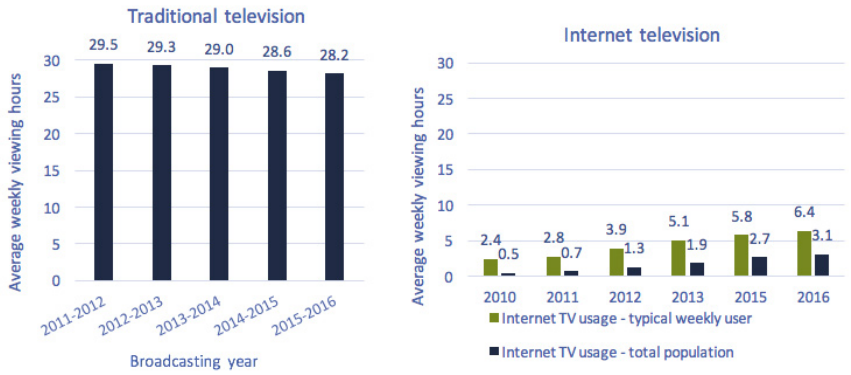
Linear TV

Linear TV, or traditional TV, generally continues to hold its own among Canadians as the preferred way of watching television programming.

The CRTC's *2017 Communications Monitoring Report*[17], published in November 2017, notes that Canadians aged 2+ watched an average of 26.6 hours of traditional television weekly, down slightly from 28.2 hours in 2011-2012. Not surprisingly, the biggest drop in traditional television viewing is occurring among younger Canadians, specially teens and those between 18 and 49 years old.

At the same time, Canadians are increasingly turning to platforms and devices connected to the Internet for their television and video content. According to the CRTC report, Canadians aged 18 years or older watched 3.1 hours of Internet TV per week in 2016, compared to 0.7 hours in 2011. Canadians aged 18-34 years old are leading the trend with 23% watching TV exclusively online. Nationally, 13% of Anglophones watch TV exclusively online. Overall, Canadians aged 18 years or older watched 3.1 hours of Internet TV per week in 2016, compared to 2.7 hours in 2015.

Figure 1: Average number of hours Canadians 18+ watched traditional television (2011-2012 through 2015-2016 broadcast years) and Internet television (2010 to 2016)



Source: CRTC *2017 Communications Monitoring Report*, Figure 4.2.16

While cord-cutting is the new reality in the Canadian traditional TV distribution market (cable TV, IPTV, and satellite TV), Boon Dog has repeatedly noted that the cord-cutting numbers are fairly small relative to the size of the market. More than 11 million Canadian households still pay to subscribe to a traditional TV service, which means traditional TV is holding its own, sort of.

We say "sort of" because the cord-cutting numbers do not factor in the approximate 200,000 housing starts in Canada annually. That means the traditional TV service providers are losing pace with household growth in the country and therefore TV subscription penetration is declining at a greater level than simply the cord-cutting numbers suggest. The latest CRTC figures show the continuing decline in the penetration of traditional TV distribution services, which reached 76.2% in 2016 (at Aug. 31), compared to 82.8% in 2012.[18]

[17] See http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2017/index.htm.

[18] See Table 4.3.6 in the CRTC's *2017 Communications Monitoring Report*, http://crtc.gc.ca/eng/publications/reports/policymonitoring/2017/cmr4.htm#t436.

Additionally, it is important to note that the cord-cutting numbers do not take into account what many observers consider to be an even greater threat to the traditional TV system—"cord-nevers"—defined as those people who have never subscribed to a traditional TV system.[19]

Given that traditional television viewing and traditional TV distribution continue to be the preferred way of watching and accessing television content for the majority of Canadian households, it's not surprising that Canadian broadcasters/media companies continue to license content primarily for these traditional platforms. That does not mean they are ignoring the winds of change. For the most part, Canadian broadcasters/media companies continue to acquire all the rights to television programming available to them—linear, digital, and mobile—when possible.

With respect to linear TV rights, we've seen some experimentation as a way to squeeze as much revenue out of those rights as possible and/or promote viewership for future seasons of television series or subscriptions to related linear TV channels or digital platforms.

For example, Bell Media aired Season 1 of HBO's *Game of Thrones* on CTV (and also made it available on the CTV GO app) in a 10-episode programming marathon in August 2016 as a "centerpiece" of its Summer 2016 programming strategy.[20] It was the first time the global hit show aired on network television in North America. Bell Media was able to do this because of its comprehensive, long-term rights deal with HBO noted above.

Another interesting experiment/development in television program rights strategy this fall worth noting was local independent Hamilton, Ontario conventional TV station CHCH acquiring the rights to broadcast the hit Netflix original series *House of Cards*.[21] Airing for the first time on North American broadcast television, CHCH launched an extensive media campaign in the Toronto market to promote the show.

Things did not turn out as planned, however. On November 15, 2017, the broadcaster posted a note on its Facebook page stating that it was immediately removing *House of Cards* from its schedule due to the sexual misconduct allegations against the show's star Kevin Spacey. Some viewers and at least one media critic questioned CHCH's motives, however, pointing out the show's abysmal ratings.[22]

Similarly, Canadian pay TV channel Super Channel will premiere Season 1 of Amazon original series *American Gods* on its service in Spring 2018 after acquiring the exclusive Canadian broadcast rights to the show from FremantleMedia International.[23] Season 1 is already available to Canadians on the Amazon Prime Video OTT service.

While the experiments cited above brought mixed results, it's likely we will continue to see Canadian broadcasters/media companies try these and other kinds of strategies in an attempt to find new audiences or to drive viewers to other platforms and services with the ultimate goal of maximizing revenue out of the linear TV and ancillary rights they own.

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[19] Cartt.ca, Kaan Yigit, Letter to the Editor: "How cord-cutters are just the visible tip of the iceberg". https://cartt.ca/article/letter-editor-how-cord-cutters-are-just-visible-tip-iceberg (subscription required)

[20] Bell Media news release, July 7. 2016: "Winter is Coming – CTV to Broadcast GAME OF THRONES Season 1 in Historic Network Marathon Beginning August 8". http://www.bellmedia.ca/pr/press/winter-is-coming/

[21] CHCH news release, September 6, 2017: "CHCH Presents 2017 Fall Schedule and Premiere Dates". http://www.chch.com/chch-presents-2017-fall-schedule/

[22] Brioux.TV, "CHCH quickly folds on House of Cards," November 17, 2017. https://brioux.tv/2017/11/chch-quickly-folds-on-house-of-cards/

[23] Super Channel news release, October 16, 2017: "Super Channel acquires American Gods from FremantleMedia International". https://www.superchannel.ca/pressreleases/super-channel-acquires-american-gods-fremantlemedia-international

A great example of this involves the critically acclaimed and multi-Emmy Award-winning TV series *Breaking Bad*. David Sims, a senior consulting editor who writes about culture at *The Atlantic*, observed in a fascinating roundtable discussion about the state of television published in 2015, that the show only found its audience when earlier seasons of the series were made available on Netflix.[24] Being on Netflix allowed viewers previously unfamiliar with the show (or those who had missed the first season and needed a way to catch up) to discover it, view the series from the beginning with catch up viewing (many likely binge watched), and then tune into AMC to watch the final few seasons.

VOD

VOD continues to be an important choice offered by Canadian broadcasters/media companies to allow viewers to catch up on recently aired programming and so they continue to acquire the VOD rights to the programs they license, where available and where economically feasible. All of the major broadcasters offer most of the programs they license to viewers on-demand on their respective websites, free of charge (but with commercials), as long as users subscribe to the channel on which the program they wish to view was aired.

Most broadcasters also have agreements with Canada's largest and medium-sized (and many small) broadcast distributors to offer their programs, free of charge (but increasingly with commercials), on the distributors' VOD services via subscriber set-top boxes. Again, users must subscribe to a channel in order to watch content on-demand from that channel.

Transactional VOD, whereby users rent a movie for a period of time (usually 24 or 48 hours), is available to Canadians via online services like the Cineplex Store, iTunes, Google Play, or the VOD services of broadcast distributors.

For television content, the iTunes Store and Google Play, are forms of transactional VOD, although users purchase and own the digital content following a transaction rather than just rent it. The iTunes Store, for example, has past television seasons and episodes available for purchase. Additionally, many shows have a "Season Pass" available, which allows users to follow along with a TV season that is currently airing on broadcast TV by purchasing an entire season in advance rather than individual episodes, which would cost more. Episodes are typically available to purchase/view the day after the original broadcast. Google Play offers similar full-season purchase options.

Canadian broadcasters/media companies also offer much of the programming they license on a subscription VOD basis, via dedicated channels on the VOD services of broadcast distributors, with the number of SVOD options growing significantly in recent years.[25] These are considered subscription VOD channels because users must subscribe to a linear TV channel in order to watch that channel's SVOD offering.

While Netflix, CraveTV, Club illico, and other OTT services are technically SVOD services, they are discussed in the OTT section below.

[24] The Atlantic, "Have We Reached Peak TV?" August 12, 2015.
https://www.theatlantic.com/entertainment/archive/2015/08/have-we-reached-peak-tv/401009/

[25] Rogers Cable, for example, offers dozens of SVOD channels from premium TV channels such as TMN On Demand, HBO Canada On Demand, and Super Channel On Demand, to specialty channels such as YTV On Demand, Showcase On Demand, and HGTV On Demand.

Portable Devices, TV Everywhere / "GO" Apps, Mobile

As noted above, every major Canadian broadcaster now offers TV Everywhere or "GO" apps for each or most of their TV channels to allow viewers to watch their content where they want, when they want, on portable devices such as laptops, tablets, or smartphones. A user has to be a subscriber to the linear TV channel in order to access the related GO app.

In order to offer TV Everywhere services to subscribers, broadcasters have had to acquire those rights as part of its larger rights deals with rights holders (linear TV, on-demand/digital, mobile). And they've done so without any additional subscription revenue attached as GO apps are offered as free digital extensions of the linear TV channel. Offering a TV Everywhere product has pretty much become a cost of doing business in today's "where I want, when I want" consumer culture.

Another significant advancement in the rights market for television content since the Gratton Report was written is the significant growth of mobile video distribution. Ericsson, the Swedish-based global communication technology company, predicts that by 2020, half of all TV and video viewing will be done on a mobile screen, an 85% increase since 2010.[26]

In the Canadian market specifically, as an example, Bell's wireless service offers smartphone users the Bell Mobile TV offering that includes more than 40 live and on-demand TV channels for $8/month.

A recent development in the mobile video market saw Vidéotron, Quebec's largest broadcast distributor and one of the province's leading communications companies, in November 2017 begin offering the mobile version of its SVOD/OTT service Club illico with every new mobile plan subscription, which it says gives it an advantage in the highly competitive mobile market.[27] Club illico offers unlimited access to French-language movies, exclusive and original television series, children's programs, documentaries, concerts, with the content available updated weekly.

In making the announcement, Vidéotron cited recent surveys that show that 20% of Quebec consumers watch videos, TV series, or movies on their smartphones. Among Canadian Francophone smartphone owners aged 18 to 34 that number jumps to 85%.

Netflix and Other OTT Video Streaming Services

The explosive growth of online video and streaming is nothing short of astounding. Sandvine, the Canadian-based global leader in network intelligence, says streaming audio and video now accounts for 71% of evening traffic on North American fixed access networks. According to Sandvine's 2016 Global Internet Phenomena report, the company expects this figure will reach 80% by 2020.[28]

Initially relegated to computers and gaming consoles, the launch in recent years of designated streaming devices and USB-like "sticks" with a variety of price points (such as Apple TV, Roku, Slingbox, Amazon Fire, Google Chromecast, to name a few) and Smart TVs with integrated streaming functionality have fueled OTT usage in Canada.

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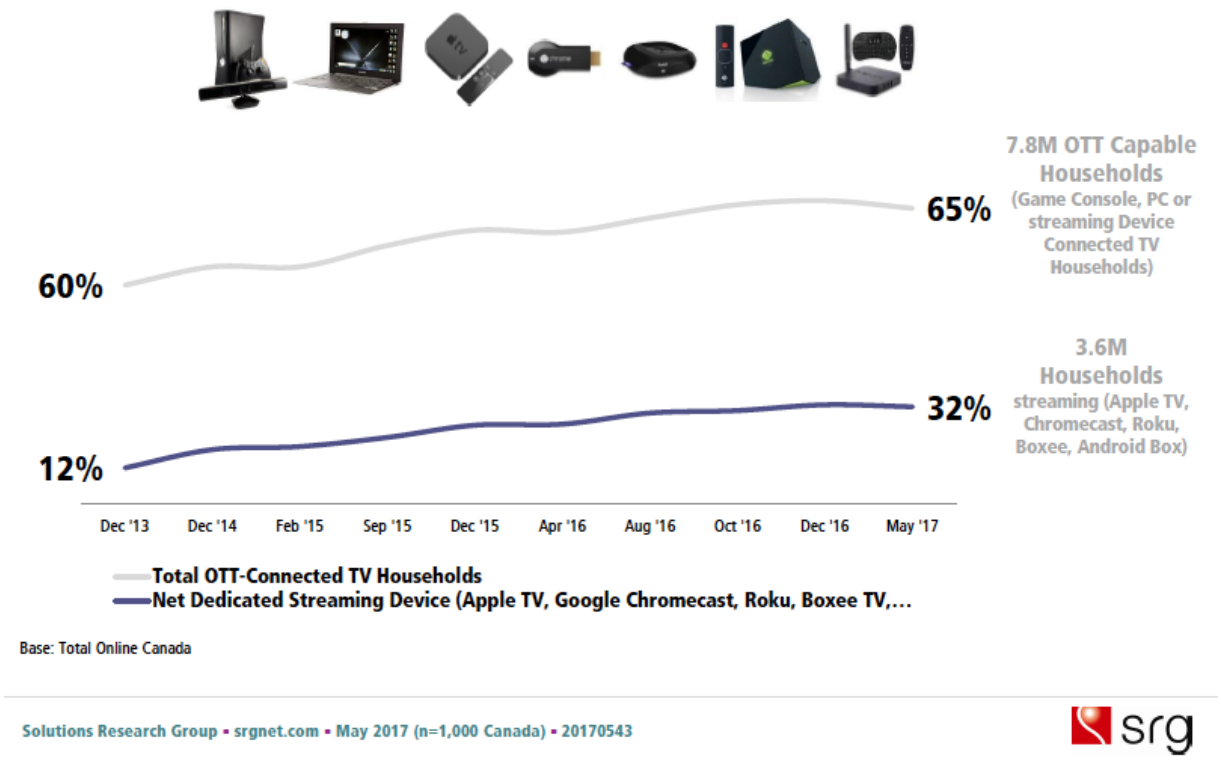
[26] 2017 Ericsson ConsumerLab TV and Media report, https://www.ericsson.com/en/networked-society/trends-and-insights/consumerlab/consumer-insights/reports/tv-and-media-2017?utm_source=Twitter&utm_medium=social_organic&utm_campaign=CL_TVMedia2017&utm_content=ZGLOBAL&hootPostID=22c92b38def55868d969e512318b0732#tvin2020andbeyond.

[27] Vidéotron news release, November 15, 2017: "The best in entertainment: Club illico now included in Videotron mobile plans". http://corpo.videotron.com/site/press-room/press-release/953

[28] See https://www.sandvine.com/resources/global-internet-phenomena/2016/north-america-and-latin-america.html.

According to the latest research from Toronto-based Solutions Research Group's Digital Life Canada Quarterly Tracking survey (May 2017), 32% of all Canadian online households (or some 3.6 million households) had a dedicated streaming device attached to a TV set, almost triple the number (12%) in December 2013.

Figure 2: Over-the-Top Capability and Dedicated Streaming Devices in Canadian Households



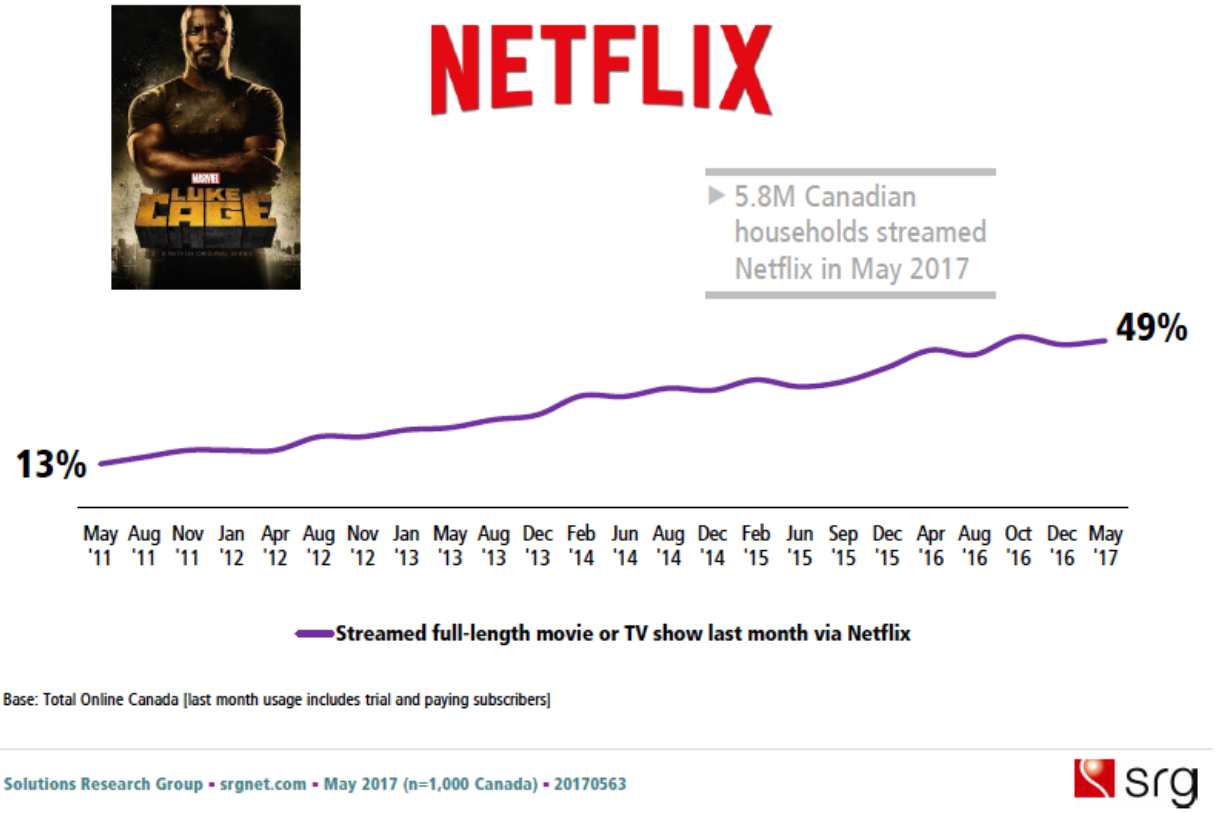
Netflix is unquestionably the dominant video streaming service in Canada and globally, with 109 million subscribers in more than 190 countries as of October 2017. In Canada, Netflix has grown significantly from an estimated 900,000 subscribers in 2011 as cited in the Gratton Report to an estimated 6 million today.

According to the latest Media Technology Monitor survey, conducted by CBC/Radio-Canada Research and Analysis, 53% of Anglophone Canadians now subscribe to Netflix and 57% have at least one video streaming service (free trial or full subscription).[29] The research shows that Netflix is by far the most popular video streaming service in Canada, miles ahead of CraveTV (9% penetration), Amazon Prime Video (5% penetration), and Sportsnet Now (5% penetration).[30]

[29] The Globe and Mail, "Netflix leads streaming services in Canada," October 20, 2017. https://mtm-otm.ca/Download.ashx?file=Files/News/6.NETFLIX%20LEADS%20STREAMING%20SERVICES%20IN%20CANADA.pdf

[30] Huffington Post, "Canadians Lead World In 'Binge-Racing' TV Shows, Netflix Says," October 23, 2017. http://www.huffingtonpost.ca/2017/10/23/canadians-lead-world-in-binge-racing-tv-shows-netflix-says_a_23252741/

Figure 3: Growth in Netflix Usage in Canada



The number of original series offered by Netflix has also grown exponentially, and its programming budget continues to rise and will top $6 billion in 2018.[31]

Beyond Netflix, there has been a significant increase in the number of OTT services available to Canadians.[32] While many of these are and will continue to be niche services with much, much smaller subscriber bases than Netflix, the exponential growth in OTT options available to Canadians in recent years, with more expected in the future, is an important development in the program rights market as it means there are more players competing for rights.

The launch of national Canadian-owned OTT services[33] was an important milestone. Shomi, a joint venture of Rogers Communications and Shaw Communications, and CraveTV, owned by Bell Media, launched in late 2014, with mixed results.

Shomi, which launched in November 2014 with 11,000 hours of popular TV shows, was initially available to only Rogers and Shaw Internet and TV subscribers. In Boon Dog's view, that strategy,

[31] CNBC.com, "Netflix plans to spend $6 billion on new shows, blowing away all but one of its rivals," October 17, 2017. https://www.cnbc.com/2016/10/17/netflixs-6-billion-content-budget-in-2017-makes-it-one-of-the-top-spenders.html

[32] Including, for example, Acorn TV, Fandor, Tubitv, Crackle, Mubi, Crunchyroll, Shudder, Spuul.com, OUTtvGo, Sundance Now, Dramafever, Tou.TV, and beIN Sports Connect.

[33] They were actually more like subscription video-on-demand services when they first launched since they were available only to Rogers and Shaw Internet and TV subscribers (in the case of Shomi) and all TV subscribers (in the case of CraveTV). In other words, they were not initially available over-the-top.

while protecting Rogers and Shaw's TV distribution business, was a flawed approach and doomed from the start. Shomi faced criticism for that approach and was later made available to all Canadians as an OTT service, but it was likely too little too late. Various commentators, including Boon Dog, offered their opinions in this article[34] as to why Shomi was unable to succeed.

In deciding to shut down the service, Shomi's senior VP and general manager stated the business was more challenging to operate than its owners expected and cited a changing business climate and online video market as reasons for shuttering the service.[35] Shomi had approximately 900,000 subscribers when it was officially shut down in November 2016.

Bell's CraveTV launched in December 2014 with more than 10,000 hours of content.[36] The service was initially priced at a mere $4/month (it's now $7.99/month) and was available to all broadcast distributors, not just Bell's TV subscribers. The service became a true OTT service (i.e., available to all Internet-connected Canadians) in January 2016. At launch, nearly 65% of the entire CraveTV catalogue was exclusive to the service. Original Canadian productions exclusive to the service, such as the cult hit *Letterkenny*[37] as the first, have been gradually added to the service, with more and more originals being announced.

Bell announced in November 2016 as part of its release of its Q3 2016 financial results that CraveTV had surpassed one million subscribers but Bell has not disclosed subscriber results since.

CraveTV has had the advantage of having the entire library of premium HBO scripted content, albeit HBO's back catalogue, and SHOWTIME's premium library as part of its service from the start, thanks to Bell Media's program rights deals with HBO and SHOWTIME noted above. With respect to HBO content specifically, this includes shows like *The Sopranos*, *Six Feet Under*, *Sex and the City*, and *Curb Your Enthusiasm* that are not available legally to Canadians anywhere else, except for purchase on iTunes and Google Play.

Canadian TV cord-cutters and cord-nevers have long expressed their dissatisfaction on chat sites and elsewhere with their inability to legally access current HBO content without a traditional TV subscription. Under the Bell Media-HBO rights deal, there's nothing stopping Bell Media from launching its own HBO NOW[38] OTT service for the Canadian market or adding current HBO titles to CraveTV, except of course economics. While Bell Media has repeatedly said it continues to assess the market, it's clearly in Bell's business interests (as the country's largest broadcast distributor) to allow only customers with a TV subscription to get access to current HBO content via a subscription to TMN/HBO Canada. At least for now.

Amazon Prime Video launched in Canada in December 2016 after months of speculation as part of a global expansion to more than 200 countries and territories. The service is available for free in Canada to Amazon Prime members. Amazon Prime costs $79 a year.

It's difficult to assess the long-term impact that Amazon Prime Video will have on the program rights market in Canada. That's because many of the titles (especially movies) currently available on the

[34] CBC.ca, "Shomi hadn't much hope with Netflix already in the living room," September 28, 2016. http://www.cbc.ca/news/business/shomi-netflix-streaming-cravetv-1.3781427

[35] CBC.ca, "Web streaming service Shomi to shut down as of Nov. 30; Rogers and Shaw launched online service in November 2014," September 26, 2016. http://www.cbc.ca/news/entertainment/shomi-shut-down-1.3779675

[36] Bell Media news release, December 3, 2014: "Introducing CraveTV: All You Can Watch for $4/month". http://www.bellmedia.ca/pr/press/introducing-cravetv/

[37] The producers of *Letterkenny* are now shopping the show internationally to platforms and networks, according to this column in The Globe and Mail: https://www.theglobeandmail.com/arts/television/is-the-world-ready-for-letterkenny/article36750954/

[38] Similar to the HBO NOW OTT service available in the U.S. market.

service are also available in Canada on linear TV or other platforms, including TV series *Mr. Robot* (Showcase, Amazon Prime Video, iTunes, Google Play), *Preacher* (AMC, iTunes), *Fear the Walking Dead* (AMC, iTunes), and *The Walking Dead* (AMC, Netflix, iTunes). The Amazon original series *Bosch*, produced by Amazon Studios and Fabrik Entertainment, is an interesting test case for discussion.

The Emmy Award-nominated police procedural was licensed by Bell Media for the Canadian market and has been an exclusive on CraveTV since its debut on the service in February 2015. In announcing Season 2 of *Bosch* on CraveTV in March 2016, Bell Media said the series had become one of the streaming service's most-watched dramas in terms of number of views since the debut of its first season.

Bell Media even aired Season 1 of the show in prime time on CTV in the summer of 2016, its North American network debut, as part of its strategy aimed at attracting new audiences to its subscriber-based channels and services.[39]

CTV and CraveTV's senior VP of programming described the strategy as follows:

> BOSCH continues to be a success for us on CraveTV. The addition to the CTV schedule provides a tremendous sampling opportunity for CTV viewers and a great opportunity to drive new interest in Season 2, which remains exclusively available to CraveTV subscribers.[40]

But here's the interesting thing. *Bosch* is also currently available on the Amazon Prime Video service in Canada. (Although, interestingly, the show was not initially available on Amazon Prime Video in Canada after its launch here.[41] We assume that's because Bell Media's CraveTV had the exclusive streaming rights for Canada at the time and those rights later expired. *Bosch* appeared on Amazon Prime Video's Canadian offering in July 2017, some seven months after the launch of the service in this country.)

The big question is, will Amazon/Fabrik stop licensing future seasons (production of Season 4 is currently underway in Los Angeles) of *Bosch* to Bell Media for streaming on CraveTV and/or broadcast on its linear TV channels and instead keep the show exclusively for the Amazon streaming service? And will past seasons of the show soon disappear from CraveTV, meaning the service would lose one of its most-watched shows?

This would seem to be the most logical scenario, especially if Amazon wants to drive subscriptions to Amazon Prime Video in Canada. But if Amazon/Fabrik can earn additional revenue by selling non-exclusive rights for *Bosch* to Bell Media or another Canadian broadcaster while still keeping the show on Amazon Prime Video, would it not at least consider this option, assuming a Canadian broadcaster was even interested in this scenario? Only Amazon knows the answer to this question, and the answer can change on a dime as Amazon's business strategy adapts to the changing video marketplace.

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[39] Media in Canada, "From streamer to CTV: Bell Media moves Bosch," July 11, 2016. http://mediaincanada.com/2016/07/11/from-streamer-to-ctv-bell-media-moves-bosch/

[40] Bell Media news release, July 11, 2016: "Critically Acclaimed Crime Drama BOSCH Makes its Network Debut on CTV This Thursday, July 14". http://www.bellmedia.ca/pr/press/critically-acclaimed-crime-drama-bosch-makes-its-network-debut-on-ctv-this-thursday-july-14/

[41] See Mobile Syrup, "Bosch and Catastrophe are now available on Amazon Prime Video Canada," July 18, 2017, https://mobilesyrup.com/2017/07/18/series-coming-to-amazon-prime-video-in-july/; and The Toronto Star, "Amazon launches Prime Video in Canada," December 14, 2016. https://www.thestar.com/business/tech_news/2016/12/14/amazon-prime-video-now-available-in-canada.html

Perhaps the most talked about recent OTT service launch announcement is CBS' plan to expand its streaming service CBS All Access to international markets. The expansion will begin with a launch in Canada in the first half of 2018, with other global markets to follow.

"CBS All Access is growing faster than we anticipated domestically, and now represents a whole new opportunity internationally as well," Leslie Moonves, Chairman and CEO of CBS, said in a statement announcing the expansion. "By going direct-to-consumer around the world, we will facilitate new connections between the global audience and our industry-leading premium content."[42]

It's too early to say exactly how CBS All Access will affect the Canadian rights market since rights for certain shows on the streaming service are currently locked up by Canadian broadcasters for the Canadian market and by other players internationally. For example, the rights to one of CBS All Access' flagship shows, *Star Trek: Discovery*, are owned by Bell Media for the Canadian market (Space and CraveTV) and by Netflix for most other markets in which it operates internationally. *Star Trek: Discovery* has been a major hit on Space and CraveTV since its debut.[43]

But again, the big question is, when current rights deals expire, will CBS snub existing longstanding partners and keep all CBS All Access content for all international markets, or will rights holders pay dearly in order to continue business as usual. CBS has certainly signaled that it would like to deliver more of its premium content directly to consumers internationally.[44]

The big concern among all Canadian broadcasters and media companies (and the wider Canadian industry including policymakers) is, at what point will CBS decide to take Showtime's OTT service, or Time Warner decide to take the HBO NOW OTT service (or name any other foreign OTT service) directly to Canadian consumers once current rights deals expire, leaving current Canadian broadcast rights holders with large gaps in their linear TV schedules or streaming service libraries to fill.

That, of course, is the million-dollar question. In other words, how close are we to the tipping point of losing a distinct Canadian program rights market?

The issue of a disappearing separate Canadian program rights market was addressed succinctly in a 2016 paper by lawyers Jay Kerr-Wilson and Ariel Thomas, as follows:

> The threat posed by OTT services to the Canadian program rights market is different from the threats that have gone before in one very important aspect: OTT services are operating within the regulatory tent in Canada despite having no significant regulatory requirements or obligations. The barbarians are no longer at the gate; they have moved in and taken up residence. If foreign OTT services can acquire, without restriction, Canadian program rights as part of their global licensing deals, and can freely operate in Canada without any of the Canadian ownership or Canadian content obligations imposed on traditional broadcasters, have we finally given up on protecting and promoting a distinctly Canadian rights market?[45]

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[42] CBS news release, August 7, 2017: "CBS All Access to Expand Globally."
http://investors.cbscorporation.com/phoenix.zhtml?c=99462&p=irol-newsArticle&ID=2292376

[43] Space news release, September 29, 2017: "Star Trek: Discovery Sets Audience Record in Canada".
http://www.newswire.ca/news-releases/star-trek-discovery-sets-audience-record-in-canada-648679773.html

[44] See footnote 10 above.

[45] Jay Kerr-Wilson and Ariel Thomas, "The Canadian Rights Market Under Siege: The 'end of times' or merely another link in the evolutionary chain?" Presented at the Law Society of Upper Canada conference, April 21, 2016, at page 26.
http://www.fasken.com/files/Publication/0ade5da6-4349-4903-92a7-cad0748047ae/Presentation/PublicationAttachment/97b817d6-31aa-4bb0-bc90-ccf20b54a4c4/93180878_v(6)_The%20Canadian%20Rights%20Market%20Under%20Siege.pdf

Given the popularity and importance of live sports programming in the media business we would be remiss not to at least briefly mention developments with respect to sports-based OTT services.

In April 2016 Rogers launched Sportsnet Now as a standalone streaming service that holds exclusive rights to Toronto Blue Jays, National Hockey League (NHL), and some Toronto Raptor's games.[46] In announcing the launch, Rogers claimed that Sportsnet is the first major sports network in North America to offer its content live over the Internet to paying subscribers.

One development that caused a bit of a stir was UK-based DAZN's (pronounced Da Zone) announcement in July 2017 that it had secured exclusive streaming rights for Canada to all National Football League (NFL) games starting with the 2017/2018 season.[47] The deal essentially replaced the premium subscription TV service previously offered by Canadian broadcast distributors known as *NFL Sunday Ticket*, which gave subscribers access to all NFL games including out-of-market games, and *NFL Game Pass*, the league's streaming service.

DAZN had a rocky start to its launch in Canada, to say the least, with various technical issues plaguing the service after launch that left many subscribers frustrated with the on-demand sports streaming service.[48]

In response to subscriber complaints, which included for example the Twitter account @DAZNSucks created to unite unhappy customers, in October 2017 the NFL and DAZN reached agreements allowing several Canadian broadcast distributors to resume selling *NFL Sunday Ticket* to their TV subscribers via set-top boxes.[49]

Social Media Platforms

Another new development in the program rights market since the Gratton Report was written is the emergence of social media platforms as distributors of live and original video content. In recent years leading social media platforms such as Facebook (via Facebook Live) and Twitter have seen live sports content streamed on their platforms.[50]

One of the deals that created the most buzz was Twitter's one-year deal with the NFL, announced in April 2016, to stream 10 of the 16 NFL *Thursday Night Football* games that aired in the 2016/2017 football season.[51] While Twitter won the global streaming rights to these games as part of the deal, for which it reportedly paid about $10 million, the deal specifically excluded the Canadian market as

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[46] The Globe and Mail, "Rogers launches direct-to-consumers Sportsnet Now streaming service," March 31, 2016. https://www.theglobeandmail.com/report-on-business/rogers-launches-direct-to-consumers-sportsnet-now-streaming-service/article29471799/

[47] CBC.ca, "Sports streaming app DAZN launches in Canada with all NFL games for $20 a month; Will launch with NFL digital rights, company says more will be added," July 21, 2017. http://www.cbc.ca/news/business/dazn-streaming-nfl-1.4214428

[48] CBC.ca, "'It's ruining my NFL experience': Canadians fume about new streaming service; Canadians who want to have access to all NFL games must use DAZN, which has had hiccups since launching," September 15, 2017. http://www.cbc.ca/news/canada/nova-scotia/dazn-canada-nfl-football-streaming-problems-1.4289869

[49] The Toronto Star, "NFL reattaches cable as streaming service falters; DAZN no longer exclusive provider of league's Sunday Ticket package," October 22, 2017. https://www.thestar.com/sports/2017/10/22/nfl-reattaches-cable-as-streaming-service-falters.html

[50] Rapid TV News, "Live sports streaming on social media gains ground," May 15, 2017. https://www.rapidtvnews.com/2017051547210/live-sports-streaming-on-social-media-gains-ground.html#axzz4zIXRmtMj

[51] NFL news release, April 5, 2016: "National Football League and Twitter Announce Streaming Partnership for Thursday Night Football; Twitter to stream 10 Thursday Night Football games globally". https://nflcommunications.com/Pages/National-Football-League-and-Twitter-Announce-Streaming-Partnership-for-Thursday-Night-Football.aspx

Rogers' Sportsnet owned exclusive rights to *Thursday Night Football* (TV and online) for the 2016/2017 season. The games aired on Sportsnet via simulcast of CBS, NBC, and the NFL Network's linear TV channels, as well as on their respective websites. CBS.com, NBC.com, etc. had the right to stream domestically but not worldwide.

In April 2017 Twitter lost the deal to stream the NFL's Thursday night games for the 2017/2018 season to Amazon, which reportedly paid $50 million[52] under a one-year deal for the right to do so.[53] Although not mentioned in the announcement, the Amazon agreement specifically excluded Canada, as the Twitter deal did, because DAZN has the exclusive streaming rights for Canada for all NFL games, as noted above.

Bell Media and the NFL announced in June 2017 that all *Thursday Night Football* games would air on TSN and CTV Two for the first time, and return to RDS, beginning with the 2017/2018 season as part of a multi-year rights agreement extension that makes Bell Media the exclusive television broadcast partner of the NFL in Canada.[54] We emphasize the word "broadcast" in the preceding sentence because, as noted above, DAZN and not Bell Media has the streaming rights to all NFL games in Canada.

If this sounds complicated and confusing, that's because it is. Welcome to today's program rights market.

The NFL has called its approach to licensing the rights to *Thursday Night Football* as a "tri-cast" model: broadcast (NBC/CBS in the U.S.; CTV and CTV Two in Canada), cable (NFL Network in the U.S., and TSN/RDS in Canada, and digital distribution (Amazon Prime Video in the U.S. and DAZN in Canada).

The NFL's approach to do short-term streaming deals (i.e., one year) for *Thursday Night Football* is in sharp contrast to the NHL's 12-year, $5.2-billion deal signed in November 2013 with Rogers for exclusive Canadian linear TV and digital rights to NHL games.[55] The deal began with the 2014/2015 season and runs through the 2025/2026 season.

A number of Canadian broadcasters have had a presence for a few years on Snapchat, a mobile-focused social media platform/app, owned by California-based Snap Inc. But in November 2017 it was reported that the CBC and Bell Media would be the first Canadian broadcasters to provide Snapchat with original Canadian content for Snap's Discover and Our Stories features.[56] Earlier this year, Snapchat revealed plans to move into scripted content.[57]

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[52] The Wall Street Journal, "NFL and Amazon Reach One-Year Streaming Deal for About $50 Million; Deal for 10 Thursday night games will be available only to Amazon Prime members," April 4, 2017. https://www.wsj.com/articles/nfl-and-amazon-reach-one-year-streaming-deal-for-about-50-million-1491347701

[53] NFL news release, April 19, 2017: "National Football League and Amazon Prime announce streaming partnership for Thursday Night Football; Amazon Prime to stream 10 Thursday Night Football games globally". https://nflcommunications.com/Pages/NATIONAL-FOOTBALL-LEAGUE-AND-AMAZON-PRIME-ANNOUNCE-STREAMING-PARTNERSHIP-FOR-THURSDAY-NIGHT-FOOTBALL.aspx

[54] Bell Media news release, June 7, 2017: "Thursday Night Football Comes to TSN, CTV, CTV Two, and RDS". http://www.bellmedia.ca/pr/press/thursday-night-football-comes-to-tsn-ctv-ctv-two-and-rds/

[55] NHL.com, "NHL, Rogers announce landmark 12-year deal," November 26, 2013. https://www.nhl.com/news/nhl-rogers-announce-landmark-12-year-deal/c-693152

[56] See https://www.linkedin.com/pulse/welcome-snapchat-bell-media-cbc-joe-strolz/.

[57] Variety, "Snapchat to Move into Scripted Content by Year's End," August 23, 2017. http://variety.com/2017/digital/news/snapchat-shows-move-scripted-content-by-years-end-1202536733/

Boon Dog expects more social media platforms to try streaming live/original video content in the years ahead. Not all will stick, like the Twitter/NFL pact, but experimentation will no doubt continue as rights holders and social media platforms try to find a winning formula.

Theatrical Distribution

While not explicitly addressed in the Gratton Report, some rights holders have turned to theatrical distribution as an additional window for the distribution of their content. Most recently, the NFL (that's right, a pattern seems to be developing here with the NFL in experimenting with new distribution models) announced a three-year "sponsorship agreement" with Cineplex that is bringing *Sunday Night Football* and the Super Bowl live to Cineplex theatres across Canada.[58] "NFL Sundays at Cineplex" premiered in-theatre on November 12, 2017, with NFL games broadcast live to 15 theatres across Canada initially and will expand to 50 locations for Super Bowl LII. Tickets to "NFL Sundays at Cineplex" are just $5 each.

As noted above, Bell Media now holds the Canadian broadcast rights (TSN/CTV Two/RDS) to *Sunday Night Football* and the Super Bowl so this deal will eat into its audience for these games, albeit, in our view, in a limited way. It's worth noting that "NFL Sundays at Cineplex" uses the Bell Media broadcast feed including Canadian commercials thanks to a deal with Bell Media, a Cineplex spokesperson confirmed to Boon Dog.

While the Cineplex-NFL deal gives the NFL another slice of pie (revenue) over and above its existing program rights agreements, would other rights holders try the same approach for other live, big-event type programming, such as the Academy Awards, Golden Globe Awards, or the Grammy Awards—some of the most-watched shows in Canada on linear TV?

IV. Opportunities for Canadian TV Producers and Rights Holders

Thus far in this report the discussion has focused on the changing market for television program rights related to foreign (mainly U.S.) content and how that is affecting, or will affect, Canadian broadcasters/media companies. But what about Canadian television programming?

Just as it has for foreign rights holders, the evolving market for television program rights (new platforms, new players, the growth of OTT) is creating new opportunities for Canadian programming and those who hold the rights to that programming.

Canadian television content creators and rights holders have a love-hate relationship with OTT players, particularly Netflix. While many in the creative industry have called for OTT providers to be required to contribute to the creation of Canadian programming, many are also (sometimes quietly) happy to have these "new doors to knock on" to sell Canadian programming. This is especially true since the massive amount of consolidation that has occurred in Canada in recent years has reduced the number of Canadian doors to knock on, and given large Canadian broadcast groups' enormous negotiating power over television producers, which in turn allows them to demand all or significant

[58] Cineplex news release, November 3, 2017: "Cineplex Quarterbacks Exclusive Canadian Sponsorship to Bring the NFL to the Big Screen; Fans Can Enjoy Sunday Night Football and the Super Bowl at Theatres Across Canada". https://mediafiles.cineplex.com/press-releases/Cineplex%20NFL%20Canada%20Partnership%20Release%20FINAL_20171103130455_0.pdf

rights in exchange for a broadcast licence fee (and other compensation), which is still a trigger required for television producers to access certain funding.[59]

Netflix has emerged as an important distribution and financing partner for Canada's public broadcaster, particularly its English-language TV network. With limited second-window distribution opportunities due to its lack of entertainment-based specialty TV channels, the CBC turned to Netflix not long after its launch in Canada to essentially be its "second-viewing" or catch-up viewing platform.[60] That relationship has evolved to being co-financers of high-quality and big-budget drama series such as *Anne* and *Alias Grace*. Without Netflix's participation, it's possible the CBC would not have been able to commission these shows—certainly not at their high budget levels—and, therefore, quite possibly, the shows may never have been made. *Anne* and *Alias Grace* are broadcast on CBC and available on-demand on CBC.ca, and streamed globally on Netflix outside of Canada.

The following excerpt from a *Playback* article highlights the love-hate relationship that private Canadian broadcasters/media companies have with Netflix:

> "Netflix is a very, very, very powerful force in this country, never mind the world, from a content point of view. And [partnering with it to create content] is sleeping with the enemy. And they are the enemy," Williams [Barb Williams, EVP and COO, Corus Entertainment], said.
>
> She added that while Corus will partner with Netflix again on season two of *Travelers*, and perhaps other series in the future, the media company is trying to figure out the right balance to financing premium quality content.
>
> "We're all acknowledging that we can make [great content] if we get the money to do it. But who are the right partners and what are the right terms? What is a win in the short term but might be very damaging in the long term?" she said. "Maybe you could do one or two [shows] with them, but you don't want your whole slate with [Netflix]."[61]

Perhaps the best example of the new program rights market being a boon for Canadian programming is the *Trailer Park Boys* franchise. Years after finishing its successful cult-following run on the Showcase specialty TV channel in Canada, the show found a new life on Netflix in the fall of 2014 and a new global fan base.[62] Season 8 of *Trailer Park Boys*, which consists of 10 all-new episodes, premiered exclusively on Netflix that year and Seasons 1-7 and various specials were eventually made available to Netflix subscribers worldwide.

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[59] Concerns of Canadian independent producers in English Canada can be summarized in this CMPA news release, which was issued following the CRTC's approval of the Shaw-Corus transaction in March 2016, http://cmpa.ca/news-events/news-releases/crtc-approval-corus-shaw-deal-puts-canada's-independent-producers-risk.

[60] CBC.ca, "Netflix beefs up Canadian content," December 13, 2010. http://www.cbc.ca/news/netflix-beefs-up-canadian-content-1.965001

[61] Playback, "Media execs weigh in on working with Netflix," March 10, 2017. http://playbackonline.ca/2017/03/10/is-netflix-the-enemy/

[62] Netflix and Entertainment One news release, March 5, 2014: "Only On Netflix: Canada's Incomparably-Entertaining Trailer Park Boys Return For Seasons 8 & 9 Beginning This Fall". http://www.newswire.ca/news-releases/only-on-netflix-canadas-incomparably-entertaining-trailer-park-boys-return-for-seasons-8--9-beginning-this-fall-513866151.html

In October 2017, Netflix revealed that *Trailer Park Boys* was the 7th most "Binge Raced"[63] show on its service globally since 2012.[64] Any Canadian producer would be thrilled to make such a list.

V. Conclusion

As this report has attempted to show, there have been some significant changes in the licensing of television content in North America in recent years, with the number of platforms and players in the mix growing exponentially. Yet, at the same, it can be said that much has remained the same, at least so far.

Generally speaking, the traditional "orderly marketplace" for television program rights remains mostly the same as it has always been. Program rights holders carve out rights according to country or territory and by platform and try to maximize the revenue they earn from those rights.

At the same time, however, the "orderly marketplace" for television program rights is clearly in flux. As Gratton noted in his report in 2011, the program rights market in Canada continues to appear "fragmented and chaotic, at times even contradictory". How else can one explain why a show like *Mr. Robot* is available to Canadians in a number of ways (on the Showcase specialty TV channel, on the Amazon Prime Video OTT service, and on iTunes and Google Play)? Or, why on the one hand Canadian broadcasters/media companies see Netflix as a major global threat, and on the other hand have partnered with the company for the distribution of their content (CBC and Corus with Nickelodeon content, for example) or to commission original programming (CBC with *Anne* and *Alias Grace*, Bell Media with *Frontier*, and Corus Entertainment with *Travelers*, for example).

With the growth of global streaming players such as Netflix and Amazon, selling rights on a global basis, rather than by country or territory, is a new option available to rights holders and increasingly seen as a viable and lucrative one. Netflix has made clear its desire to acquire global rights to the content it licenses as much as possible. CBS has indicated its desire to distribute more of its content directly to consumers outside of the United States, via its CBS All Access streaming service. Indeed, for Canadian broadcasters/media companies the "orderly marketplace" for television program rights can change on a dime.

Experimentation, change, contradiction, and disruption appear to be the new normal in the television program rights market. No clear model has yet to emerge as the standard for the future distribution of television rights in North America.

There's no denying, however, that intense competition for acquiring the rights to great foreign (mainly U.S.) television content is real and growing.

During a CRTC hearing in November 2016, then-Bell Media President Mary Ann Turcke spoke about the new reality now facing Canadian broadcasters/media companies in acquiring rights from foreign (mainly U.S.) rights holders for the Canadian market. Her remarks came just days before Amazon Prime Video launched in the Canadian market.

> Now, a new global OTT competitor—Amazon Prime—is entering the Canadian market in two days. So, it's not just our fellow Canadian broadcasters who will try to outbid us for

[63] Netflix defined "Binge Racers" as members who completed a season of a TV show within 24 hours of its release on Netflix. Data accommodates for time zones and is reflective of a show's launch within 24 hours of a country's release. Netflix's binge racing ranking has no relation to overall viewership.

[64] Netflix news release, October 17, 2017: "Ready, Set, Binge: More Than 8 Million Viewers 'Binge Race' Their Favorite Series". https://media.netflix.com/en/press-releases/ready-set-binge-more-than-8-million-viewers-binge-race-their-favorite-series

> first-run original programming, but it's Netflix and now Amazon, two entities that are not subject to the same regulatory requirements as us and that have astronomically more buying power than we do.
>
> And Amazon is just the next one in a potential universe of six worldwide brands that we will have to compete against.
>
> Let me give you a real-world example. Last May, we were in Los Angeles buying our foreign television content. There were three shows that we were bidding on and Netflix was the competitor, a competitor who put a global, first-run and SVOD rights deal on the table even though these are shows that are coming into Canada on the U.S. networks. We were fortunate to take two of the three shows; however, we paid a significant premium.
>
> The conclusion, therefore, is that Netflix was willing to pay more for the content even in a non-ad supported world. The global scale of these players fundamentally alters the monetization model in this country. It also begs the question whether the "product" we currently buy that is known as "Canadian rights" is going to become obsolete.
>
> Consider a world where Netflix, or another global OTT player, acquires the majority of the top prime time network television shows. The consequences are broad and can be bucketed into two scenarios.
>
> First, Canadians will watch this popular television content on a U.S. network, taking away Canadian broadcasters' viewers and reducing our ability to monetize our prime-time schedule, not to mention taking away the opportunity for Canadian businesses to advertise to these viewers. We must remember that the revenue earned from popular foreign programming is still the prime support for Canadian production, including local news.
>
> Even worse for the existing ecosystem though, is the second scenario where Canadians decide they don't need any TV subscription at all because the best of prime-time television is dropped day and date on Netflix. In this instance, broadcast revenue is falling and BDU [broadcasting distribution undertaking] revenue is falling. The functional relationship between BDU revenue, CMF [Canada Media Fund] contributions, advertising revenue, and Canadian production is so inter-related that negative motion in any of these components results in an exponential decline in the system.[65]

More recently, a Rogers Media executive noted that Rogers won't be overpaying for U.S. television programming to fill its linear TV channel schedules and digital platforms against the likes of Netflix or Amazon. "They aren't making money. But they're spending a lot of money," Colette Watson, Senior VP of Television and Broadcast Operations at Rogers Media, said of Netflix and Amazon at this year's Los Angeles Screenings. "It will be careful, it will be strategic, but yes you would do that (buy all rights), but we can't afford to do that on everything we do."[66]

As current, long-term television program rights agreements approach their expiry date many will be watching whether Canadian broadcasters/media companies will be able to extend those rights agreements at a reasonable cost, or will they be outbid by the new global behemoths like Netflix and Amazon (and potentially others)?

One thing is for sure, given everything we know and have seen to date, the amount and pace of change in the television program rights market will only accelerate in the years ahead.

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[65] Transcript, CRTC Hearing, November 29, 2016, at line 1905-1912. http://crtc.gc.ca/eng/transcripts/2016/tb1129.htm

[66] Cartt.ca, "Upfronts 2017: Rogers Media set to get back into streaming TV after Shomi," June 6, 2017. https://cartt.ca/article/upfronts-2017-rogers-media-set-get-back-streaming-tv-after-shomi

APPENDIX 1

About Boon Dog Professional Services Inc.

Boon Dog Professional Services Inc. is an Ottawa-based research and consulting firm offering a range of professional services and research studies to clients in a number of sectors, with an expertise in the broadcasting and media sectors. Services provided include the following:

- strategic business and market intelligence;
- strategic marketing communications and public relations;
- writing and editing; and
- communications/broadcasting regulatory consulting and analytics.

Boon Dog Co-founder and Partner Mario Mota has extensive knowledge of the Canadian broadcasting and communications industries and CRTC regulatory processes. From 1999 to 2000, Mario served as Director of Policy and Regulatory Affairs at the Specialty and Premium Television Association (SPTV), which represented licensed Canadian specialty, pay, and third-language TV services. Mario assumed the position of Director of Specialty and Pay Television Policy at the Canadian Association of Broadcasters (CAB) following SPTV's merger with the CAB in December 2000. From April 2006 to November 2010, Mario oversaw broadcasting policy and regulatory matters for the Canadian Media Producers Association (CMPA) (then the Canadian Film and Television Production Association and later the Canadian Media Production Association), first as Senior Director of Broadcast Relations & Research and then as Vice-President, Broadcasting Policy & Regulatory Affairs.

Prior to co-founding Boon Dog Professional Services in 2006, Mario was Vice-President of Broadcast/Media Research at Decima Research Inc. (now Harris/Decima) where he managed the company's growing broadcast and media research practice.

Mario first joined the Decima group in July 2001 as President and Publisher of Decima Reports Inc. (then Decima Publishing but now The Wire Report and published by The Hill Times). One of Mario's key mandates in this leadership position was to increase Decima Research's exposure and credibility in the broadcasting sector. He achieved this by coordinating research projects on broadcasting industry topics such as digital television and HDTV. During his time at Decima Reports, Mario developed and managed Decima's successful THE DIGITAL DOMAIN research series, Canada's most comprehensive independent research series on the digital TV market. Mario continued to manage this highly regarded research product when he joined Decima Research in June 2004. Boon Dog Professional Services continues to produce this report series today under the name ***Canadian Digital TV Market Monitor***.

Mario and Boon Dog also produce the ***Canadian Television Benefits Monitor***, an annual syndicated research study that tracks spending for all current television tangible public benefits packages, using data contained in reports filed annually with the CRTC.

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RIGHTS OWNERSHIP OF THE TOP 100 TV PROGRAMS IN CANADA (ENGLISH CHANNELS) ACCORDING TO AMA

By:
Mario Mota, Boon Dog Professional Services Inc.

For:
TELUS

November 2017

Rights Ownership of the Top 100 TV Programs in Canada (English Channels) According to AMA

2017-2018 Broadcast Year to Date (Aug. 28 - Nov. 19, 2017)

This is an analysis of who owns the rights to the Top 100 TV programs that have aired on English-language television channels in Canada according to Average Minute Audience (AMA)[1] in the 2017-2018 broadcast year to date (between August 28, 2017 and November 19, 2017). The list of the Top 100 programs can be found in the table on the pages that follow.

It should be noted that duplicate listings (airings) of the same program title (series) have been removed from the list, with the exception of news programs and sporting events. In other words, whereas the program *The Big Bang Theory* (as an example) would have appeared numerous times in the Top 100 list, only the episode/airing with the highest AMA is included in the list.

As can be seen, Canada's vertically integrated broadcasters combined—Bell Media (CTV, CTV Two, TSN, Space), Corus Entertainment (Global, Treehouse, W Network), and Rogers (Citytv, Sportsnet—dominate the list of Top 100 programs, with Canada's national public broadcaster, CBC, appearing several times and one U.S. specialty channel (AMC) appearing just once.

Beyond linear TV rights, Canadian broadcasters almost always acquire the video-on-demand and digital (streaming) rights to the shows they license, when available to them. A review of other platforms confirmed that the overwhelming majority of the Top 100 programs were also made available to viewers[2] either on the broadcasters' respective websites or TV Everywhere / GO apps, or both. With the exception of news, sports, and some big-event awards shows (such as the Emmys), these programs were also generally mostly available on the VOD platforms of broadcasting distribution undertakings (BDUs).[3] At least one program, CTV's *Long Time Running*, is also available on Bell's over-the-top (OTT) service CraveTV.

In some cases, entire seasons (including past seasons) of these programs are available on the broadcaster's website and/or TV Everywhere / GO app, and in other cases only recent episodes from the current season are available.

In many cases, past seasons of these programs are available on other platforms, such as the iTunes Store, Netflix, and CraveTV. Additionally, many of these programs, such as *The Big Bang Theory* and *Young Sheldon*, have a "Season Pass" available on iTunes, which allows users to follow along with a TV season that is currently airing on broadcast TV. Episodes are typically available to purchase/view the day after the original broadcast.

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[1] AMA is the average number of viewers watching a program during any given minute.

[2] In order to view these programs on the broadcaster website or via a TV Everywhere / GO app, viewers must be subscribers to the channel on which the program was broadcast and must sign in using their sign in info from their TV service provider.

[3] For this analysis, Boon Dog used Rogers' VOD service to verify availability of programs on-demand as it was the only one available to us, but it can be assumed that these programs were also available on similar VOD services operated by other major BDUs.

Top 100 Programs - Total Canada (English Channels)
2017-2018 Broadcast Year to Date (Aug. 28 - Nov. 19, 2017)

Rank	Program	Channel	Date	Day	Start	End	Duration	Episode Name	Total 2+ AMA(000)
1	THE BIG BANG THEORY	CTV Total	2017-09-25	Monday	20:00:00	20:30:00	0030:00	Premiere	3851.6
2	YOUNG SHELDON	CTV Total	2017-09-25	Monday	20:30:00	21:00:00	0030:00	Debut	3561
3	THE GOOD DOCTOR	CTV Total	2017-11-13	Monday	22:01:00	23:00:00	0059:00		2864.3
4	STAR TREK: DISCOVERY	CTV Total	2017-09-24	Sunday	20:48:00	21:53:00	0065:00	Debut (CTV & Space)	2274.4
5	Survivor	Global Total	2017-09-27	Wednesday	20:00:00	21:00:00	0060:00	I'm Not Crazy, I'm Confident	2238.8
6	Seal Team	Global Total	2017-09-27	Wednesday	21:00:00	22:00:00	0060:00	Tip of the Spear	2136
7	NCIS	Global Total	2017-11-14	Tuesday	20:00:00	21:00:00	0060:00	Voices	2084.6
8	HNIC Prime East	CBC Total	2017-10-14	Saturday	19:08:00	21:59:00	171:00:00	2017-10-14 Toronto @ Montreal	2071.3
9	GREY'S ANATOMY	CTV Total	2017-10-12	Thursday	20:00:00	21:00:00	0060:00		1989.1
10	Bull	Global Total	2017-10-24	Tuesday	21:00:00	22:00:00	0060:00	Play The Hand You're Dealt	1984.9
11	THE AMAZING RACE CANADA	CTV Total	2017-09-12	Tuesday	20:00:00	21:00:00	0060:00	Finale	1961.3
12	America's Got Talent	City Total	2017-09-20	Wednesday	20:00:00	22:01:00	121:00:00		1879.8
13	AMERICAN MUSIC AWARDS	CTV Total	2017-11-19	Sunday	20:00:00	23:05:00	185:00:00	2017	1858.2
14	EMMYS	CTV Total	2017-09-17	Sunday	20:00:00	23:04:00	184:00:00	69th Primetime Emmy Awards	1794.8
15	DESIGNATED SURVIVOR	CTV Total	2017-09-27	Wednesday	22:00:00	23:00:00	0060:00	Premiere	1776.2
16	Will & Grace	Global Total	2017-09-28	Thursday	21:00:00	21:30:00	0030:00	11 Years Later	1710.5
17	S.W.A.T.	Global Total	2017-11-02	Thursday	22:00:00	23:00:00	0060:00	Pilot	1649
18	THIS IS US	CTV Total	2017-09-26	Tuesday	21:00:00	22:01:00	0061:00	Premiere	1621.2
19	Hawaii Five-0	Global Total	2017-09-29	Friday	21:00:00	22:00:00	0060:00	A'ole E 'Olelo Mai Ana Ua Ana Ia (Fire Will Never Say That I	1602.5
20	CTV EVENING NEWS	CTV Total	2017-11-06	Monday	17:59:00	19:00:00	0061:00		1593.1
21	BLUE BLOODS	CTV Total	2017-10-13	Friday	22:00:00	23:00:00	0060:00		1584.5
22	THE GIFTED	CTV Total	2017-10-02	Monday	21:00:00	22:01:00	0061:00	Debut	1562.7
23	LAW AND ORDER: SVU	CTV Total	2017-10-18	Wednesday	21:00:00	22:00:00	0060:00		1501
24	Walking Dead, The	AMC+	2017-10-22	Sunday	21:00:00	22:07:00	0067:00	08-001	1472.6
25	NCIS: Los Angeles	Global Total	2017-10-01	Sunday	21:00:00	22:00:00	0060:00	Party Crashers	1470.1
26	LUCIFER	CTV Total	2017-11-06	Monday	20:00:00	21:00:00	0060:00		1461.9
27	ME, MYSELF & I	CTV Total	2017-09-25	Monday	21:30:00	22:01:00	0031:00	Debut	1446.6
28	CRIMINAL MINDS	CTV Total	2017-09-27	Wednesday	20:00:00	21:00:00	0060:00	Premiere	1436.6
29	Chicago Fire	Global Total	2017-09-28	Thursday	22:00:00	23:00:00	0060:00	It Wasn't Enough	1413.9
30	CFL PLAYOFFS	TSN+	2017-11-19	Sunday	13:00:00	16:24:00	204:00:00	EAST FINAL - SASKATCHEWAN\TORONTO	1392.8
31	LONG TIME RUNNING	CTV Total	2017-10-20	Friday	20:00:00	21:36:00	0096:00	World Broadcast Premiere	1381.5
32	Chicago PD	Global Total	2017-10-18	Wednesday	22:00:00	23:00:00	0060:00	Snitch	1375.9
33	NHL HOCKEY-LEAFS	Sportsnet National+	2017-10-04	Wednesday	19:18:00	21:51:00	153:00:00	Toronto @ Winnipeg - L	1374.2
34	MacGyver	Global Total	2017-09-29	Friday	20:00:00	21:00:00	0060:00	DIE or DYE	1372.7
35	CTV NATIONAL NEWS	CTV Total	2017-10-09	Monday	23:00:00	23:30:00	0030:00		1345.8
36	Big Brother	Global Total	2017-09-10	Sunday	20:00:00	21:00:00	0060:00	Big Brother - 1935	1345.2
37	NCIS: New Orleans	Global Total	2017-10-31	Tuesday	19:00:00	20:00:00	0060:00	ACCEPTABLE LOSS	1275.2
38	The Brave	Global Total	2017-09-25	Monday	22:00:00	23:00:00	0060:00	Pilot	1273
39	Murdoch Mysteries	CBC Total	2017-11-13	Monday	20:00:00	21:01:00	0061:00	11-07 The Accident	1248
40	CTV EVENING NEWS WEEKEND	CTV Total	2017-11-19	Sunday	18:00:00	19:00:00	0060:00		1229.6
41	KEVIN (PROBABLY) SAVES THE WORLD	CTV Total	2017-10-03	Tuesday	22:00:00	23:00:00	0060:00	Debut	1214.3
42	Wiggle Wiggle Wiggle	Treehouse+	2017-09-23	Saturday	8:50:00	9:15:00	0025:00	S1 Eps 001	1182.4

43	Saturday Night Live	Global Total	2017-11-04	Saturday	23:29:00	25:02:00	0093:00	Host: Larry David; Musical Guest: Miley Cyrus	1150.7
44	COURAGE: IN MEMORY OF GORD	CTV Total	2017-10-20	Friday	21:36:00	22:00:00	0024:00		1142.8
45	Wisdom of the Crowd	Global Total	2017-10-01	Sunday	20:00:00	21:00:00	0060:00	Pilot	1129.3
46	AMERICAN NINJA WARRIOR	CTV Total	2017-09-18	Monday	20:00:00	22:00:00	120:00:00	Finale	1127.7
47	THE VOICE	CTV Total	2017-10-03	Tuesday	20:00:00	21:00:00	0060:00		1125.2
48	MLB WS PLAYOFFS	Sportsnet National+	2017-11-01	Wednesday	20:00:00	24:07:00	247:00:00	World Series - Houston @ LA Dodgers - Game 7 - L	1105.4
49	MASTERCHEF	CTV Total	2017-09-13	Wednesday	20:00:00	22:00:00	120:00:00		1083.2
50	MARVEL'S INHUMANS	CTV Total	2017-09-29	Friday	20:00:00	22:00:00	120:00:00		1080.2
51	THE FLASH	CTV Total	2017-11-14	Tuesday	20:00:00	21:00:00	0060:00		1073.2
52	HNIC Prime West	CBC Total	2017-10-07	Saturday	22:05:00	25:05:00	180:00:00	2017-10-07 Edmonton @ Vancouver	1044.3
53	Law & Order True Crime: The Menendez Murders	Global Total	2017-09-26	Tuesday	22:00:00	23:00:00	0060:00	Episode 1	1043.6
54	DIANA, 7 DAYS	CTV Total	2017-09-01	Friday	20:00:00	22:00:00	120:00:00		1023.5
55	INVICTUS GAMES	CTV Total	2017-09-23	Saturday	20:00:00	22:30:00	150:00:00	2017 Invictus Games Opening Ceremony	1000.7
56	The Blacklist	City Total	2017-10-11	Wednesday	20:00:00	21:00:00	0060:00		998.6
57	Madam Secretary	Global Total	2017-10-29	Sunday	22:00:00	23:00:00	0060:00	Shutdown	998.5
58	Dancing with the Stars	City Total	2017-09-18	Monday	20:00:00	22:01:00	121:00:00		998.5
59	THE DISAPPEARANCE	CTV Total	2017-11-05	Sunday	21:00:00	22:00:00	0060:00	Finale	994.7
60	HOCKEYCENTRAL	Sportsnet National+	2017-10-04	Wednesday	21:51:00	22:18:00	0027:00	I	971.5
61	TEN DAYS IN THE VALLEY	CTV Total	2017-10-01	Sunday	22:00:00	23:00:00	0060:00	Debut	964.5
62	HOW TO GET AWAY WITH MURDER	CTV Total	2017-10-19	Thursday	22:00:00	23:00:00	0060:00		958
63	MLB LCS PLAYOFFS	Sportsnet National+	2017-10-21	Saturday	20:00:00	23:26:00	206:00:00	ALCS - New York Yankees @ Houston - Game 7 - L	953.4
64	Kevin Can Wait	Global Total	2017-10-02	Monday	21:01:00	21:31:00	0030:00	Business Unusual	951.2
65	BASEBALL:BLUE JAYS	Sportsnet National+	2017-09-04	Monday	19:12:00	22:38:00	206:00:00	Toronto @ Boston - L	943.9
66	NFL LATE	CTV Total	2017-10-08	Sunday	16:23:00	19:35:00	192:00:00	CTV & TSN	933.1
67	BLINDSPOT	CTV Total	2017-10-27	Friday	20:00:00	21:01:00	0061:00	Premiere	923.5
68	CTV LATE NEWS	CTV Total	2017-10-16	Monday	23:30:00	24:05:00	0035:00		922.7
69	Midnight, Texas	Global Total	2017-09-11	Monday	22:00:00	23:00:00	0060:00	Last Temptation of Midnight	921.3
70	The Orville	City Total	2017-10-26	Thursday	21:01:00	22:00:00	0059:00		921.1
71	Scorpion	City Total	2017-09-25	Monday	22:01:00	23:00:00	0059:00		919.1
72	Modern Family	City Total	2017-09-27	Wednesday	21:00:00	21:31:00	0031:00		903.1
73	Rock and Roll Preschool	Treehouse+	2017-09-04	Monday	7:40:00	8:40:00	0060:00	Rock and Roll Preschool	902.7
74	Global National	Global Total	2017-10-02	Monday	18:30:00	19:00:00	0030:00	Global National	895.9
75	GOTHAM	CTV Total	2017-11-02	Thursday	21:01:00	22:00:00	0059:00		889.4
76	THE ORIGINAL SANTA CLAUS PARADE	CTV Total	2017-11-19	Sunday	16:30:00	18:00:00	0090:00	2017	889.2
77	INNERSPACE SPECIALS	Space+	2017-09-24	Sunday	20:30:00	20:48:00	0018:00		878.7
78	Global News 6 WKN	Global Total	2017-11-05	Sunday	18:00:00	18:30:00	0030:00	Global News at 6	873.1
79	Frankie Drake Mysteries	CBC Total	2017-11-06	Monday	21:01:00	22:00:00	0059:00	1-01 Mother of Pearl	858.5
80	Heartland	CBC Total	2017-11-12	Sunday	19:00:00	20:00:00	0060:00	11-07 Ours Sons and Daughters	856.6
81	Global News Hour	Global Total	2017-10-18	Wednesday	17:30:00	18:30:00	0060:00	Global News Hour	847.6
82	Rick Mercer Report	CBC Total	2017-11-07	Tuesday	20:00:00	20:30:00	0030:00	15-Jun	846.1
83	SP: SNL Halloween	Global Total	2017-10-28	Saturday	24:00:00	25:03:00	0063:00	Saturday Night Live Special	831.7
84	The Night Shift	Global Total	2017-08-31	Thursday	22:00:00	23:00:00	0060:00	Resurgence	828.5
85	The Young and the Restless	Global Total	2017-11-02	Thursday	16:30:00	17:30:00	0060:00	11/03/2017 -	825.2
86	CMA AWARDS	CTV Two Total	2017-11-08	Wednesday	20:00:00	23:00:00	180:00:00	2017	819.7
87	W5	CTV Total	2017-11-04	Saturday	19:00:00	20:00:00	0060:00		819.4
88	THE NATIONAL PT 1	CBC Total	2017-09-10	Sunday	22:00:00	22:25:00	0025:00	2017-09-10- Part 1	817.5
89	NFL EARLY	CTV Total	2017-10-29	Sunday	12:59:00	16:05:00	186:00:00	NFL Early: Oakland Raiders at Buffalo Bills	810.1

90	9JKL	Global Total	2017-10-02	Monday	20:31:00	21:01:00	0030:00	Pilot	810
91	Outlander	W Network+	2017-10-22	Sunday	21:00:00	22:35:00	0095:00	Outlander - 306	803.9
92	CFL FOOTBALL	TSN+	2017-09-03	Sunday	16:00:00	19:06:00	186:00:00	WINNIPEG\SASKATCHEWAN	801.3
93	Still Standing	CBC Total	2017-08-29	Tuesday	20:00:00	20:30:00	0030:00	3-11 Vulcan AB	801.1
94	NHL HOCKEY-CDN	Sportsnet National+	2017-10-04	Wednesday	22:18:00	24:52:00	154:00:00	Calgary @ Edmonton - L	799.3
95	Kim's Convenience	CBC Total	2017-10-10	Tuesday	21:00:00	21:30:00	0030:00	2-03 House Guest	781.1
96	The Wiggles: Pumpkin Face (a.k.a. Wiggly Halloween)	Treehouse+	2017-10-15	Sunday	16:52:00	17:37:00	0045:00	The Wiggles: Pumpkin Face (a.k.a. Wiggly Halloween)	775.9
97	CTV NEWS AT FIVE	CTV Total	2017-11-09	Thursday	17:00:00	17:59:00	0059:00		766.6
98	Salvation	Global Total	2017-08-30	Wednesday	21:00:00	22:00:00	0060:00	Coup de Grace	762.6
99	The National Part 1	CBC Total	2017-11-06	Monday	22:00:00	22:25:00	0025:00	2017-11-06 - Part 1	749
100	The Good Place	Global Total	2017-09-28	Thursday	20:30:00	21:00:00	0030:00	Dance Dance Resolution	745.5

Notes:
1) The above table shows the Top 100 TV programs for all Canadian English-language national networks and English-language specialty networks for the 2017-2018 Broadcast Year to date (Aug. 28 - Nov. 19, 2017). Programs are ranked based on their AMA(000). AMA(000) is the average minute audience in thousands. The table also indicates the broadcast outlet (channel) on which the program aired, the date and day on which it aired, the program's start and end time (shown in Eastern Time), and the program's duration. The episode name is also listed where available.
2) Duplicate listings (airings) of the same program title (series) have been removed from the table, with the exception of news programs and sporting events. In other words, whereas the program *The Big Bang Theory* (as an example) would have appeared numerous times in the Top 100 list, only the episode/airing with the highest AMA(000) is included in the table.

Source: Numeris [AMA 2+, Total Canada, English Channels, 2017-2018 Broadcast Year to date (Aug. 28 - Nov. 19, 2017), 7 days PVR playback included]

Broadcasting and Telecommunications Legislative Review

Financing and Promoting National Audiovisual Media Services: *Review of the Regulatory and Legal Requirements for Commercial Undertakings in Selected Jurisdictions*

by

Suzanne Lamarre, LL.B., P.Eng.

11 JANUARY 2019

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

This report provides an overview of the regulatory funding mechanisms for audiovisual production in place in Australia, Belgium's French Community, France, Germany, Italy, Spain and the United Kingdom, as well as a targeted review of the European Union's legal framework on this issue.

Our analysis highlighted 5 types of funding schemes, split in 2 different categories.

Obligations for support of audiovisual production funding can either be direct or indirect. Under the direct category, we find the mechanisms imposed on the audiovisual services providers themselves, such as mandated minimal levels of production expenses and exhibition quota requirements.

Indirect obligations, such as funds' contributions or taxes, catalogue quotas and discoverability schemes, can not only be imposed on the audiovisual services providers but also on entities present along the value chain from the inception of the production to its effective viewing or acquisition by its audience.

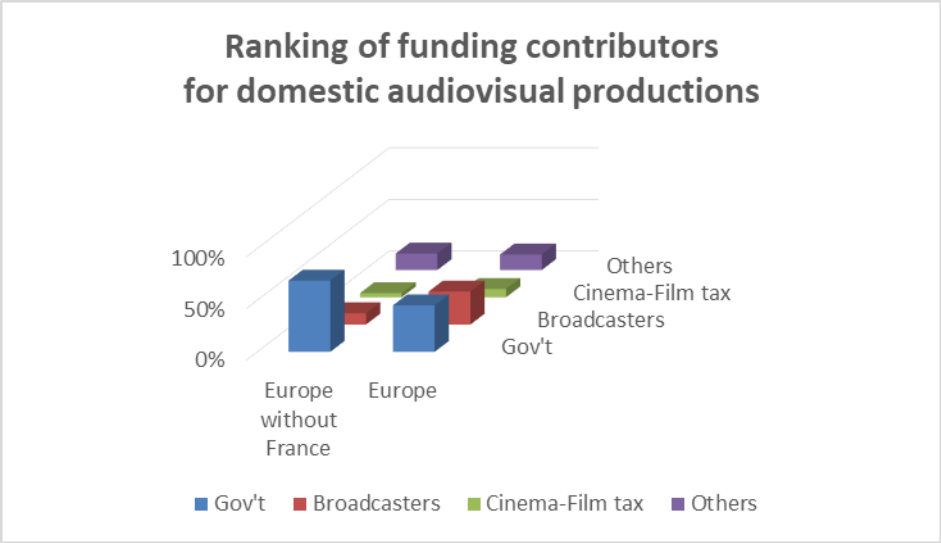
Direct Obligations		Indirect Obligations		
Production Expenses	Exhibition Quotas	Funds & Tax Contribution	Catalogue Quotas	Visibility/ Promo

Support mechanisms vary by jurisdiction. Notably, common law jurisdictions tend to be less interventionist than civil law jurisdictions. Indeed, while France, the most interventionist jurisdiction, mandates direct and indirect funding obligations on all types of audiovisual services providers, the United Kingdom imposes only minimal exhibition requirements on non-commercial as well as digital programmes television services. France and the United Kingdom are at the two opposing ends of the funding spectrum in that regard, with all other jurisdictions in the study falling somewhere in between.

Within the European Union (EU), governments are the most important contributors to audiovisual production funding, with levels of contributions averaging 45%, followed by broadcasters[1] (32%), dedicated taxes (8%), and other measures (15%).

[1] In this context, the expression "broadcaster" means all linear broadcasting entities, including distributors, where they fall under the domestic broadcasting regulations of the EU member states.

That being said, these numbers are somewhat skewed due to France's quite onerous financial obligations on private-sector stakeholders. When France is removed from the overall picture, the relative importance of government funding increases significantly to 69%, while funding by broadcasters diminishes in importance, from 32% to 11%.



Do note that the taxes referred to in the "tax" category are levied on cinema and/or film revenues. No jurisdiction we surveyed taxes Internet service providers to support the production and discoverability of domestic content.[2]

With respect to the applicability of audiovisual funding schemes to on-demand video service providers, the European Commission revised its 2010 Audio Visual Media Service ("**AVMS**") Directive in late 2018 to include new provisions relating to on-demand video service providers as potential contributors for funding of national or local audiovisual works. Some EU member countries, such as Germany and France, have already imposed levies on providers of on-demand video services to fund domestic audiovisual works.

[2] While France started levying a tax on telecommunications carriers in 2009 to fund the activities of its public broadcaster, it recently decided to treat the tax proceeds as general revenue and no longer dedicates it to the public broadcaster. Spain, not a jurisdiction surveyed in this report, has also put in place a "telecom tax" dedicated to its public broadcaster. Hungary has adopted such a tax but treats its proceeds as general revenue.

CONTEXT

TELUS has asked that we provide an overview of financing and visibility measures in support of national audiovisual production, as they currently exist in other jurisdictions.

This report provides an overview of the legislative frameworks and regulatory measures in place within selected jurisdictions and provides a selected bibliography of books and reports that we believe would be particularly useful for further reflection on this topic. While looking at international best practices may be useful in identifying potential avenues for broadcasting policy reform in Canada, this report does not provide any opinion or policy recommendations.

This report focuses mainly on financing methods, and the regulatory and legal requirements put upon commercial undertakings to provide part of such financing of audiovisual productions. This includes an overview of each jurisdiction's legislative framework, and notably their licensing requirements. It does not, however, include a review of financing mechanisms for national public broadcasters, nor does it address tax credit schemes.

Selected Jurisdictions and Topics

The selected jurisdictions are: European Union Member States Belgium's (its French Community only), France, Germany, Italy, Spain and the United Kingdom; as well as Australia.

The selected EU Member States bear political and cultural similarities to Canada. France and the United Kingdom have obvious historical and cultural links to Canada. Germany offers an interesting profile as a federal state, as does the French-language minority of Belgium, another federated state that, like Canada, has more than one official language. Italy is a discretionary selection.

Australia, another common law jurisdiction, was added to this list because of political and cultural similarities shared with Canada. Both countries' audiovisual industries face strong competition from the dominant American media and entertainment industry, which is due to the quality and quantity of American productions, the important gap between the cost of rights for these foreign productions and national ones, as well as the absence of a language barrier.

We will start by describing the EU's overall situation, specifically the directives that set out the goals that all EU countries must achieve with respect to the financing and promotion (also identified as visibility or cataloguing) of national and local audiovisual media service ("AVMS") productions.[3]

Secondly, we will describe how, and to what extent, the selected EU Member States have chosen to attain these goals.

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[3] If an EU "*directive" is a legislative act that sets out a goal that all EU countries must achieve [while] it is up to the individual countries to devise their own laws on how to reach these goals*, a *"decision" is binding on those to whom it is addressed (e.g. an EU country or an individual company) and is directly applicable*; https://europa.eu/european-union/eu-law/legal-acts_en last accessed on January 5, 2019 [our emphasis].

We will provide, at last, a description of the measures that Australia has put in place to support its national and local audiovisual productions.

General comments

One of the main justifications for Canada's ongoing broadcasting and telecommunications legislative review is a need to adapt the existing regulatory environment to the new distribution environment that has been disrupted by an expansion of video on demand and the digitization of media productions.[4] As noted in a recent UNESCO report, "*[s]pecific measures and policies are [throughout the world] being adopted to impact the distribution of digital content as well as online trade in cultural goods and services*".[5] Canada is not the only state facing the challenges arising from the digitization of society.

According to the UNESCO report, "*[i]ntegrated policies and measures ideally combine to successfully support independent local [audiovisual] production while also ensuring the availability of diverse [audiovisual] content from several regions or continent*".[6] To achieve this objective, over 90 countries around the world have a variety of quota regulations, some of which are being adapted to the digital environment.[7] [our emphasis]

At the same time, financing obligations of local (i.e. domestic) independent productions are under threat as the notion of "broadcaster" is evolving while obligations are still linked to an outdated notion of this concept. In jurisdictions where such obligations were already imposed on over-the-air broadcasters or cable operators, measures are being considered and taken so as to expand the sources of production funding. The need to categorize the myriad of AVMS providers properly then becomes unavoidable.

The EU has been working on updating the notions of "media", VOD, broadcasting or "TV-Like" programming for over eight (8) years. From the BEREC's *Report on OTT services* of 2016,[8] to the recitals and provisions of the EU's 2010 AVMS Directive that came into force in November 2018[9], all stakeholders do not necessarily agree on how to perfectly adapt legacy concepts to the new digital environment. Nevertheless, several criteria emerge from the decade-long consultations and legislative reviews:

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[4] *See* UNESCO, Global Report "Re|Shaping Cultural Policies", 2017, chapter 3, in particular, 73, 76.; *see also* Broadcasting and Telecommunications Legislative Review, *Terms of Reference*, June 5, 2018, 10, http://www.ic.gc.ca/eic/site/110.nsf/eng/home last accessed on January 4, 2019.
[5] UNESCO, Global Report "Re|Shaping Cultural Policies." 2017, chapter 3, 73.
[6] UNESCO, Global Report "Re|Shaping Cultural Policies," 2017, chapter 3, 57.
[7] UNESCO, Global Report "Re|Shaping Cultural Policies," 2017, chapter 3, 57.
[8] Body of European Regulators for Electronic Communications (BEREC), Report on OTT services, BoR (16) 35, January 2016.
[9] EC, *European Parliament legislative resolution of 2 October 2018 on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, taking into account changing market realities (COM(2016)0287 - C8-0193/2016 - 2016/0151(COD)),* [2018].

- AVMS carried by electronic communication services may be considered TV-Like or broadcast programming;[10]
- AVMS are under the editorial responsibility of a media service provider, the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, the general public by electronic communications networks.[11]

In layman's terms, Europe's new notion of media services in the digital environment includes the following list of cumulative criteria:[12]

- That it be a service;
- That a media service provider has editorial responsibility;
- That its principal purpose is the provision of programmes;
- That the provided programmes are "TV-like";
- That the purpose of the programmes is to inform, entertain or educate;
- That the target audience of the programmes is the general public;
- That the programmes are delivered over electronic communications networks.

While report authors do recognize that an Internet service provider or a common carrier may offer applications or content, they will not consider that the transport service itself then becomes a media service by the mere fact that some of the content being transported are media services.[13]

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[10] Nikoltchev, Susanne (ed.), VOD, platforms and OTT: which promotion obligation for European works ?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 25 footnote 113.
[11] Nikoltchev, Susanne (ed.), VOD, platforms and OTT: which promotion obligation for European works ?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 26; Revised Directive 2010/13/EU on Audiovisual Media Services (AVMSD), art 56-57.
[12] Nikoltchev, Susanne (ed.), VOD, platforms and OTT: which promotion obligation for European works ?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 26.
[13] *See for example* Nikoltchev, Susanne (ed.), VOD, platforms and OTT: which promotion obligation for European works ?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 25.

1- EUROPEAN UNION

The Audiovisual Media Services Directive[14] adopted by the European Council in 2010 allows Member States to impose regulatory measures on AVMS providers to protect and finance national audiovisual content. Such measures must be applied on a non-discriminatory basis, regardless of the service provider's nationality. This initiative derives from the objective to create a common European digital market, which would harmonize online trade between Member States and establish rules for access to the EU market by non-Member States.

The Directive applies mainly to broadcasting service providers, both linear and on demand. The 2018 revision[15] of this Directive extended its scope to video-on-demand services that have no connection with programming or broadcasting distribution undertakings.[16] An important objective of this revision was to impose rules on American undertakings, such as Netflix, Google and Youtube, so that financing national productions and discoverability (or visibility) obligations would be distributed fairly among the undertakings providing audiovisual content for a cost, regardless of their country of establishment.

While considering the adaptation or harmonization of its rules to a single digital market, the European Commission has "*focuse[d] on the [following] main characteristics of online platforms*":[17]

- they have the ability to create and shape new markets, to challenge traditional ones and to organize new forms of participation or conducting business based on collecting, processing, and editing large amounts of data;
- they operate in multisided markets but with varying degrees of control over direct interactions between groups of users;
- they benefit from network effects, where, broadly speaking, the value of the service increases with the number of users;
- they often rely on information and communications technologies to reach their users […];

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[14] Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive or "AVMS Directive").
[15] European Parliament legislative resolution of 2 October 2018 on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, taking into account changing market realities (COM(2016)0287 - C8-0193/2016 - 2016/0151(COD)).
[16] *See* Fact Sheet: Digital Single Market: Commission Updates EU Audiovisual Rules and Presents Targeted Approach to Online Platforms, European Commission, May 25, 2016, online: http://europa.eu/rapid/press-release_MEMO-16-1895_en.htm, last accessed on November 25, 2018.
[17] Nikoltchev, Susanne (ed.), VOD, platforms and OTT: which promotion obligation for European works?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 29.

- they play a key role in digital value creation, notably by capturing significant value (including through data accumulation), facilitating new business ventures, and creating new strategic dependencies.

The protection of national content is at the heart of this dynamic. It is worth noting that all 28 members of the EU are parties to the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.[18] Numerous studies, analyses and consultations have resulted in the development of new European legislative texts and their incorporation within national legal frameworks. Member States have maintained their autonomy for financing independent national or European productions and gained the power to factor in new digital platforms so to mitigate their disrupting effect on the availability of funding.

The mandatory production support schemes currently present in the EU can be divided into the following categories:

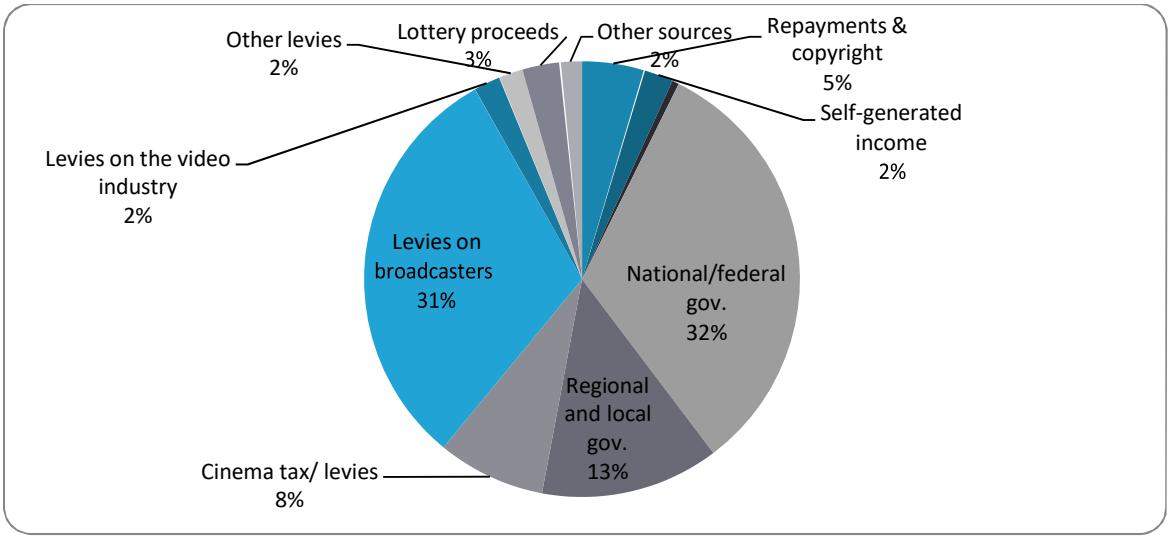
Mandatory production support schemes in Europe[19]

1. obligations only apply to public broadcasters;
2. obligations only apply to private broadcasters;
3. different obligations apply to public and private broadcasters;
4. the same obligations apply to both public and private broadcasters;
5. obligations are based on the size of the broadcaster (i.e. with a revenue threshold above which contribution is mandatory);
6. obligations are based on the broadcaster's programme (i.e. when films represent a representative part of its programming).

[18] UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Paris, 20 October 2005.
[19] *See* Talavera Milla, Julio, Gilles Fontaine, and Martin Kanzler, *Public financing for film and television content – The state of soft money in Europe*, Council of Europe, European Audiovisual Observatory, 2016, 84-85.

The list of these measures is very similar to those currently in effect in Canada, although their relative importance, if not their presence, varies from state to state. The contributions for the financing of local production are apportioned, in Europe, between a limited number of stakeholders, as shown in Figure 1.

Figure 1 Share of income by source in Europe, 2010-2014[20]

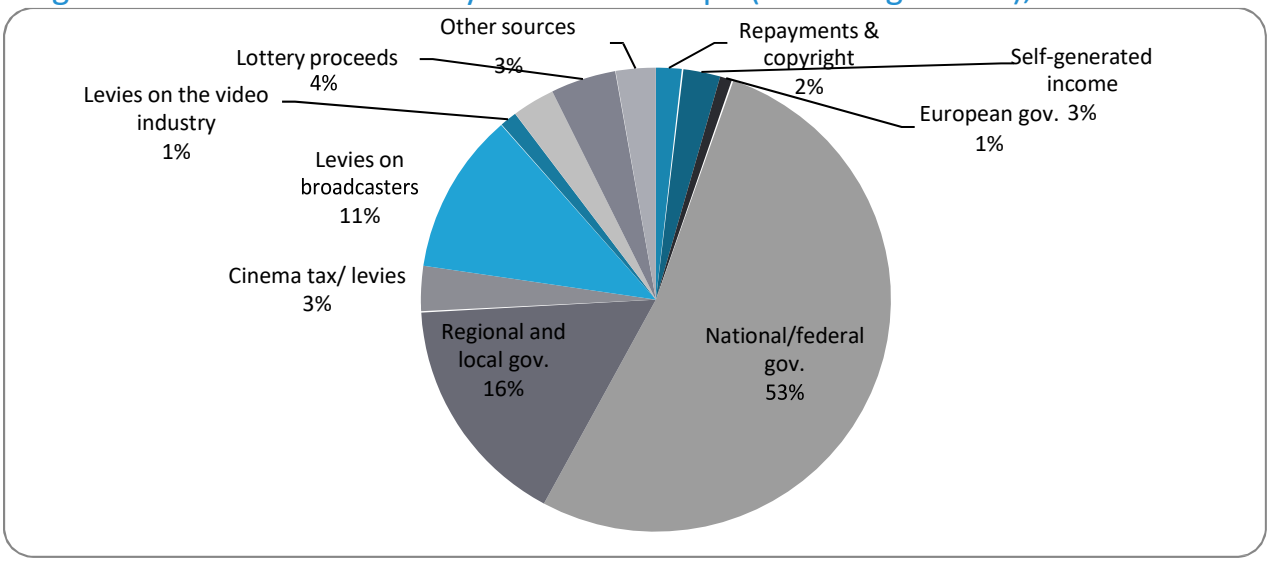


Source: OBS

Figure 1 shows that broadcasters are a major contributor at 31% and that their level of funding is almost as important as national governments'. However, this single European snapshot is somewhat misleading. Indeed, France imposes levies on broadcasters that far exceed those in other European States. If we remove France from the overall European picture, the funding breakdown differs significantly, as shown in Figure 2.

[20] Talavera Milla, Julio, Gilles Fontaine, and Martin Kanzler, *Public financing for film and television content – The state of soft money in Europe*, Council of Europe, European Audiovisual Observatory, 2016, Figure 29.

Figure 2 Share of income by source in Europe (excluding France), 2010-2014[21]



Source: OBS

While many countries, rely on contributions from broadcasters to finance the production of domestic audiovisual content, France is an outlier in having broadcasting provide more financing than the national government does. In the rest of Europe, broadcasters only provide 11% of the financing contributions while national governments cover close to five times as much (53%).

Both foreign and domestic undertakings that generate revenues are subject to audiovisual content funding requirements in the EU. They are directly targeted to broaden the contribution base and to compensate contribution losses that are linked to the decrease of legacy broadcasting services' revenues. The same approach is utilized for the same reasons vis-à-vis digital platform providers.

The key provisions of the original and revised AVMS Directive are Articles 7b and 13, which respectively deal with the discoverability (or visibility) of national or local content and its financing.

> **Article 7b of Directive 2010/13/EU as revised (visibility requirements):**
>
> Member States may take measures to ensure the appropriate prominence of audiovisual media services of general interest.

[21] Talavera Milla, Julio, Gilles Fontaine, and Martin Kanzler, *Public financing for film and television content – The state of soft money in Europe*, Council of Europe, European Audiovisual Observatory, 2016, Figure 30.

Article 13 of Directive 2010/13/EU as revised (contributions to financing):

1. Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30 % share of European works in their catalogues and ensure prominence of those works.

2. Where Member States require media service providers under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds, they may also require media service providers targeting audiences in their territories, but established in other Member States to make such financial contributions, which shall be proportionate and non-discriminatory.

3. In the case referred to in paragraph 2, the financial contribution shall be based only on the revenues earned in the targeted Member States. If the Member State where the provider is established imposes such a financial contribution, it shall take into account any financial contributions imposed by targeted Member States. Any financial contribution shall comply with Union law, in particular with State aid rules.

4. Member States shall report to the Commission by … [three years after the entry into force of this amending Directive] and every two years thereafter on the implementation of paragraphs 1 and 2.

5. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraphs 1 and 2, taking into account the market and technological developments and the objective of cultural diversity.

6. The obligation imposed pursuant to paragraph 1 and the requirement on media service providers targeting audiences in other Member States set out in paragraph 2 shall not apply to media service providers with a low turnover or a low audience. Member States may also waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services.

While article 13 lays the groundwork for financial contributions from AVMS providers, article 7 legitimizes both discoverability and quota requirements. Both articles are applicable to linear as well as nonlinear services, whether they are distributed over-the-air, through a broadcasting transmitting undertaking ("**BDU**") or online. In other words, this directive is technology neutral and targets media service providers as contributors for the financing of audiovisual productions.

A large portion of the EU Member States have incorporated the AVMS Directive's powers into their domestic legal or regulatory framework, in effect levelling somewhat the playing field between foreign and domestic AVMS providers to a certain extent.

Taxation on Internet Service Providers' Revenues

Identifying new contributors to compensate for the reduction of funding from existing sources is one possible strategy. Notably, some have proposed that ISPs be taxed to finance the production of domestic content. The European Commission has historically opposed such levies as well, "[*n]ot only [because] this new tax on operators seem incompatible with the European rules, [but] also [out of] concerns [for] a sector that is now one of the major drivers of economic*".[22]

The idea of taxing ISPs to fund domestic audiovisual production has gathered little traction among the jurisdictions whose funding regimes we have reviewed[23]. Only France and Spain have imposed "telecom taxes" to fund audiovisual content, back in 2009. Both taxes were challenged by the European Commission, but France's tax was upheld by the European Court of Justice in 2013, which led to the case against Spain being dropped.[24] However, Spain appears to be the only remaining jurisdiction with such a dedicated tax, as France appears to have recently decided to stop dedicating the proceeds of the tax to its public broadcaster, starting in 2019.[25]

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[22] *See* European Commission, Press Release, "Telecommunications: Commission takes action against France over 'telecoms tax' '" (28 January 2010), online: http://europa.eu/rapid/press-release_IP-10-67_en.htm, last accessed on January 10, 2019; *see also* Directive 97/13/EC of the European Parliament and of the Council, *on a common framework for general authorizations and individual licences in the field of telecommunications services*, 10 April 1997, whereas (12) and art 11.

[23] For a review of the judicial developments on this issue in the EU from 2003 to 2013, *see Albacom SpA v Ministero del Tesoro, del Bilancio e della Programmazione Economica & Ministero delle Comunicazioni,* C-292/01, [2003] ECR I-09449 (joint cases); *Infostrada SPA v Ministero del Tesoro, del Bilancio e della Programmazione Economica & Ministero delle Comunicazioni,* C-293/01, [2003] ECR I-09449 (joint cases); *Mobistar SA v Commune de Fléron,* C-544/03, [2005] ECR I-07723 (joint cases); *Belgacom Mobile SA v Commune de Shaerbeek,* C-545/03, [2005] ECR I-07723 (joint cases); *Nuova società di telecomunicazioni SpA v Ministero delle Comunicazioni and ENI SpA,* C-339/04, [2006] ECR I-06917; *see also* EC, *Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)*, [2002] OJ, L 108/21, art 12; European Commission, Press Release, "Digital Agenda: Commission refers France and Spain to Court over 'telecoms taxes'" (14 March 2011), online : European Commission Press Release database http://europa.eu/rapid/press-release_IP-11-309_en.htm , last accessed on January 3, 2019; European Commission, Press Release, "Digital Agenda: Commission requests Hungary to end special tax on telecom operators" (29 september 2011), online : European Commission Press Release database < http://europa.eu/rapid/press-release_IP-11-1108_en.htm?locale=en >, last accessed on January 3, 2019. Hungary also levied a telecom tax, but it was not meant to fund audiovisual works.

[24] ECJ *European Commission v. French Republic*, C-485/11, [2013], I-427; ECJ *European Commission v. Kingdom of Spain*, C-468/11, [2013], I-527; ECJ *European Commission v. Hungary*, C-462/12, [2013], I-818; *see also* EC, *Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)*, [2002] OJ, L 108/21, art 12 EC, *Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)*, [2002] OJ, L 108/21, art 12.

[25] Cyril, Lacarrière, "L'État prive France Télévisions de la « taxe Copé »…mais la garde pour lui!, l'Opinion, 24 September 2018, online: https://www.lopinion.fr/edition/economie/l-etat-prive-france-televisions-taxe-cope-garde-lui-163158 , last accessed on January 3, 2019.

EU Developments

The original AVMS directive[26] was adopted in 2010. In 2016 a revision process was undertaken and led to several modifications that were adopted in 2018.[27] The most significant modification was that on-demand video service providers were explicitly identified as potential contributors for funding of national or local audiovisual works. This Directive does not identify ISPs as contributors and a review of written submissions filed by interested parties during the consultations period leading to this 2018 revision reveals no pressure from stakeholders in doing so.[28]

SELECTED CASE STUDIES

The following sections provide an overview of the current regulatory frameworks and requirements for AVMS providers in a selected group of European States as well as in Australia. Specifically, it presents the licensing structure of AVMS providers (as it unavoidably relates to regulatory obligations) and the financing or contribution requirements for national/local (i.e. domestic) audiovisual content and the promotion of the visibility of such content.

2- UNITED KINGDOM[29]

The United Kingdom has a unique regime, compared to most EU Member States, for regulatory requirements imposed on AVMS services providers, both for funding contributions of the domestic content and the discoverability measures for it.

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[26] Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive or "AVMS Directive").
[27] European Parliament legislative resolution of 2 October 2018 on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, taking into account changing market realities (COM(2016)0287 - C8-0193/2016 - 2016/0151(COD)).
[28] Revised Directive 2010/13/EU on Audiovisual Media Services (AVMSD), online: https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd, last accessed on November 25, 2018.
[29] *See e.g.*: Nikoltchev, Susanne (dir.), VOD, platforms and OTT: which promotion obligation for European works ?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 56-57; Furmémont, Jean-François (dir.), Mapping of licensing systems for audiovisual media services in EU-28, Council of Europe, European Audiovisual Observatory, 2018, 188-202; *The International Comparative Legal Guide to: Telecoms, Media & Internet – Laws and Regulations 2019*, 12th ed., ICLG, online https://iclg.com/practice-areas/telecoms-media-and-internet-laws-and-regulations/united-kingdom, last accessed on December 30, 2018.

Licensing structure

The Office of Communications ("**Ofcom**") is responsible for monitoring AVMS service providers, including the BBC, the UK's public broadcaster, in accordance with the *Communications Act 2003.*[30] It has no regulatory powers regarding the content offered by those providers and may only act in accordance within the powers given by Parliament.[31]

Licensing is applicable to digital television programme services provided through a digital terrestrial television multiplex, as defined by the *Broadcasting Act 1996*,[32] and television licensable content services are made available using satellites, a radio multiplex or an electronic communications network (like cable).[33]

Nonlinear AVMS are subject to a notification process to Ofcom if they meet the statutory definition established in section 368A of the *Communications Act* 2003:

> "368A Meaning of "on-demand programme service"
> (1) For the purposes of this Act, a service is an "on-demand programme service" if—
>
> (a) its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;
>
> (b) access to it is on-demand;
>
> (c) there is a person who has editorial responsibility for it;
>
> (d) it is made available by that person for use by members of the public; and
>
> (e) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive. [emphasis added]
>
> (2) Access to a service is on-demand if—
>
> (a) the service enables the user to view, at a time chosen by the user, programmes selected by the user from among the programmes included in the service; and
>
> (b) the programmes viewed by the user are received by the user by means of an electronic communications network (whether before or after the user has selected which programmes to view).

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[30] *Communications Act* 2003 (UK), c 21.
[31] *Communications Act* 2003 (UK), c 21, s 1.
[32] *Broadcasting Act 1996*, c. 55, s 1.
[33] *Communications Act* 2003 (UK), c 21, s 232.

(3) For the purposes of subsection (2)(a), the fact that a programme may be viewed only within a period specified by the provider of the service does not prevent the time at which it is viewed being one chosen by the user.

(4) A person has editorial responsibility for a service if that person has general control—

(a) over what programmes are included in the range of programmes offered to users; and

(b) over the manner in which the programmes are organised in that range; and the person need not have control of the content of individual programmes or of the broadcasting or distribution of the service (and see section 368R(6)).

(5) If an on-demand programme service ("the main service") offers users access to a relevant ancillary service, the relevant ancillary service is to be treated for the purposes of this Part as a part of the main service.

(6) In subsection (5), "relevant ancillary service" means a service or facility that consists of or gives access to assistance for disabled people in relation to some or all of the programmes included in the main service."[34]

(7) In this section "assistance for disabled people" has the same meaning as in Part 3.

Financing Requirements of National/Local Content

No contribution obligations are currently imposed on AVMS providers. Production of local content is encouraged through creative industry tax reliefs.[35]

Visibility Requirements

Provisions of the *Communications Act 2003* are generally meant to encourage the broadcasting of independent productions. Where there are requirements, they are imposed on linear service providers only.

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[34] *Communications Act* 2003 (UK), c 21, s 368A.
[35] *Films Act 1985* (UK), c. 11.Corporation Tax: Creative industry tax reliefs: https://www.gov.uk/guidance/corporation-tax-creative-industry-tax-reliefs, last accessed on December 30, 2018; *The Cultural Test (Television Programmes) Regulations 2013, SI 2013/1831 (*specifically, to be eligible the television programme, animation or film must pass a cultural test that is based on a point system. In this system, points are allocated based, among else, on the percent of the production that is set and developed in the UK and the number of characters that are from the UK.).

For example, public service television editors must ensure that a minimum of 25% of the total amount of time allocated to broadcasting is allocated to a range and diversity of independent productions.[36] In the case of digital television programme services, the minimum quota is set at 10%.[37]

Regarding local content, Ofcom must encourage on-demand service providers, to promote production and access to European works.[38] No further obligations or quotas are currently imposed on either linear or nonlinear commercial AVMS providers.

3- FRANCE[39]

Licensing structure

In France, licensing of commercial AVMS is regulated by the *Conseil supérieur de l'audiovisuel* ("**CSA**") in application of the Law on Freedom of Communication.[40]

The obligations imposed by the CSA on AVMS vary depending on the transmission technology used (over-the-air ("**OTA**") BDU or online) and its annual revenues.[41] Digital OTA Television services, and their associated UHF-band frequencies, are respectively licensed and assigned by the CSA, usually after a call for applications followed by a legal agreement between the successful applicant and the CSA. This legal agreement sets forth specific obligations, including mandatory expenses from the AVMS to ensure they contribute to the national audiovisual production industry and broadcast such content.[42] AVMS not transmitted by OTA frequencies must simply notify the CSA of the services that intend to provide. They shall then conclude a legal agreement with the CSA only if their annual revenue is over EUR 150,000.[43] Licensing is clearly not technology neutral, even within the linear services sphere.

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[36] *Communications Act* 2003 (UK), c 21, s 277.
[37] *Communications Act* 2003 (UK), c 21, s 309.
[38] *Communications Act* 2003 (UK), c 21, s 368C.
[39] *See e.g.*: Nikoltchev, Susanne (dir.), VOD, platforms and OTT: which promotion obligation for European works ?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 54-56; Furmémont, Jean-François (dir.), Mapping of licensing systems for audiovisual media services in EU-28, Council of Europe, European Audiovisual Observatory, 2018, 176-187; *The International Comparative Legal Guide to: Telecoms, Media & Internet – Laws and Regulations 2019*, 12th ed., ICLG, online https://iclg.com/practice-areas/telecoms-media-and-internet-laws-and-regulations/france, last accessed on December 30, 2018.
[40] *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)*, JO, October 1st 1986, 11749, art 22.
[41] *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)*, JO, October 1st 1986, 11749, art 25, 28, 29, 29-1, 30-1, 30-5, 30-6.
[42] *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)*, JO, October 1st 1986, 11749, art 27 2°.
[43] *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)*, JO, October 1st 1986, 11749, art 33, 34.

Financing Requirements of National/Local Content.

France prioritizes financial contributions for European and French language works and imposes them on linear and nonlinear service providers that are within French jurisdiction. These requirements are mostly determined by three decrees that are applicable respectively to OTA broadcasters,[44] other linear subscription-based broadcaster[45] and on-demand audiovisual media service providers (VOD services).[46] These decrees describe how these contributions must be made, which production companies are eligible under the expenses requirements and what proportion of the total contributions must be invested specifically in movie productions and/or other genres of productions that are in French. Contributions can be invested, at the discretion of the AVMS, either in production copyrights, the promotion of European and French productions or in the purchase of broadcasting rights.[47] The minimum requirement for these contributions is established on a percentage relating to the revenues of the content editor. Depending on the decree, the percentage of this contribution is shared between European works, works that are originally in French and works made in France. In the case of on-demand-services, the percentage varies depending on the number of movie productions made available within 36 or 22 months following their release.[48]

Minimum requirements for contributions dedicated to national audiovisual productions vary depending on the type of content that is generally broadcast by the AVMS. Notwithstanding specific provisions, the percentages specified below are the most common ones generally applicable:

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[44] *Décret n° 2010-747 du 2 juillet 2010 relatif à la contribution à la production d'œuvres cinématographiques et audiovisuelles des services de télévision diffusés par voie hertzienne terrestre,* JO, 3 July 2010, 12098.

[45] *Décret n° 2010-416 du 27 avril 2010 relatif à la contribution cinématographique et audiovisuelle des éditeurs de services de télévision et aux éditeurs de services de radio distribués par les réseaux n'utilisant pas des fréquences assignées par le Conseil supérieur de l'audiovisuel*, JO, 29 April 2010, 7774.

[46] *Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande*, JO, 14 November 2010, 20215.

[47] *Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande*, JO, 14 November 2010, 20215, art 7; *Décret n° 2010-416 du 27 avril 2010 relatif à la contribution cinématographique et audiovisuelle des éditeurs de services de télévision et aux éditeurs de services de radio distribués par les réseaux n'utilisant pas des fréquences assignées par le Conseil supérieur de l'audiovisuel,* art 7, 12; *Décret n° 2010-747 du 2 juillet 2010 relatif à la contribution à la production d'œuvres cinématographiques et audiovisuelles des services de télévision diffusés par voie hertzienne terrestre,* JO, 3 July 2010, 12098, art 4.

[48] *Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande*, JO, 14 November 2010, 20215, art 4.

Type of broadcaster	Contribution
Linear AVMS	- 3.2% of net sales revenue of content providers for European movies. Out of this amount, at least 2,5% of net sales revenues must go to French movies.[49] - 15% or 14% of net sales revenue of content providers for European audiovisual works, a percentage of which is to be dedicated to French content and production of original works, the percentage varying according to revenue.[50]
On-demand services	- Between 15% and 26% of net sales revenues for either European movies or European audiovisual works and between 12% and 22% of these revenues must be dedicated to French content and production of original works. Each percentage varies according to the number of movies that are made available by the service during a specific time period.[51]
Pay-per-view	- 15% of annual net revenues generated by movie sales must contribute to European movies, 12 of which must go to French movies. - 15% of annual revenues generated by audiovisual works must contribute to European audiovisual works, including French audiovisual works.[52]

The contribution requirements imposed by legal agreements between the CSA and AVMSs cover only legal entities based in France. In order to mandate contributions from entities under the

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[49] *Décret n° 2010-747 du 2 juillet 2010 relatif à la contribution à la production d'œuvres cinématographiques et audiovisuelles des services de télévision diffusés par voie hertzienne terrestre,* JO, 3 July 2010, 12098, art 3*; Décret n° 2010-416 du 27 avril 2010 relatif à la contribution cinématographique et audiovisuelle des éditeurs de services de télévision et aux éditeurs de services de radio distribués par les réseaux n'utilisant pas des fréquences assignées par le Conseil supérieur de l'audiovisuel,* JO, 29 April 2010, 7774, art 6.

[50] *Décret n° 2010-747 du 2 juillet 2010 relatif à la contribution à la production d'œuvres cinématographiques et audiovisuelles des services de télévision diffusés par voie hertzienne terrestre,* art 9 to 11; *Décret n° 2010-416 du 27 avril 2010 relatif à la contribution cinématographique et audiovisuelle des éditeurs de services de télévision et aux éditeurs de services de radio distribués par les réseaux n'utilisant pas des fréquences assignées par le Conseil supérieur de l'audiovisuel,* JO, 29 April 2010, 7774, art 11.

[51] *Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande*, JO, 14 November 2010, 20215**,** art 4.

[52] *Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande*, JO, 14 November 2010, 20215, art 5.

jurisdiction of other EU Member States,[53] France relies on its tax laws, and does so in compliance with the EU's AVMS Directive. These laws not only impose contribution obligations on other EU Member States; they also applied to non-European AVMS providers.

Hence, in addition to the above-mentioned financial contributions, France levies a 2% tax on revenues made in France of on-demand audiovisual services, the proceeds of which are allocated to the *Centre national du cinéma et de l'image animée.*[54] A similar tax is applicable to television content providers and broadcasters.[55] This tax is technologically neutral and makes no distinction between foreign and domestic on-demand audiovisual services.

Visibility Requirements for National/Local Content

By law, the CSA must regulate OTA AVMS to ensure that 60% of broadcasting time, is allocated to European works and 40% to original French-Language productions specifically during prime time.[56] Furthermore, regulations provide that the main webpage of an on-demand AVMS provider must prominently feature European or French productions.[57]

4- GERMANY[58]

Licensing structure

In Germany, licensing of linear commercial AVMS is regulated by 14 different state media authorities ("Landesmedienanstalten") that are responsible for the licensing and surveillance of radio and television broadcasters. Cooperation and uniformity between regulations of the federated states to achieve national harmonization were deemed essential by the federal government. This cooperation is achieved through four central commissions (each with a specific

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[53] Jurisdiction being established according to the *European Convention of Transfrontier Television.*
[54] *Code général des impôts* art 1609 sexdecies B.
[55] *Code du cinéma et de l'image animée* art L115-6.
[56] *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)*, JO, October 1st 1986, 11749, art 28 2º; *Décret n°90-66 du 17 janvier 1990 pris pour l'application de la loi n° 86-1067 du 30 septembre 1986 et fixant les principes généraux concernant la diffusion des oeuvres cinématographiques et audiovisuelles par les éditeurs de services de télévision,* JO, 18 January 1990, 757, art 7-9.; *Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande*, JO, 14 November 2010, 20215, art 12.
[57] *Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande*, JO, 14 November 2010, 20215, art 13.
[58] *See e.g.*: Nikoltchev, Susanne (dir.), VOD, platforms and OTT: which promotion obligation for European works ?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 51-52; Furmémont, Jean-François (dir.), Mapping of licensing systems for audiovisual media services in EU-28, Council of Europe, European Audiovisual Observatory, 2018, 125-135; *The International Comparative Legal Guide to: Telecoms, Media & Internet – Laws and Regulations 2019*, 12th ed., ICLG, online https://iclg.com/practice-areas/telecoms-media-and-internet-laws-and-regulations/germany, last accessed on December 30, 2018.

mission) which are in turn regulated by the Interstate Broadcasting agreement ("Rundfunkstaatsvertrag").

Most notably, the Commission on Licensing and Supervision (Kommission für Zulassung und Aufsicht, ZAK) monitors nationwide commercial broadcasters and their licensing. Nationwide AVMS providers are subject to ZAK licensing specifically while regional and local AVMS can be licensed on a state level only.[59] Licensing is technologically neutral.

Commercial nonlinear AVMS are not subject to a licensing process and therefore benefit from a no entry-barrier market, with no obligation to notify their existence.[60]

Financing Requirements of National/Local Content

The *Film Promotion Act* ("Filmförderungsgesetz") regulates the funding and support for film on a national level. It is financed by a special tax imposed on undertakings in the movie and audiovisual industry, including the broadcasting sector. This tax is used for the support of domestic film production and distribution[61] and is imposed on distributors and providers of on-demand audiovisual services with net annual revenues of over EUR 500,000 in Germany,[62] and also on state-level public broadcasters. State-level public broadcasters pay a film tax of 3% of their costs of acquisition.[63]

Providers of video on-demand services must pay a film tax that ranges between 1.8% and 2.3% of annual gross revenues.[64] This film tax is applicable whether the distributor or provider is established in Germany or elsewhere, but only to the extent that the revenue is not subject to a comparable tax in its country of origin. The legality of this aid scheme was challenged by Netflix, which contended that the German film tax impinged on the EU's "country of origin" principle and violated state aid rules. However, Netflix was rebuffed twice, by the European Commission and the European Court of Justice, which found that the film tax was compatible with the European Union's internal market policies and did not discriminate between local and foreign service providers.[65]

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[59] *Interstate Treaty on Broadcasting and Telemedia*, art 20, 20A, 36, online : https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Rundfunkstaatsvertrag_RStV_20_english_version.pdf, last accessed on January 2, 2019; *see also* The Media Authorities, online: https://www.die-medienanstalten.de/en/about-the-media-authorities/, last accessed on December 31, 2018.

[60] *Mapping of licensing systems for audiovisual media services in EU-28, Council of Europe, European Audiovisual Observatory*, 2018, 129.

[61] *Gesetz über Maßnahmen zur Förderung des deutschen Films*, art 159.

[62] *Gesetz über Maßnahmen zur Förderung des deutschen Films*, art 153.

[63] *Gesetz über Maßnahmen zur Förderung des deutschen Films*, art 154.

[64] *Gesetz über Maßnahmen zur Förderung des deutschen Films*, art 153.

[65] *See* EC, *Commission Decision No. 2016/2042 of 1 September 2016 on the aid scheme SA.38418 — 2014/C (ex 2014/N) which Germany is planning to implement for the funding of film production and distribution*, [2016] OJ, L. 314/63; *Netflix v. European Commission,* Case T-818/16, [2018], ECLI:EU:T:2018:274.

Visibility Requirements for National/Local Content

Visibility requirements for German and European content are on par with what is permitted by applicable EU AVMS directives. The *Interstate Broadcasting Agreement* specifies that television broadcasters and German channels should reserve a majority of proportion of time to the transmission of feature films, films made for televisions, series, documentaries and comparable production overall for European productions.[66] No specific percentage level is imposed specifically for German content.

5- BELGIUM (FR) [67]

Since the federalization of the Belgian State in 1971, the federated entities, respectively the French, Flemish and German-speaking Communities, have been awarded the ability, within their jurisdiction, to regulate the content of the audiovisual media distribution sector.

Telecommunications are within the jurisdiction of the Federal State. The Belgian Institute for Postal services and Telecommunications ("**BIPT**") is the national telecommunications regulator and manages the electronic spectrum of radio frequencies that are delegated to these three Communities.

Since telecommunication policies and regulations regarding AVMS regularly overlap both levels of government, a cooperation agreement was entered into between the communities, the Federal State, and their respective agencies on November 17, 2006, so as to better coordinate their shared regulatory responsibilities.[68] Based on this agreement, the Conference of the Electronic Communications Sector was instated as a permanent administrative body to monitor decisions taken by each community's regulatory agency.[69]

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[66] *Interstate Treaty on Broadcasting and Telemedia,* art 6, 7.
[67] *See e.g*. Nikoltchev, Susanne (dir.), VOD, platforms and OTT: which promotion obligation for European works ?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 49-50; Furmémont, Jean-François (dir.), Mapping of licensing systems for audiovisual media services in EU-28, Council of Europe, European Audiovisual Observatory, 2018, 70-78; *The International Comparative Legal Guide to: Telecoms, Media & Internet – Laws and Regulations 2019*, 12th ed., ICLG, online https://iclg.com/practice-areas/telecoms-media-and-internet-laws-and-regulations/belgium, last accessed on December 30, 2018.
[68] *Accord de coopération du 17 novembre 2006 entre l'Etat fédéral, la Communauté flamande, la Communauté française et la Communauté germanophone relatif à la consultation mutuelle lors de l'élaboration d'une législation en matière de réseaux de communications électroniques, lors de l'échange d'informations et lors de l'exercice des compétences en matière de réseaux de communications électroniques par les autorités de régulation en charge des télécommunications ou de la radiodiffusion et la télévision*, art 1, online : http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006111740&table_name=loi , last accessed on January 2, 2019.
[69] *Accord de coopération du 17 novembre 2006 entre l'Etat fédéral, la Communauté flamande, la Communauté française et la Communauté germanophone relatif à la consultation mutuelle lors de*

The findings presented in this section relate only to the French Community of Belgium.

In the French Community, the *Conseil Supérieur de l'Audiovisuel* ("**CSA**") is the designated regulator and ensures compliance of all AVMS providers.[70] Pursuant to the terms of a government decree, the CSA has competence over any content provider that is established in the French region or in the Brussels-Capital region when its activities are exclusively attached to the French community.[71]

Licensing Structure

Unless they intend to use an over-the-air analogue or digital frequency, AVMS content providers do not require any authorization or licence from BIPT nor CSA; they must only send a declaration to the CSA before commencing activities.[72]

Financing Requirements of National/Local Content

Both television content editors and broadcasters, be it through linear or nonlinear means, must contribute to the production of local audiovisual works. This contribution can be made through coproduction or the pre-purchase of audiovisual productions, or by transferring all of the mandatory financial contribution to the *Centre du Cinéma et de l'Audiovisuel,* a governmental body that supports and promotes local audiovisual works.[73] If the provider chooses to contribute to local production of an audiovisual work or to pre-purchase a locally produced work, an ad hoc committee is formed by the Community Government to ensure that the undertaking is accomplished.[74] The Government must also ensure that such a contribution, if authorized, generates economic benefits for the community that are comparable to the sum invested.

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l'élaboration d'une législation en matière de réseaux de communications électroniques, lors de l'échange d'informations et lors de l'exercice des compétences en matière de réseaux de communications électroniques par les autorités de régulation en charge des télécommunications ou de la radiodiffusion et la télévision, art 3, online : http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006111740&table_name=loi , last accessed on January 2, 2019.

[70] *Mapping of licensing systems for audiovisual media services in EU-28, Council of Europe, European Audiovisual Observatory, 2018*, p. 70.

[71] *Décret coordonné sur les services de médias audiovisuels* (Consolidated), art 2, online : http://www.csa.be/documents/2882, last accessed on December 30, 2018.

[72] *Décret coordonné sur les services de médias audiovisuels (Consolidated),* art 38, 100, online : http://www.csa.be/documents/2882, last accessed on December 30, 2018.

[73] *See* Centre du cinéma, online : http://www.audiovisuel.cfwb.be/index.php?id=avm_cinema, last accessed on December 31, 2018.

[74] *Décret coordonné sur les services de médias audiovisuels (Consolidated),* art 41, 80, online : http://www.csa.be/documents/2882, last accessed on December 30, 2018.

For content editors,[75] the amount that must be invested or paid depends on annual net revenues:

- between EUR 300,000 and EUR 5 million: 1.4% of the content editor's annual revenues;
- between EUR 5 and EUR 10 million: 1.6% of the content editor's annual revenues;
- between EUR 10 and EUR 15 million: 1.8% of the content editor's annual revenues;
- between EUR 15 and EUR 20 million: 2% of the content editor's annual revenues;
- above EUR 20 million: 2.2% of the content editor's annual revenues.[76]

For broadcasting distributors, this amount is either:

- EUR 2 for each of the previous year's subscribers;
- 2.5% of the broadcaster's annual revenues.[77]

Broadcasting distributors not only must provide a contribution to the *Centre du Cinéma et de l'Audiovisuel*, they also must compensate directly each local TV stations included in its product offering.[78] The amount of compensation is either:

- EUR 2 for each of the previous year's subscribers located within the coverage area of said TV local station;
- 2.5% of the distributor's previous year's annual revenues generated by subscribers located within the coverage area of said TV local station;

To develop and encourage even further audiovisual productions within its territory, the French Community has also founded a government-funded investment company, Wallimage, in 2001.[79]

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[75] *Décret coordonné sur les services de médias audiovisuels (Consolidated),* art 1(16), online : http://www.csa.be/documents/2882, last accessed on December 30, 2018 (The content editor being « the person that assumes the editorial responsibility for the content of the media service and established how it will be organized», hence it includes BDUs as well as broadcasters).
[76] *Décret coordonné sur les services de médias audiovisuels (Consolidated),* art 41, online : http://www.csa.be/documents/2882, last accessed on December 30, 2018.
[77] *Décret coordonné sur les services de médias audiovisuels (Consolidated),* art 80, online : http://www.csa.be/documents/2882, last accessed on December 30, 2018.
[78] *Décret coordonné sur les services de médias audiovisuels (Consolidated),* art 81, online : http://www.csa.be/documents/2882, last accessed on December 30, 2018.
[79] *See Tout savoir sur Wallimage,* online : https://www.wallimage.be/fr/news/1353, last accessed on December 30, 2018; *Règlement Wallimage, online* :

Visibility Requirements for National/Local Content

The *Décret coordonné sur les services de médias audiovisuels*[80] provides that linear audiovisual content editors must ensure that:

- 20% of broadcasting time, excluding the airtime for sports events, games, publicity, self-promotions or teleshopping is dedicated to content that was produced in French;
- Most programmes are shown in French.[81]
- A majority of programmes are produced in Europe or within the French Community.
- 10% of broadcasting time is reserved for productions from independent producers of the French Community.[82]

At the time of this review, article 46 of the French-speaking Media Decree specifies that nonlinear television content providers must prominently feature European productions in their catalogue, especially productions created by authors from the French-speaking community. However, there is no minimum quota regarding the availability of this content on nonlinear services.[83]

6- ITALY[84]

Licensing structure

The Italian audiovisual market is regulated by both the Ministry of Economic Development, "*Ministero dello Sviluppo Economico*" and the regulatory authority "Autorità per le garanzie nelle comunicazioni" ("**AGCOM**"), compliance of AVMS providers being supervised by the latter.[85]

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https://cms.wallimage.net/sites/default/files/downloads/reglement2019_fr.pdf, last accessed on December 31, 2018.

[80] *Décret coordonné sur les services de médias audiovisuels* (Consolidated), online : http://www.csa.be/documents/2882, last accessed on December 30, 2018.

[81] *Décret coordonné sur les services de médias audiovisuels (Consolidated),* art 43, online : http://www.csa.be/documents/2882, last accessed on December 30, 2018.

[82] *Décret coordonné sur les services de médias audiovisuels (Consolidated),* art 44, online : http://www.csa.be/documents/2882, last accessed on December 30, 2018.

[83] *Décret coordonné sur les services de médias audiovisuels (Consolidated),* art 46, online : http://www.csa.be/documents/2882, last accessed on December 30, 2018.

[84] *See e.g.* Nikoltchev, Susanne (dir.), VOD, platforms and OTT: which promotion obligation for European works ?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 58-60; Furmémont, Jean-François (dir.), Mapping of licensing systems for audiovisual media services in EU-28, Council of Europe, European Audiovisual Observatory, 2018, 248-259; *The International Comparative Legal Guide to: Telecoms, Media & Internet – Laws and Regulations 2019*, 12th ed., ICLG, online https://iclg.com/practice-areas/telecoms-media-and-internet-laws-and-regulations/italy, last accessed on December 30, 2018.

[85] *See* Resolution N°353/11/CONS on digital terrestrial television, online : https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_ls3TZl

Licensing is imposed on commercial service linear AVMS, while nonlinear AVMS must only notify AGCOM when services are made available in accordance with AGCOM Resolution N°607/10/CONS.[86] AGCOM has thirty days to stop the service if notification does not meet legal requirements.

Obligations regarding European and Italian content visibility and financing have been recently implemented in Italian legislation via Legislative Decree N°204 of 7 December 2017.[87]

Financing Requirements of National/Local Content

In accordance with article 44(3) of Legislative Decree Nº 177,[88] as recently amended by the Legislative Decree N°204 of 7 December 2017:

> *broadcasters, including pay-per-view providers, must, whether or not scrambling their transmissions, also reserve 10 percent of their net revenues deriving from the*

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Resolution N°127/00/CONS on cable and satellite licensing, online : https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_ls3TZlzsK0hm&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_ls3TZlzsK0hm_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_ls3TZlzsK0hm_assetEntryId=707528&_101_INSTANCE_ls3TZlzsK0hm_type=document, last accessed on January 2, 2019;
Resolution N°606/10/CONS regarding licensing of other platforms (Internet Protocol television ("IPTV") and OTT), online : https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_ls3TZlzsK0hm&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_ls3TZlzsK0hm_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_ls3TZlzsK0hm_assetEntryId=686964&_101_INSTANCE_ls3TZlzsK0hm_type=document, last accessed on January 2, 2019.

[86] *See* Resolution N°607/10/CONS regarding on-demand audiovisual services, online : https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_ls3TZlzsK0hm&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_ls3TZlzsK0hm_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_ls3TZlzsK0hm_assetEntryId=854396&_101_INSTANCE_ls3TZlzsK0hm_type=document, last accessed on January 2, 2019.

[87] *Riforma delle disposizioni legislative in materia di promozione delle opere europee e italiane da parte dei fornitori di servizi di media audiovisivi, a norma dell'articolo 34 della legge 14 novembre 2016, n. 220. (17G00219) (GU Serie Generale n.301 del 28-12-2017), online : http://www.gazzettaufficiale.it/eli/id/2017/12/28/17G00219/sg, last accessed on January 2, 2019*; *see also* Apa, Ernesto and Marco Bassini, *New legislation on promotion of European and Italian works by audiovisual media service providers released by the Italian Government*, OE, IRIS Newsletter 2018-2, 19, online: https://merlin.obs.coe.int/iris/2018/2/article23.en.html, last accessed on December 28, 2018.

[88] Legislative Decree N°177 of 31 July 2005, online: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-07-31;177!vig , last accessed on January 10, 2019.

> *advertising, teleshopping, sponsorship, private and public contributions' and pay-TV offerings for non-sporting events for which it is the editor for the production, financing, pre-purchase and purchase of audiovisual programmes of European independent producers.*[89]

This percentage will reach 15% in 2020. A sub-quota for Italian works is currently set at 3.2% and will be set at 4% in 2020.

Regarding on-demand service providers, 20% of their annual net revenues will have to be invested in EU works, half of it being allocated for Italian works.[90] Nonetheless:

> *"VOD providers will be free to decide whether to adopt technical and/or editorial measures aimed at giving prominence to European works. VOD providers who implement such measures will benefit from a reduction up to 20% of the relevant quotas (either content or investment quotas, depending on the choice of the provider). AGCOM Decision No. 149/15/CONS, adopted by means of co-regulation procedures, sets forth such measures and the relevant reduction percentage linked to each measure".*[91]

Starting January 2019, this quota will be binding to service providers even if they are based outside of the EU.[92]

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[89] *See* Nachman, Ariel and Paolo Guarneri, *Telecom and Media*: Italy, July 2018, online: https://gettingthedealthrough.com/area/39/jurisdiction/15/telecoms-media-italy/, last accessed on December 28, 2018; *see also* Apa, Ernesto and Marco Bassini, *New legislation on promotion of European and Italian works by audiovisual media service providers released by the Italian Government*, OE, IRIS Newsletter 2018-2 and Apa, Ernesto and Portolano Cavallo, *Three new pieces of legislation on cinema and audiovisual media services*, OE, IRIS Newsletter 2017-10.

[90] *See* Resolution no. 353/11 / CONS of June 22, 2011 concerning terrestrial television broadcasting in digital technology, online: https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_ls3TZlzsK0hm&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_ls3TZlzsK0hm_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_ls3TZlzsK0hm_assetEntryId=831440&_101_INSTANCE_ls3TZlzsK0hm_type=document, last accessed on December 28, 2018.

[91] Nikoltchev, Susanne (dir.), VOD, platforms and OTT: which promotion obligation for European works ?, IRIS Plus 2016-3, Council of Europe, European Audiovisual Observatory, 2016, 59; *see also*:. AGCOM Decision No. 149/15/CONS

[92] *Riforma delle disposizioni legislative in materia di promozione delle opere europee e italiane da parte dei fornitori di servizi di media audiovisivi, a norma dell'articolo 34 della legge 14 novembre 2016,* n. 220. (17G00219) (GU Serie Generale n.301 del 28-12-2017), online : *http://www.gazzettaufficiale.it/eli/id/2017/12/28/17G00219/sg, last accessed on January 2, 2019*; *see* also: Apa, Ernesto and Marco Bassini, *New legislation on promotion of European and Italian works by audiovisual media service providers released by the Italian Government*, OE, IRIS Newsletter 2018-2, 19; https://merlin.obs.coe.int/iris/2018/2/article23.en.html, last accessed on December 28, 2018.

AVMS providers may nonetheless apply with AGCOM to be exempt from these quotas if the thematic genre of the programming schedule or catalogue does not match what is provided by European producers or if they have not made any profits in each of their last two years of operation.[93]

Visibility Requirements for National/Local Content

Article 44(4) of Legislative Decree Nº 177[94] specifies that on-demand services must promote the production of European works and access to such works. Article 44(7) of the same decree enables AGCOM to regulate said promotion, as well as the financial contribution of on-demand services to the production and rights acquisition of European works.

Since the adoption of Legislative Decree N°204 on 7 December 2017, national broadcasters and on-demand service providers are subject to quotas. In the case of national broadcasters, quotas for European works must represent 50.01% of the broadcast content. This quota will increase to 60% starting in 2021, a third of which must be Italian works for private broadcasters.[95] When it comes to on-demand service providers, 30% of the catalogue will have to include European works of the last five years, half of which must be Italian.[96]

7- AUSTRALIA[97]

Licensing structure

In Australia, commercial AVMS are regulated by 2 distinct authorities: the Australian Communication and Media Authority ("ACMA") and the Australian Competition & Consumer Commission ("ACCC").

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[93] Apa, Ernesto and Donato Cordone, *Three new pieces of legislation implementing Franceschini Act on cinema and audiovisual media services*, Media Laws, 2018-1, 479; http://www.medialaws.eu/three-new-pieces-of-legislation-implementing-franceschini-act-on-cinema-and-audiovisual-media-services/, last accessed on December 28, 2018.

[94] Legislative Decree N°177 of 31 July 2005, online: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-07-31;177!vig , last accessed on January 10, 2019.

[95] Apa, Ernesto and Portolano Cavallo, *Three new pieces of legislation on cinema and audiovisual media services*, OE, IRIS Newsletter 2017-10, 24.

[96] https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_ls3TZlzsK0hm&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_ls3TZlzsK0hm_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_ls3TZlzsK0hm_assetEntryId=831440&_101_INSTANCE_ls3TZlzsK0hm_type=document, last accessed on December 28, 2018.

[97] *See e.g. Digital Platforms Inquiry – Preliminary Report*, ACCC, December 2018; https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry;*The International Comparative Legal Guide to: Telecoms, Media & Internet – Laws and Regulations 2019*, 12th ed., ICLG, online https://iclg.com/practice-areas/telecoms-media-and-internet-laws-and-regulations/australia, last accessed on December 30, 2018.

ACMA licenses over-the-air television services and regulates the requirements for local content, specifically news and information, and also national production content. It also regulates subscription television, linear and nonlinear services. The applicable legislation is the *Broadcasting Act.*[98]

The ACCC "*is responsible for the economic regulation of the communications sector, including telecommunications and the National Broadband Network (NBN), broadcasting and content sectors*".[99] There are numerous statutes which empowers the ACCC, the most relevant one for the communication sector being the *Competition and Consumer Act* 2010.[100]

Both ACMA's and ACCC's actions involve a number of protective measures, such as regulating advertising, preventing copyright infringements, consumer protection and development of programmes.[101]

Licence conditions are designed to prohibit unwanted behaviour, while a system of industry-developed codes of practice provides for the programming standards. ACMA ensures that these standards, which are under the responsibility of TV stations, reflect those of the community they serve.[102]

Financing Requirements of National/Local Content

While "*Australian content (including Australian content in advertising) on commercial television is regulated by compulsory standards determined by the ACMA […] and subscription television (ie Pay TV) drama channels are also regulated by a compulsory standard requiring expenditure on minimum amounts of Australian drama programs",*[103] minimum quotas for local content and news are imposed on OTA broadcasters through licence conditions.[104]

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[98] *Broadcasting Services Act* 1992, (Cth) No. 110, 1992.
[99]Online: https://www.accc.gov.au/regulated-infrastructure/communications/accc-role-in-communications , last accessed on December 31, 2018.
[100] *See* https://www.accc.gov.au/regulated-infrastructure/communications/broadcasting-content , last accessed on December 31, 2018; *see also Competition and Consumer Act* 2010, (Cht) No. 51, 1974.
[101] *See e.g*. https://www.acma.gov.au/Industry/Broadcast/Television/TV-content-regulation/tv-content-regulation, last accessed on December 31, 2018.
[102] *See Broadcasting Services Act* 1992, (Cth) No. 110, 1992; *see also* online: https://www.acma.gov.au/Industry/Broadcast/Television/TV-content-regulation/tv-content-regulation , last accessed on December 31, 2018.
[103] Online: https://www.acma.gov.au/Industry/Broadcast/Television/TV-content-regulation/tv-content-regulation , last accessed on December 31, 2018; *see also* Park, S., Davis, C.H., Papandrea, F., & Picard, R.G. (2015). *Domestic Content Policies in the Broadband Age: A Four-Country Analysis*. Canberra: News & Media Research Centre, University of Canberra, 13-18.
[104] The requirement is not amount specific, it rather lists a series of principles to be respected; *see Broadcasting Services Act* 1992, (Cth) No. 110, 1992, schedule 3; ACMA, Fact Sheet 116 (FS-116) *New licence conditions imposed on regional commercial television broadcasters*, January 2010; *see also* online: https://www.acma.gov.au/Home/theACMA/local-content-conditions-on-regional-commercial-television-broadcasters , last accessed on December 31, 2018.

Hence, the Australian and local content and programming are mainly funded by the linear AVMS providers.[105]

In 2008, the Commonwealth of Australia created a corporate body, Screen Australia, with a mission to support and promote the development of Australian screen production.[106] To accomplish its mission, Screen Australia receives a Parliament appropriation.[107] It may also, in the performance of its functions, accept gifts, devises, bequests and assignments.

Australia's broadcasting and telecommunications legislative and regulatory frameworks do not tax ISPs to fund the production of domestic audiovisual content.

Visibility Requirements for National/Local Content

Visibility requirements are imposed on linear AVMS providers, local over-the-air commercial broadcasters as well as a subscription-based services (Pay TV). Some of those requirements are agreed upon between the industry and ACMA and result in the establishment of mandatory industry codes.

More specifically, "*the [Broadcasting Service Act] requires all commercial free-to-air television licensees to broadcast an annual minimum transmission quota of 55 percent Australian programming between 6am and midnight on their primary channel. They are also required to provide during the same time at least 1460 hours of Australian programming on their non-primary channels."*[108]

"The current Australian Content Standard 2016 [which] came into effect on 31 March 2016, […] sets out specific minimum annual sub-quotas for Australian drama, documentary and children's programs that all commercial free-to-air television licensees must broadcast."[109]

Nonlinear AVMS providers, either Australian or foreign, have no such nor similar obligations.[110] The ACCC is currently examining the impact of digital platforms on *"the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers*",[111] and will issue its final recommendations in June 2019.

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[105] *See* Submission by Free TV Australia, Digital Platforms Inquiry Australian Competition & Consumer Commission, April 2018, online: https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/submissions.
[106] *Screen Australia Act* 2008, (Cth) No. 12, 2008, s 6.
[107] *Screen Australia Act* 2008, (Cth) No. 12, 2008, s 39.
[108] Online: https://www.acma.gov.au/Industry/Broadcast/Television/Australian-content/australian-content-television , last accessed on December 31, 2018; *see also Broadcasting Services Act* 1992, (Cth) No. 110, 1992, s 121G. .
[109] Online: https://www.acma.gov.au/Industry/Broadcast/Television/Australian-content/australian-content-television., last accessed on December 31, 2018; *see also Broadcasting Services (Australian Content) Standard 2016*, made under subsection 122(1) of the *Broadcasting Services Act* 1992.
[110] *Digital Platforms Inquiry – Preliminary Report*, ACCC, December 2018, 134; online: https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry, last accessed on December 31, 2018.
[111] *Digital Platforms Inquiry,* online: https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry, last accessed on December 31, 2018.

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Synopsis report of the Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - *A media framework for the 21st century - 06 July-30 September 2015,* https://ec.europa.eu/digital-single-market/en/news/report-public-consultation-review-audiovisual- media-services-directive-avmsd, last accessed on November 25, 2018

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APPENDIX
Biography of Suzanne Lamarre

Suzanne Lamarre joined Therrien Couture following 25 years of dedicated work in broadcasting and telecommunications in the public sector. Her work focuses on the areas of telecommunications, radiocommunications and broadcasting law where she acts as a strategic advisor on regulatory and governmental matters at both the national and international level. Her work in this capacity includes preparing submissions and appearing before the CRTC, the Ministry of Innovation, Science and Economic Development of Canada and the International Telecommunications Union.

Her practice includes the areas of public international law as well as professional conduct and ethics. Since December 2007, she serves as a member of the Disciplinary Council of the Ordre des ingénieurs du Québec and, since 2015, she is a member of the Board of Governors of the Bureau du cinéma et de la télévision du Québec. In 2017, she was appointed as a member of Télé-Québec's Board of Directors since August 2018 she has been Chair of its Governance and Ethics Committee. She served as Commissioner (Quebec Region) on the Canadian Radio-television and Telecommunications Commission (CRTC) from 2008 to 2013.

In the academic realm, Suzanne gives seminars about telecommunications policy, including international rules and best practices recommended by the World Trade Organization (WTO), to representatives of telecommunication carriers and regulatory organizations outside of Canada.

Quebec Bar Admission 2005
Ordre des Ingénieurs du Québec member – since 1989
Professional Engineers of Ontario member – since 2014

Law Degree (LL.B.), Université de Montréal (2004)
Electrical Engineering Degree, Université de Sherbrooke (1986)

Appendix 8: International Comparison of Intermediary Liability Measures

European Union

1. In the EU, the *Electronic Commerce Directive ("ECD")* requires member states to implement domestic laws that protect carriers from liability for all forms of content they carry, provided that certain conditions are met:

    - the carrier acts as a "mere conduit"; that is, it does not initiate the transmission; select the receiver;
    - the carrier does not select or modify the content; and
    - the carrier does not store the content longer than is reasonably necessary for the transmission.[1]

2. (There are also similar exclusions of liability for caching (automatic, intermediate and temporal storage of information in the network for the sole purpose of making more efficient the information's onward transmission to recipients) [2] and hosting (provision of storage space on web servers for use of third parties).[3])

3. Carriers that provide services of the types identified above do not have a general obligation to monitor the information they transmit or store, or a general obligation actively to seek facts or circumstances indicating illegal activity. However, ISPs must inform the appropriate authorities of alleged illegal activities undertaken or information provided by a recipient of their service as soon as ISPs become aware of it; and must disclose the identity of recipients with whom they have a storage agreement upon receiving a request from competent authorities.[4]

United States

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1 ***Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market,*** OJ L178, July 17, 2000, p. 1, article 12; https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031. Transposed into UK law by the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013.

2 ***Directive 2000/31/EC***, article 13.

3 Ibid., article 14.

4 Ibid., article 15.

4. The *Digital Millennium Copyright Act of 1988* ("DCMA") provides protections similar to those available under the EU *Electronic Commerce Directive* for ISPs and other intermediaries, but limited to circumstances where the claim arises from infringement of copyright.[5] Section 512 of the DCMA provides as follows:

> § 512. Limitations on liability relating to material online
>
> (a) TRANSITORY DIGITAL NETWORK COMMUNICATIONS.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—
>
> (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
>
> (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
>
> (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;
>
> (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

[5] 17 U.S.C. §511 and following.

(5) the material is transmitted through the system or network without modification of its content.

5. (There are also similar exclusions of liability for caching and hosting.)

6. Other types of content-related claims are covered by the *Communications Decency Act of 1996,* which provides, in part, that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider".[6]

Japan

7. In Japan, the *Provider Liability Limitation Act*[7] specifies that when a right is infringed by information distributed by a relevant service provider, the provider shall not be liable for any consequential loss unless it knew or could reasonably have known, that an infringement was occurring. The law applies, inter alia, to copyright and trademark rights, invasion of privacy and defamation with respect to individuals and damage to honour or credibility with respect to juridical persons.

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6 47 U.S.C. §230.

7 Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders, Act No. 137 of November 30, 2001, Article 3; http://www.japaneselawtranslation.go.jp/law/detail_main?re=&vm=02&id=2088.
See also the guidelines on the interpretation and application of the law relating to copyright, defamation and privacy and trademarks published by the Provider Liability Limitation Act Guidelines Review Council Review Council: https://www.telesa.or.jp/consortium/provider/pconsortiumproviderindex_e-html.

Controlling the Habit

A Paper Submitted in Support of the TELUS Submission to the Broadcasting and Telecommunications Legislative Review Panel

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Broadcasting and Legislative Review Panel Terms of Reference Priority 7. - Governance and Effective Administration

Questions

7.1 Is the current allocation of responsibilities among the CRTC and other government departments appropriate in the modern context and able to support competition in the telecommunications market?

7.2 Does the legislation strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?

January 11, 2019

"You play rather loosely with the Act."

Anthony Manera, President of the CBC

"It's an old habit."

Keith Spicer, Chair of the CRTC[1]

Introduction:

1. This memorandum is offered in support of TELUS's overall submission and in particular its comments and recommendations regarding Question 7.2 set out in the Terms of Reference for the Broadcasting and Telecommunications Legislative Review Panel.

2. The overall conclusion of the TELUS Submission is that the current *Telecommunications Act* does not strike the right balance "between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way." TELUS recommends in particular that the objectives set out in the current legislation are fundamentally flawed and need to be replaced. It also recommends that, assuming that amended legislation would also continue to include the current policy directive power, the existing political appeal power is no longer appropriate and should be eliminated, or as a distinct second-best alternative, be revised to limit the Governor in Council to sending back CRTC decisions for reconsideration or setting them aside, which is the existing provision governing appeals on Broadcasting decisions.

3. This memorandum will elaborate on the three aspects of the TELUS submission pertinent to Question 7.2, namely the deficiencies in the current objectives and the need to replace them; the need to continue the inclusion of a policy directive power; and problems with the existing legislated political appeal provision and how these problems can be ameliorated.

[1] Quoted in Hudson Janisch "In Search of Common Themes in an Apparently Confused Regulatory World," *Media & Communications Law Review*, 4, p. 260.

Part 1: Some Preliminary Comments on the Historical Background Relevant to Terms of Reference Question 7.2

4. Independent regulatory agencies, such as the Canadian Radio-television and Telecommunications Commission (CRTC) in our parliamentary system are one of the category of non-departmental forms which are, to employ Hodgetts' phrase, "structural heretics"[2] They merit this nomenclature because, in a system premised on ministerial responsibility for both public policy and governmental behaviour to Parliament, they lay outside the traditional norms. Designated ministers for individual regulatory agencies such as the CRTC are not responsible or accountable to Parliament for the decisions or other actions of such agencies. They are only answerable, but not accountable, to Parliament, subject of course to the qualifications discussed below when the Government issues a policy direction or "varies or rescinds" a decision which consequently makes the Government, and the answerable Minister, accountable to Parliament for such actions.

5. By way of introduction, it is important to note that the question of the appropriate balance between government policy control and regulatory independence is of relatively recent origin. In the first six or seven decades after the creation of the Board of Railway Commissioners in 1904 or its successor, the Board of Transport Commissioners (1937-1967), the issue of balance between political control and regulatory independence simply did not arise. (I ignore, for purposes of this submission, the fact that the latter Board was stripped of its air licensing responsibilities in 1944 because of a decision that conflicted with stated Government policy and replaced by an advisory Air Transport Board- a sure way to guarantee balance.)

6. The question of balance did not arrive because of the narrow set of responsibilities and roles delegated to the Board of Railway/Transport Commissioners. As one of the leading students of transport regulation, has noted, the Board "… functioned only in comparatively narrow fields, where its duties can be precisely defined by Parliament or where the determination of what ought to be done can be fairly clearly arrived at by means of

[2] J.E. Hodgetts, *The Canadian Public Service* (Toronto: University of Toronto Press, 1973) Chapter 7.

engineering and statistical data."[3] In short, to use a colloquialism, the Board was asked to and "stuck to its knitting". As another student noted, the Board "… time and time again emphasized that it is empowered to deal with transportation matters only. It refused to order experimental or developmental rates…. The board has refused to change rates to offset the effect of a tariff, and will not alter rates on the grounds of desirable public policy, because, it says, Parliament is the proper place for such matters."[4] The Board's repeated refusal to address larger issues surrounding the "railway question" such as regional disparities was one of the direct causes for the regular governmental recourse to royal commissions to address such questions.

7. When the Board of Railway Commissioners was given responsibility in 1906 for the regulation of telephone rates and practices, it adopted the same narrow, focussed definition of its responsibilities and roles. It declared at various times that it was not regulating the telephone industry but individual telephone companies; that its job was "to regulate not initiate"; that its responsibilities were remedial or corrective and *ex post facto*; that they were not managerial. As with regulation of the railways, the Board and its successor the Canadian Transport Commission (CTC) routinely rejected proposals well into the first half of the 1970s when it had jurisdiction to adjust telephone rates for what it called social welfare purposes. For example, in 1972, the CTC noted

> The impact of rate increases on persons who are in a position of economic disadvantage is of great concern to the Commission. It is not, however, within the Commission's discretion to adjust rates to meet the individual economic circumstances of subscribers belonging to the same category.[5]

Similarly, in 1975 in response to a telephone company request for a discount in telephone rates for senior citizens, the regulator described the proposal as "… a form of social assistance as might properly be funded by the general taxpayer…. [and that] We believe

3 A.W.Currie, "The Board of Transport Commissioners as an Administrative Body" in *Canadian Public Administration* edited by J.E.Hodgetts and D.C.Corbett, (Totonto:Macmillan,1960) p.224.

4 Quoted in *ibid.*, pp. 236-237. On this topic the work of Howard Darling is also instructive in *The Politics of Freight Rates* (Toronto: McClelland and Stewart, 1980).

5 Canadian Transport Commission (CTC), *Canadian Transport Cases* Vol. 1972, (Ottawa: Information Canada) p. 183.

that relief to groups or individuals in need should be met by adjustments in pensions and allowances by the Federal, Provincial and Municipal Government bodies concerned."[6]

8. Balance obviously is a two-way street and it is important to note that, notwithstanding its power to vary, rescind or refer back for review the regulator's decisions, the Federal Government demonstrated considerable reluctance to exercise such powers from 1906 to 1976. As Ryan has found in his comprehensive analysis of Cabinet appeals in the telecommunications sector, only 6 appeals were entertained in those seventy years.[7] Although referring mainly to railway cases, Currie's explanation is relevant: cabinet had a "strong inclination to support the judgment of the board" and in support he cited a Cabinet comment on one of the appeals:

> A practice has grown up not to interfere with an order of the board unless it is manifest that the board has proceeded upon some wrong principle, or that it has been otherwise subject to error. Where the matters at issue are questions of fact depending on their solution upon a mass of conflicting testimony, or are otherwise such as the board is particularly fitted to determine, it has been customary, except as aforesaid, not to interfere with the findings of the board.[8]

9. In short, prior to 1976, the year it should be noted that the CRTC was given responsibility for the regulation of telecommunications matters, there was no question that balance had been established between the regulator and the government. One of the major reasons for this is that, despite the apparent openness of the terms "just and reasonable rates" or "undue discrimination," the regulatory agency, to use language I have employed elsewhere, was a quintessential "economic policing agency."[9] Its role was to constrain, and if necessary discipline, the behaviour of individual firms subject to its jurisdiction. It was proscriptive

6 CTC, Telecommunication Committee, Decision, "In the matter of the application of Bell Canada dated May 30, 1975 … for approval of revisions of certain of its rates for service, equipment and facilities," Nov. 22 1975, Attachment 2, "Extract from the Decision of the Telecommunications Committee dated November 3, 1975, on an application by British Columbia Telephone Company," p. 2.

7 Michael H. Ryan, "Executive Control of Administrative Action: "Cabinet Appeals" and the CRTC" 2014. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403402.

8 Currie, *op. cit.*, p. 229.

9 Richard Schultz and Alan Alexandroff, *Economic Regulation and the Federal System* (Toronto: UofT Press, 1985) pp. 1-24.

not prescriptive, remedial not managerial, reactive not initiating. It was not regulating industries but specific firms. Exogenous objectives were neither imposed on it nor pursued by it. Indeed, it vigorously and effectively eschewed such objectives. Although unavoidably its responsibilities and its decisions were "political" in the larger meaning of the term, the nature of its mandate and the self-imposed interpretation of that mandate resulted in a regulatory process largely insulated from the wider political process. As far as the regulator and the government were concerned, the appropriate balance between the two had been established and continued until 1976.

Part 2: The CRTC Years and the Loss of Balance

10. The difference in the post-1976 years in telecommunications regulation from the previous period could not be starker. One measure of the difference is that according to Ryan's study, the number of cabinet appeals went from 6 to 59 in the years from 1976-2012. Another feature of this development was the increasing perception that, given the Cabinet appeal provision, decisions by the CRTC were increasingly considered as simply the first step in the decision-making process.as telecommunications went from being largely insulated from to being integrated into the political process. The CRTC became embroiled in inter-governmental and intra-governmental turmoil and conflicts, and its Chair once threatened to sue the government of the day, albeit over a broadcasting intervention. Although there were multiple factors that caused the politicization of telecommunications post-1976, it is indisputable that one of the major causes was the widely-perceived lack of balance in the respective roles of the regulator and the government in policy-making. It is my argument that this lack of balance was caused initially by the rather "loose" interpretation of its mandating statute, to use Manera's description, in the years prior to 1993 and subsequently the comprehensive but incoherent set of policy objectives that were found in the 1993 *Telecommunications Act* that virtually transferred substantial policy-making authority to the CRTC. The conflicts which culminated in the 2006 Policy Direction, I argue, had their roots in the inadequacy of the legislated policy objectives as a constraint on the CRTC.

11. To fully understand the lack of balance in both the years 1976-1993 and the subsequent years to the present, I suggest that it is necessary to understand the roles and powers assigned to the CRTC when it was created as broadcasting regulator in 1968. The CRTC as broadcast regulator was the model that the CRTC adopted for telecommunications after 1976, a model that has caused the lack of balance in the respective roles of the agency and the government.

12. The 1968 *Broadcasting Act* created perhaps the most powerful regulatory agency that Canada has ever known. As one commentator described it at the time, the CRTC was "an almost completely independent body."[10] The power of the Federal Government to review and control CRTC decisions was much more constrained than the power over decisions of other agencies such as the NEB whose decisions required governmental approval or as noted in the case of the transport regulator whose decisions could be sent back, rescinded, and, as noted above, most importantly varied, with little constraint on the nature of the variance - a no could be changed to a yes. In the case of the CRTC, its decisions could only be sent back for review and/or set aside. There was no possibility for the Federal Government to vary a decision. The new legislation did contain a novel provision for the Federal Government to issue a policy direction - perhaps influenced by the recent quarrel with the Governor of the Bank of Canada which led to the inclusion of a similar provision in the *Bank of Canada Act*. This power, however, was severely circumscribed as it was limited to only 3 matters originally of which arguably only one was truly political, namely the ineligibility of a class of applicants to be granted or hold a broadcasting licence. This provision was directed at non-Canadian applicants or current licence holders and was extremely political inasmuch as it was primarily directed at Americans and thus raised international issues deemed appropriately to be assigned to the Federal Government.

13. What was particularly significant about the CRTC was first the broadcasting policy objectives it was to pursue and secondly the role assigned to the Commission. The *Broadcasting Act* of 1968 in s. 2, set out a broad range of policy objectives perhaps the most important of which at the time was the statement that the broadcasting system was to

[10] Ronald G. Penney, "Telecommunications Policy and Ministerial Control" *Canadian Communications Law Review*, 1968, p. 14.

be considered "a single system" and that "it should be effectively owned and controlled by Canadians *so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada*." (emphasis added) The open-ended, undefined nature of the latter objective was such that in combination with the limited government controls over the CRTC, the Commission, in the words of Penney, was a "mini-legislature" as it was given in effect the power to define the substance of Canadian broadcasting policy. It was to be "the parliament of broadcasting."

14. Just as important as the open-ended nature of the policy objectives was the role assigned to the regulator. Unlike the Board of Transport Commissioners or its successor, the CTC, which was to be an economic policeman, the CRTC was to be much more. It would be a planning agency, with largely unconstrained responsibility for setting the objectives and roles for the individual participants. This was made clear by the final section of the statement of policy which declared that "the objective of broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and *supervision* (emphasis added) of the Canadian broadcasting system by a single independent pubic authority." By "supervision" the Act intended and the CRTC so interpreted, that it was to manage the broadcasting sector. As such the Government had in effect assigned, some might say abdicated, its responsibilities and thereby thrown any sense of balance by the wayside. Penney claims Peter Grant's description of the Broadcasting Board of Governors (BBG), the predecessor was equally applicable to the CRTC: "the government in effect left it to the Board both to define and solve the current problems."[11]

15. The CRTC had in effect been granted a blank cheque to develop Canadian broadcasting policy and it proceeded to cash it. Although challenged through both political and court appeals, the Commission successfully developed the habit of "loosely" interpreting its mandate to create policies governing cable rates and hardware ownership, Canadian content, simultaneous substitution, and pay-television to mention but a few. The only setback in its first decade was its proposed policy to prohibit the use of microwave to extend

[11] Penney citing Peter Grant "The Regulation of Program Content in Canadian Television: An Introduction" *Canadian Public Administration*, 11 (1968) at p. 326.

the reach of cable to Canadians beyond the major cities near the Canada -US border. Popular opposition, voiced through MPs, forced the Commission to withdraw the proposal.

16. It was with this background as an assertive, aggressive, independent policy-maker and regulator in broadcasting that the CRTC acquired responsibility to regulate the telephone companies in 1976. It is worth noting that the CRTC did not seek such responsibility and in fact would come to see it as a potential threat to some of its broadcasting policies. The push to transfer telecommunications from the transport regulator to an expanded communications regulatory authority came largely from within the Department of Communications (DOC) established one year after the CRTC. The first Minister, Eric Kierans, had promised in the Commons debates on creating the new department that the goal was "to evolve a national communications plan and a national communications policy to integrate and rationalize all systems of communications…." [12] As Mussio notes, the departmental objective was "total regulation" of telecommunications falling under its jurisdiction. [13]Departmental ambitions were focussed on two concerns. First was, following the example of broadcasting, how to use the regulation of telecommunications for the attainment of exogenous objectives through the use of "chosen instruments". To the senior public servants in DOC it was unacceptable that telecommunications was the only network industry not under effective public control for a broad range of public purposes such as "strengthening the bonds of nationhood," defending national sovereignty, or promoting Canada's dual cultures.[14] Another central purpose was to submit to public control the telephone companies, especially Bell Canada, which through its role in the TransCanadaTelephone System, was exercising "… functions which in all western nations are considered to be the prime responsibility of government."[15] In short, the DOC at this time was largely focussed on changing the purposes and roles of government vis-à-vis the federally-regulated telephone companies and by extension if it acquired regulatory control over TCTS the other Canadian telephone companies. In terms of the purpose of this paper,

12 Hon. Eric Kierans, Minister of Communications, House of Commons *Debates*, February 27, 1969, p. 6079.
13 Laurence B. Mussio, *Telecom Nation* (Montreal: McGill-Queens University Press, 2001) p. 104.
14 See the discussion based on interviews with Alan Gotlieb, the first DOC Deputy Minister, in Lawrence Surtees, *Wire Wars* (Scarborough: Prentice-Hall, 1994) pp. 52-53.
15 Mussio, op.cit., p.106. See also the positions papers (Green and Grey) issued by the Minister of Communications on behalf of the Government of Canada in 1973 and 1975 for support for these arguments.

it is noteworthy that initially advocates of the transfer appeared to have paid little attention to the question of the appropriate balance between the government and the regulator.

17. Initially, the CRTC was supportive of the DOC's ambitions in telecommunications. This changed, however, when the intergovernmental negotiations began as the provinces were not prepared to surrender the control over telecommunications that they currently exercised or wanted to exercise, especially given their fear of federal sympathy for some degree of competition. For its part the CRTC became apprehensive that the federal government was prepared not only to sacrifice federal, i.e., CRTC, control over cable television in order to overcome provincial opposition, an action that would threaten its policies of protecting the traditional broadcasters both public and private from cable competition. The DOC was also prepared to allow provincial governments a role in making CRTC appointments.

18. The result was an intragovernmental struggle pitting the DOC against the CRTC. It was at this point that the DOC came to realize that the issue of the policy-making balance could not be ignored. In this struggle the Federal Government promised the provinces that federal legislation would reverse the existing policy direction provisions wherein the Federal Government's power to issue directions was limited to three very specific areas to one where the power would be provided for the Federal Government to issue a direction on all topics except where specifically excluded.[16] This would, the government argued, "… ensure that the development of policy would be, and would clearly be seen to be, under the control of the elected representatives of the people."[17] In addition such directions would be developed through a proposed intergovernmental ministerial committee for communications policy, a committee which would exclude CRTC participation.

19. Following the 1975 transfer of responsibility for telecommunications regulation from the CTC to the renamed Canadian Radio-television and Telecommunications Commission, a transfer which took effect in April 1976, the Federal Government introduced a combined

[16] The original subject areas were the licence eligibility of applicants, reservation of frequencies or channels for the CBC and the maximum number of channels or frequencies in a given area. Subsequently this was expanded to include granting licences to provincial agents and implementation of Article 2006 of the Canada-US Free Trade Agreement.

[17] Hon. Gerard Pelletier, Minister of Communications, "Communications: Some Federal Proposals" April 1975, p. 10.

telecommunications and broadcasting act in the House of Commons that was to establish both a new set of policy objectives for telecommunications, while continuing with most of the original broadcasting objectives, and a directive power. With respect to the former, the legislation reflected the original ambitions of the DOC for the first objective declared

> 3 (a) … efficient telecommunications systems are essential to the sovereignty and integrity of Canada, and telecommunications services and production resources should be developed and administered so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;[18]

Notably, the legislation continued the "regulation and supervision" responsibilities of the CRTC. As promised, the legislation provided for a comprehensive power of direction for the Government "respecting the implementation of the telecommunications policy for Canada…" found in s. 3 subject to very limited qualifications. It is also worth noting that the legislation, reflecting the intergovernmental conflict of the previous years, would have permitted the Minister of Communications both to seek the advice of a provincial regulatory authority on any matter and, most significantly, to delegate to a provincial regulator any of the ministerial and CRTC powers.[19]

20. Notwithstanding the fact that the Government of the day had a majority in the House of Commons, the proposed legislation inexplicably never went beyond First Reading after being introduced three times, twice in 1977 and once in 1978. Consequently, the CRTC assumed jurisdiction over telecommunications without any legislative guidance to guide its decision-making over the powers found in the 1906 *Railway Act*, or subject to a directive power.

21. It would be an understatement of the first order to suggest that the CRTC exercised its new powers based on a loose interpretation of the provisions of the *Railway Act.* Building on the precedent of the CRTC as broadcasting regulator from 1968 to 1976, within months of assuming responsibility, the CRTC, in a rather anodyne statement of "draft procedures and

[18] He House of Commons, Bill C-43, An Act respecting telecommunications in Canada, First Reading, March 22, 1977.
[19] *Ibid.* s. 6(a) and 7.

practices," announced that it was radically reinterpreting its responsibilities. Although its legislation made no mention of the "public interest", the CRTC declared that the public interest required that telecommunications services "should be responsive to pubic demand over as wide a range as possible, and equally responsive to social and technological change."[20] The CRTC also indicated that it would not be bound by its predecessor's interpretation of its statute:

> The principle of "just and reasonable rates" is neither a narrow nor a static concept. As our society has evolved, the idea of what is just and reasonable has also changed, and now takes into account many considerations that would have been thought irrelevant 70 years ago, when regulatory review was first instituted. Indeed, the Commission views this principle in the widest possible terms and considers itself obliged to continually review the level and structure of carrier rates to ensure the telecommunications services are fully responsive to the public interest.[21]

22. In its first five years as telecommunications regulator, without, it bears repeating, any statutory change, the CRTC proceeded to overturn recent precedents involving awarding intervenor costs and customer attachment of terminal equipment, imposed quality of service standards on federal carriers and subjected their TCTS rates to regulatory approval. Most importantly, it introduced a significant degree of service competition when it authorized private line long distance interconnection in 1979.[22] It is worth noting that, with one exception, neither the Federal Cabinet nor the Courts overturned any of these decisions when challenged.

23. Despite the repeated refusal to intervene, successive Ministers of Communications were critical of the policy-making power assumed by the Commission. In the one decision which Cabinet reversed on appeal, for example, the Minister lamented the fact that the appeal provision had to be employed because "… adequate statutory mechanisms through which the government could have provided clear policy guidance to the CRTC are not yet

20 CRTC, "Telecommunications Regulation- Procedures and Practices" July 20, 1976, p. 3.
21 *Ibid.*
22 Canadian Radio-television and Telecommunications Commission, Telecom Decision CRTC 79-11, 17 May 1979, *CNCP Telecommunications, Interconnection with Bell Canada.*

available…."[23] Several years later, one of her successors, Marcel Masse, argued legislation was necessary "… to establish clearly and unequivocally that only the government … is empowered to develop major policies."[24]

24. It was during this period after the failure to legislate a new telecommunications act and the turmoil resulting from the CRTC's radical reinterpretation of its 1906 powers, that several expert commentaries appeared calling for clarity in the relationship between regulatory agencies and governments and Parliament. All placed considerable priority on the need for a clear legislative statement of public policy objectives to guide regulatory agencies in their decision-making as the first instrument for providing balance between the government and regulators for establishing policy.

25. As explained below, there emerged a consensus that the enabling statutes for these independent regulatory agencies gave them far too much policy-making power in large part because of the open-ended, almost blank cheque, nature of the statutory statement of policy objectives. The concern was that elected authorities, the Federal Government and Parliament, had transferred far too much decision-making not on specific regulatory matters but on the policy to guide that decision-making to agencies under minimal political control.

26. This concern was first articulated by the Lambert Royal Commission on Financial Management and Accountability in 1979. As its title indicates one of its two central concerns was accountability for public decision-making and in this regard, it was highly critical of contemporary practice respecting regulatory agencies. In its report it stated:

> (For some of these agencies) … the constituent acts are neither clear nor unambiguous. This is especially true of … regulatory agencies which more often than not are given only the most rudimentary guidance…. Even when more extensive guidelines are provided, enormous scope for interpretation is granted to those agencies. In such situations the agencies, by virtue of the substantial

[23] Quoted in Ryan, op.cit., p. 16.
[24] Marcel Masse, Minister of Communications "Minutes of Proceedings and Evidence of the Standing Committee on Communication and Culture," Issue 10, 6 May 1985, p. 10.4.

> discretionary authority delegated to them, can become primary policy-makers. Indeed, in developing and refining their mandates, they can play a role not unlike that of Parliament itself.[25]

27. The Lambert Royal Commission consequently recommended that for regulatory agencies "the goals and public policies they are to implement, or be guided by, be clearly set out in their constituent acts."[26] The Royal Commission's concerns and recommended ameliorative measures were picked up by subsequent governmental advisory bodies such as the Economic Council of Canada and the Law Reform Commission of Canada. They recommended that regulatory agency statutes should contain clear statements of policy objectives and goals.

28. The original Bill-62, An Act respecting telecommunications, given First Reading in February 1992 which ultimately was passed as the *Telecommunications Act 1993*, was built on a four-pronged approach to ensuring balance between the regulator and the government. The Bill was sent to the Senate for "pre-study" which turned out to be the primary legislative review of the legislation. One of the prongs caused little debate, namely the inclusion of a policy directive power (s. 12) The maintenance of the traditional political appeal provision enabling the Federal Government to vary or rescind a CRTC decision drew, the Senate Committee noted, "widespread criticism from many witnesses" which persuaded the Committee to recommend that the appeal power be limited to sending back or setting aside.[27]

29. The other two prongs were much more controversial. The first was the proposal to confer on the Minister of Communications the power to issue licences for Canadian telecommunications carriers. This drew on the department's 1987 proposed policy framework although it was never clear in that framework who the licensing authority would be and reverted back to the pre-CRTC era where ministerial licensing of broadcasting was

25 Royal Commission on Financial Management and Accountability, *Final Report*, (Ottawa: Supply and Services Canada, 1979), p. 314.

26 *Ibid.*, p. 315.

27 Senate of Canada, Report of the Standing Committee on Transport and Communications on the "Subject matter of Bill C-62, An Act respecting telecommunications," Third session, Thirty-Fourth Parliament, June 1992, pp. 24-25.

the norm.[28] If enacted, the CRTC would be limited, as was the BBG before it, to an advisory role for the issuance of licences.

30. The Committee referred to a "mood of controlled indignation" over the proposed licensing system and was dismissive of the Minister's reasons for it. In particular it dismissed the primary reason, namely allowing the Minister to develop inter-governmental agreements, as being "unwise to put into Bill C-62 a power which could so easily undermine the primary justification of the legislation itself - national regulation for a national industry." Consequently, it recommended that the licensing scheme- its word- be stripped from the legislation.[29]

31. There was also considerable criticism of the proposed statement of telecommunications policy objectives from both witnesses and the Committee itself. The Committee cited the Canadian Bar Association which contended that the section's "listing approach is rife with inconsistencies" and a senior provincial official who stated that "the clause contains too many qualifiers to rank as a true statement of objectives."[30] For its part, the Committee concluded that the policy statement "has grown up, a bit like Topsy, over many years on an incremental rather than systematic basis. It is encrusted with too much history and not enough logic". Most significantly, the Committee noted the CRTC's decision in June 1992 to embrace open competition and, as noted above, pointedly stated that new legislation "will have to be capable of accommodating, guiding and furthering this massive transition."[31] The Committee concluded that section 7 suffered from what it called a "central weakness … namely the lack of a clear distinction between ends and means." Consequently, the Committee recommended that section 7 should be redrafted "to address the core issues" and "in a manner which distinguishes carefully between ends and means, and which constitute a coherent, integrated whole."[32]

32. The Senate Committee's criticism of the licensing scheme was obviously persuasive because the licensing scheme was omitted in the revised version of the legislation

28 Department of Communications "A policy Framework for Telecommunications in Canada" July 1987.
29 *Ibid.*, pp. 26-27.
30 *Ibid.*,, p. 21.
31 *Ibid.*, p. 10.
32 *Ibid.*, p. 22.

submitted to and approved by Parliament. What was little appreciated at the time, including by this author, was the significance of the Federal Government not accepting the Committee's recommendations for re-writing the statement of policy objectives. However misguided the proposal for the licensing scheme was, its removal meant that a check on the CRTC's powers was deleted and more importantly a widely criticized statement of policy objectives was conferred on the CRTC which can only be described as a blank cheque to govern its regulatory decision-making. Indeed, its powers were enlarged when the CRTC acquired the power, originally granted to the Cabinet in s. 9 of Bill C-62, to exempt a carrier from the application of the legislation.

33. Here one need only refer to assessment of the consequences offered by the Telecommunications Policy Review Panel. The Panel found the 1993 statutory objectives severely wanting. It concluded that they did not provide responsible authorities "practical guidance in the discharge…"[33] of their responsibilities because they were neither clear nor explicit. The Panel argued that it was difficult to reconcile different objectives and suggested that the objective for "orderly development" (policy objective 7(a)) was "reminiscent of a government-planned program"[34] and conflicted with the objective of relying on market forces. It went further to argue that "… s. 7 is vague in that it provides no guidance on how much reliance should be placed on market forces as opposed to regulation…."[35]

34. The result was that, after almost a decade of decisions that appeared to favour competition, the CRTC slipped back into its broadcasting regulatory mode to supervise, i.e. manage, competition through an emphasis on "orderly development" as permitted by s. 7. In order to ameliorate the situation, as we know, the Government in 2006 was compelled to issue a policy directive to the Commission instructing it to place primary emphasis on the promotion of competition.

35. To conclude this section, a review of the development of the current telecommunications policy objectives supports the argument that these objectives are fundamentally flawed as

33 *Telecommunications Policy Review Panel Final Report 2006*, page 2-5.
34 *Ibid.*
35 *Ibid.*

an instrument for balancing the roles of the Government, and Parliament, in developing telecommunications policy and the role of the CRTC in implementing that policy. The author concurs with the assessment developed in the TELUS submission that the current statement of objectives in the *Telecommunications Act* "lacks a clear, consistent, unambiguous statement of contemporary and future-oriented policy objectives. Instead the legislation contains an open-ended, unranked, largely undefined and indeed often contradictory policy statement that has the effect of governmental abdication to the regulatory agency to be the primary policy maker."

Part 3: The Policy Directive Power

36. There is a widespread consensus that the policy directive power is a valuable tool to assist in ensuring balance between the respective roles of the Government and the CRTC, particularly after the successful use of such a power in 2006.[36] I support that consensus but think it is important to make two comments on such a power. The first is that it is important to remember that the policy directive power is not a substitute for a well-crafted legislative statement of regulatory policy objectives. It is meant to supplement such a statement first, when new conditions emerge that may not have been anticipated when the statute was passed such that the policy requires adjusting or recalibrating that falls short of a requirement for a statutory change, or secondly when the regulator acts contrary to, or in some ways not supportive of, the existing policy objectives.

37. Related to this last point, it should always be remembered that exercising the policy directive power requires a significant act of political will. This was clearly demonstrated in the case of the 2006 directive where it took a determined minister opposed by his officials, the CRTC and senior personnel in central agencies, and a fortuitous set of circumstances, to demonstrate the value of the directive power.[37] Absent such political will, a poorly crafted statutory statement of policy objectives can lead to a fundamental

[36] See *Order issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, PC 2006-1534 (14 December 2006), 140:26 Canada Gazette II 2344.

[37] Richard Schultz, "What a Difference a Minister Can Make" in Alan Maslove (ed.) *How Ottawa Spends 2008-2009* (Montreal: McGill-Queen's University Press, 2008).

imbalance in the relationship between governmental policy control and regulatory independence.

Part 4: Cabinet Power to Vary, Rescind or Refer Back Regulatory Decisions

38. With a clearly crafted statement of policy objectives, supplemented by a policy directive power, the question arises as to whether the traditional power assigned to Cabinet to review and vary CRTC telecommunications decisions is necessary to ensure balance in the roles of the Cabinet and the regulator. I would answer in the negative and support this answer by drawing on long-standing criticisms of such a power. Two former Chairs of the CRTC, for example, have argued for the power to be removed or circumscribed. John Meisel was critical of the power in 1982 noting that the Cabinet appeal process was "… an invitation to vested interests and lobbyists to converge on ministers in an effort to undo, behind closed doors, decisions reached by the Commission and based on public hearings where interested parties can react to one another's argument openly." For his part, Andre Bureau suggested that such appeals "pose a threat to the independence of the regulator and the integrity of the regulatory process."[38] Bureau also questioned the legitimacy of such appeals if a political directive power which was then being contemplated, was imposed. His successor, Keith Spicer was much blunter with his comments about the use of such a combination when he stated that he was concerned about "the risk of the CRTC becoming the monkey to the government's organ-grinder." He went on to argue that "… it's not the CRTC, but Cabinet itself, which would come to rue the so-called 'tandem powers" of direction and review … (as) overuse of these powers would quickly discredit any government's commitment to a non-partisan, impartial process, and burden Cabinet with line-ups of unwelcome petitioners."[39]

39. Other commentators have also been critical. The Lambert Royal Commission, for example, recommended that political appeals of regulatory decisions should be abolished. The Lambert Commission argued, as does this paper, that authorizing legislation "should be the primary instrument for overseeing, guiding and ultimately evaluating the work…" of

[38] Cited in Ryan, op.cit., pp. 2-3.

[39] Keith Spicer, Broadcasting in the Nineties: New Balances, New Perspectives, The Empire Club of Canada Addresses (Toronto, Canada), 24 May 1990 available at http://speeches.empireclub.org/61362/data?n=34).

regulatory agencies.[40] Anticipating the criticism of Chair John Meisel, the Commission argued that agency decisions were made in open hearings but appeals "are all made in private and subject to the requirements of cabinet confidentiality…. The integrity of these agencies will be undermined… if the principle of open and impartial proceedings is not applied to the appeal process."[41]

40. The Economic Council of Canada, in response to the Prime Minister's 1978 request to undertake a major review of "specific areas of government regulation which appear to be having a substantial economic impact on the Canadian economy," addressed a number of public administration aspects of regulation including the debates surrounding the use, efficacy and appropriateness of political appeals. The Report acknowledged that political appeals could be defended on several grounds including first, the need for the Federal Government to address broader public policy concerns than those that a regulatory agency might consider in addressing an application, secondly, the claim that given the rare use of such appeals they are not particularly disruptive or destructive of regulatory integrity and finally the fact that some decisions are "of such seminal significance that no government can afford not to be involved."

41. However, the Council was not persuaded by such arguments and concluded that political appeals were in fact disruptive and potentially destructive, permitted selective or discretionary accountability and possibly favoured some parties such as the wealthy and well-organized, at the expense of others. More importantly, the Council argued that political appeals may fail to serve their fundamental purpose of providing policy direction to a regulatory agency because they "may *not* actually result in any real clarification of the policy of the government… and [consequently] may thereby increase uncertainty and result in more political appeals…."[42] (emphasis in original) After reviewing the options, the Council recommended that political appeals should be abolished and following the recommendation of the Lambert Commission, urged the Government to amend relevant regulatory statutes to permit, subject to certain procedural constraints, the Government to

40 Royal Commission on Financial Management and Accountability, op.cit., p. 341.
41 *Ibid.*, p. 319.
42 Economic Council of Canada, *Responsible Regulation* (Ottawa, November 1979) pp. 63-64.

issue policy directions to specific regulatory agencies. It argued that its recommendations would provide for both greater political accountability and make best use of regulatory agency processes, expertise and performance of their adjudicatory responsibilities.[43]

42. A third independent analysis, this time by the Law Reform Commission of Canada, also recommended that political appeals be abolished. Its rationale is worth quoting at length:

> Cabinet "appeals" … are really policy appeals replete with lobbying external to any formal written representations made, and allow for reversal on grounds of "evidence" unrelated to the considerations an agency may have regarded as relevant. Such review may have a detrimental effect on agencies and detract from the integrity of the administrative process in the eyes of those who are parties to proceedings before the agencies. To be reversed on such an appeal can be demoralizing and can contribute to a less than conscientious approach to agency responsibilities. This is particularly so when the appeal is not well-documented and the reasons obscure.
>
> Policy appeals can also be used to change policy retroactively…. This can lead to public apprehension that the Cabinet has not really limited its terms of reference in policy review to the scope and intent of the statute in question, and that there has been an abuse of executive power through the taking of action contrary to the intent of Parliament.[44]

43. Apropos the criticism of the appeal mechanism as a means of setting regulatory agency policy, one need only recall, as a. telling example supporting such an argument, the refusal of the CRTC to give effect to the Cabinet's suggested policy in the appeal in 2006 that, as noted above, ultimately forced the Government of the day to issue a direction to the Commission.

44. The Law Reform Commission, recognizing that the Cabinet may not wish to give up its complete appeal power, offered an alternative that the TELUS submission supports. That

[43] *Ibid*., pp.66-67.
[44] Law Reform Commission of Canada, *Independent Administrative Agencies*, Working Paper #25 (Ottawa; 1980) pp. 88-89.

alternative is that Cabinet should be given only the power to set aside a regulatory decision and only after it had referred the matter back to agency indicating "… what aspects of its statutory mandate the government thought the agency should weigh in reconsidering its decision."[45] Subsequent governments in the 1991 *Broadcasting Act* and the 1993 *Telecommunications Act* incorporated this second part of this recommendation, although the latter Act did not limit the appeal power of cabinet. In this context it is worth noting that the telecommunications act given first reading in March 1977 did not grant the Cabinet the power to vary CRTC telecommunications decisions but the 1978 version did. No explanation was ever provided for the change.[46]

45. It is also worth noting that, in a Law Reform Commission seminar for members of federal administrative tribunals, Gordon Smith, then Assistant Secretary to Cabinet in the PCO, indicated that the Government was considering changes to the political appeal process in the context of expanding the policy direction power. He is quoted "we are also going to find changes in the appeal process. If the government of the day has the power to issue policy directions to agencies, it seems to me the other side of that coin will be the government may not feel it needs to have the power to overturn specific decisions. In other words, this process may enhance the independence of administrative agencies in decision-making."[47] As we know, however, no such change was introduced by the Government in subsequent telecommunications legislation.

46. While I personally believe that there is no need for both a political appeal mechanism and a policy direction power, I support the TELUS recommendation that, as a second best solution, if a cabinet appeal power is to be retained, the provisions governing telecommunications should be the same as those now for broadcasting decisions. Cabinet should only be permitted the power to refer back telecom decisions for reconsideration and if necessary to set decisions aside.

45 *Ibid*., p. 89.
46 House of Commons, Bill C-43, given first reading March 22, 1977 and Bill C-16, given first reading November 9, 1978.
47 Economic Council of Canada, Responsible Regulation (1979) fn 80.

Conclusion:

47. The Law Reform Commission contended that "our political traditions stress that power and responsibility should be placed in elected officials" and that consequently "in the absence of clear justification, governmental authority should not be exercised by non-elected officials unless some basis for responsiveness to the Cabinet and Parliament is retained."[48] The argument of this paper is that such a condition has largely not be met in the telecommunications sector in the relations between the Cabinet and Parliament and the CRTC. Between 1976 and late 1980s, the CRTC was able successfully for the most part to impose its self-defined, very loose interpretation of the *Railway Act* on the telecommunications sector. In the first few years of the millennium, the CRTC once again imposed its interpretation of statutory policy on the industry. In the latter case the Government was compelled to employ an external panel review and subsequently a policy directive to correct the problem.

48. These two episodes, plus the combined commentary and analysis from expert advisory commissions, the Telecommunications Policy Review Panel and most recently the Chair of the CRTC, all support the conclusion, that notwithstanding the continued utility of the 2006 policy directive, the relationship between the Federal Government and the CRTC suffers today from a fundamental imbalance.

49. The issue it needs to be emphasized is one of trying to find a balance between regulatory decision-making independence and political control over the objectives to be pursued through such independence. No statute can, or indeed should, attempt to be so precise as to deny regulatory discretion. Governments, on the one hand, need to be diligent in avoiding the existing situation with regards to the CRTC which has been given simply what concerns the current Chair, namely a comprehensive "list" of objectives that in essence gives no meaningful policy direction. On the other hand, governments need to be equally concerned, as the recent report on the National Energy Board concludes, with giving a regulator conflicting objectives which can lead to a profound regulatory failure.[49]

[48] *Ibid.*, p. 73.
[49] Expert Panel on the Modernization of the National Energy Board, *Report: Forward, Together*, n.d.

50. The *Telecommunications Act*, particularly the statement of policy objectives in Section 7 gives the CRTC far too much opportunity to engage in interpreting public policy in such a manner that it, not Cabinet and not Parliament, is not simply interpreting its mandating statute but is allowed, indeed encouraged, to be the primary policy maker for telecommunications. Section 7, as TELUS has argued, requires a fundamental rewrite so that the objectives are clear and the Commission is constrained and disciplined by such objectives in its decision-making. Such a rewrite can be supplemented by the policy directive power. The recent history of telecommunications regulatory decision-making argues persuasively that, unless such changes are made, Cabinet and Parliament are simply continuing to enable a bad habit.

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POSITION: James McGill Professor and Chair
Department of Political Science
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EDUCATION: B.A.(Hons) York University, 1968 (Magna Cum Laude)
M.A. University of Manchester, England, 1970 (Commonwealth Scholar)
Ph.D. York University, 1976 (Canada Council Fellowship)

PROFESSIONAL EXPERIENCE:

A. Teaching/ Administrative	Department of Political Science Glendon College, York University, 1972-75 (Assistant Professor) 1978-79 (Associate Professor)
	School of Public Administration, Carleton University Sessional Lecturer, 1976-77
	Department of Political Science McGill University, 1977-78, 1979-1986 (Associate Professor) 1986-Present (Full Professor) 2003- James McGill Professor
	Director, Centre for the Study of Regulated Industries, McGill University 1982-1990
B. Academic Honours	Visiting Research Fellow, Program in Legal Theory and Public Policy, Faculty of Law, University of Toronto, 1984-85.
	Visiting Research Fellow, Program on Information Resources Policy, Harvard University, 1984-85.

United States Information Agency Visiting Fellow, Canadian Studies Center, Duke University, January-June 1994.

Senior Associate, McGill Institute for the Study of Canada, 1995-96

Fellow, Shorenstein Center on Press, Politics and Public Policy, Kennedy School of Government, Harvard University, February-June 2005

Member, Board of Directors, International Telecommunications Society, 2008 (to 2014)

Arts Undergraduate Society Excellence in Teaching Award, 2003, 2009

C. Public Service: Research Officer, Federal-Provincial Relations Office, (Privy Council Office) Government of Canada, 1975-77

D. Publications:

a) Books and Monographs

The Canadian Political Process, Toronto: Holt, Rinehart and Winston, 1970 (Co-editor with O.M. Kruhlak and S. Pobihushchy)

The Canadian Political Process (revised edition) Toronto: Holt, Rinehart and Winston, 1973 (Co-editor with O.M. Kruhlak and S. Pobihushchy)

The Canadian Political Process (3rd edition), Toronto: Holt, Rinehart and Winston, 1979 (Co-editor with O.M. Kruhlak and J. Terry)

Federalism and the Regulatory Process, (Montreal: Institute for Research on Public Policy, 1979)(also published in French)

Federalism, Bureaucracy and Public Policy: The Politics of Highway Transport Regulation, Canadian Public Administration Series (Montreal: McGill-Queen's Press, 1980)

Cabinet as a Regulatory Model: The Case of the Foreign Investment Review Act (Co-author with Frank Swedlove and Katherine Swinton) (Regulation Reference, Economic Council of Canada, 1980)

Telecommunications Regulation and the Constitution, Montreal: Institute for Research on Public Policy, 1982 (co-author with R. Buchan et al.)

Pipeline Regulation and Inflation (co-editor) (Montreal: McGill Centre for the Study of Regulated Industries, 1983)

Local Telephone Pricing: Is there a better way? (co-editor with Peter Barnes) (Montreal: CSRI, 1984)

Economic Regulation and the Federal System (with Alan Alexandroff) (Toronto: University of Toronto Press, 1985)

United States Telecommunications Pricing Changes and Social Welfare: Causes, Consequences and Policy Alternatives (Ottawa: Bureau of Competition Policy, Department of Consumer and Corporate Affairs, (1989)

Regulatory Reform: A Handbook of Possibilities (Ottawa: Bureau of Competition Policy, Department of Consumer and Corporate Affairs, May 1991)

Changing the Rules: Canadian Regulatory Regimes and Institutions (co-editor with G. B. Doern et al.) (Toronto: University of Toronto Press, 1999)

The Consumers' Association of Canada and the Federal Regulatory System, 1973-1992 (Vancouver: SFU-UBC Centre for the Study of Government and Business, 2000)

Rules and Unruliness (co-authors G. Bruce Doern and Michael Prince) (Montreal: McGill-Queen's University Press, 2013)

b) Articles

"Canadian Electoral Behaviour: A Propositional Inventory" with J.C. Terry in Kruhlak et al., The Canadian Political Process (revised edition)

"Prime Ministerial Government, Central Agencies and Operating Departments: Towards a More Realistic Analysis" in T.A. Hockin (ed.) Apex of Power (second edition) (Scarborough: Prentice Hall, 1977)

"Intergovernmental Cooperation, Regulatory Agencies and Transportation Regulation in Canada: The Case of Part III of the National Transportation Act", Canadian Public Administration, Summer 1976

"Interest Groups and the Vice of Federalism" in J. Peter Meekison (ed.) Canadian Federalism: Myth or Reality (third edition) (Toronto: Methuen, 1977)

"Regulatory Agencies in the Canadian Political System" in K. Kernaghan (ed.) Public Administration in Canada (Toronto: Methuen, 1977)

"The Regulatory Process and Intergovernmental Relations" in G.B. Doern (ed.) The Regulatory Process in Canada (Toronto: Macmillan, 1978)

"The Impact of Regulation" Canadian Public Policy V (1979)

"Regulatory Agencies and the Federal System" in Law Reform Commission of Canada, Seminar for Members of Federal Administrative Tribunals, Selected Proceedings (Ottawa, 1979)

"Recent Developments in Federal-Provincial Liaison" in Peter G. Grant (ed.) Law and Policy on Canadian Communications (Toronto: Law Society of Upper Canada, 1980)

"Delegation and Cable Distribution Systems: A Negative Assessment". Institute of Intergovernmental Relations, Queen's University, Discussion Paper No. 11, February 1981

"Regulatory Agencies" in Whittington and Williams (eds.) Canadian Politics in the 1980's (Toronto: Methuen, 1981) (second edition, 1984)

"Regulatory Agencies and the Dilemmas of Delegation" in O.P. Dwivedi (ed.) The Administrative State - Canadian Perspectives: Essays in Honour of J.E. Hodgetts (University of Toronto Press, 1982)

"Regulation and Public Administration", Canadian Public Administration 25(1982) (25th Anniversary Issue)

"Federalism and Communications: Multiplication, Division and Sharing", Osgoode Hall Law Journal 21(1983)

"Regulation as Maginot Line: Confronting the Technological

Revolution in Telecommunications" Canadian Public Administration 26(1983)

"Regulatory Responses" in Calvin C. Gotlieb (ed.) The Information Economy: Its Implications for Canada's Industrial Strategy (Toronto: The Royal Society of Canada and the University of Toronto/University of Waterloo Cooperative on Information Technology, 1984)

"Teleglobe Canada: Cash Cow or White Elephant" (with Hudson Janisch) in Thomas E. Kierans and W.T. Stanbury, (eds.) Papers on Privatization (Montreal: IRPP, 1985)

Comments on "Players, Stakes and Politics in the Future of Telecommunications Regulation in Canada" in W.T. Stanbury (ed.) Competition and Technological Change: The Impact on Telecommunications Policy and Regulation (Montreal: IRPP, 1986)

"All Talk, No Action: The Telecommunications Dossier" in Peter Leslie (ed.) Canada: The State of the Federation 1986 (Kingston: Institute of Intergovernmental Relations, Queen's University, 1987)

"Regulating Conservatively: The Mulroney Record" in Andrew B. Gollner and Daniel Salée (eds.) Canada Under Mulroney (Montreal: Véhicule Press, 1988)

"Teleglobe Canada" in A. Tupper and G.B. Doern (eds.), Privatization, Public Policy and Public Corporations in Canada (Montreal: Institute for Research on Public Policy, 1989)

Comments on "Privatization in Canada" in Paul W. MacAvoy et al. (ed.), Privatization and State-Owned Enterprises (Rochester Studies in Economics and Policy Issues) (Boston: Kluwer Academic Publishers, 1989)

"Forward to the Past: The Canadian Approach to Telecommunications Reform" in William Averyt (ed.) Managing Global Telecommunications Politics: North American Perspectives (Burlington: University of Vermont, 1989)

"Exploiting the Information Revolution:" Telecommunications Issues and Options for Canada" (with H.N. Janisch) (Montreal: The Royal Bank of Canada, 1989)

"Regulatory Agencies" in Michael S. Whittington and Glen Williams (eds.) Canadian Politics in the 1990's (Toronto: Nelson Canada, 1990)

"Privatization, Deregulation and the Changing Role of the State: Lessons from Canada" Business in a Contemporary World, Vol. III, No. 1 (Autumn 1990)

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"Federalism's Turn: Telecommunications and Canadian Global Competitiveness (with H.N. Janisch) Canadian Business Law Journal, Vol. 18, No. 2 (August 1991)

"Canada and the Movement Towards Liberalization of the International Telecommunications Regime (co-author) in A. Claire Cutler and Mark W. Zacher Canadian Foreign Policy and International Economic Regimes (Vancouver: UBC Press, 1992)

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"Freedom to Compete: Reforming the Canadian Telecommunications System", (with H.N. Janisch) (Ottawa: Bell Canada, 1993)

"Deregulation Canadian-Style: State Reduction or Recasting? in James Iain Gow and Roch Bolduc (eds.) Bilan de l'État reduit/A Downsized State? (Montreal: University of Quebec Press, 1994)

"Regulation and Telecommunications Reform: Exploring the Alternatives" in B. Wellenius and P. Stern (eds.) Implementing

Reforms in the Telecommunications Sector: Lessons from Experience (Washington: The World Bank, 1994)

"Towards the Future: Highlights and Outstanding Issues" in Wellenius and Stern, ibid.

"Paradigm Lost: Explaining the Canadian Politics of Deregulation" in C.E.S. Franks et al (eds.) Canada's Century: Governance in a Maturing Society: Essays in Honour of John Meisel (Montreal: McGill-Queen's Press, 1995)

"Embracing the Future: Recent Canadian Telecommunications Decisions" in Lucien Rapp, (ed.) Telecommunications & Space Journal Vol. 2, 1995

"Comment on Steven Globerman, "The Economics of the Information Superhighway" in Courchene (ed.) Technology, Information and Public Policy (Kingston ON: John Deutsch Institute for the Study of Economic Policy, 1995)

"Old Whine in New Bottle: The Politics of Cross-Subsidies in Canadian Telecommunications" in Steven Globerman, W.T. Stanbury and Thomas A. Wilson (eds) The Future of Telecommunications Policy in Canada (Toronto: Institute for Policy Analysis, 1995)

"From the Old Economics to the New Economics in Telecommunications" in W.T. Stanbury (ed.) The New Economics of Telecommunications (Montreal: IRPP, 1996)

"Telecommunications Policy" (Co-author Mark Brawley) in G.B.Doern, Leslie Pal and Brian Tomlin (eds.) The Internationalization of Canadian Domestic Policy (Toronto: Oxford University Press, 1996)

"Canadian Content and the Information Highway" Policy Options October 1996

"Independence and the Regulatory Arrangement Issues in Institutional Design" in Telecommunications Reform in Germany (American Institute for Contemporary German Studies, The Johns Hopkins University, 1997)

"No Longer "Governments in Miniature":Canadian Sectoral Regulatory Institutions (co-author G.B.Doern) in Doern and Wilks (eds.)Changing Regulatory Institutions in Britain and North America (Toronto: University of Toronto Press 1998)

"Universal Service/Universal Subsidies: The Tangled Web" in David Conklin (ed) Adapting to New Realities: Canadian Telecom Policy Conference (London: Richard Ivey School of Business, University of Western Ontario, 1999)

"Governing in a Gale: Overview of Regulatory and Policy Setting for Canadian Telecommunications" in Orr and Wilson (eds.) The Electronic Village: Policy Issues of the Information Economy (Toronto: C.D.Howe Institute, 1999)

"Winning and Losing: The Consumers Association of Canada and the Telecommunications Regulatory System 1973-1993" in Doern et al. (eds.) Changing the Rules: Canadian Regulatory Regimes and Institutions (Toronto: University of Toronto Press, 1999)

"Still Standing: The CRTC 1976-1996" in Doern et al (eds.) Changing the Rules: Canadian Regulatory Regimes and Institutions (Toronto: University of Toronto Press 1999)

"Canadian Regulatory Institutions: Converging and Colliding Regimes" (co-author) in Doern et al (eds.) Changing the Rules: Canadian Regulatory Regimes and Institutions (Toronto: University of Toronto Press 1999)

"Conclusions" (co-author) in Doern et al (eds.) Changing the Rules: Canadian Regulatory Regimes and Institutions (Toronto: University of Toronto Press 1999)

"Telecommunications Deregulation" (with Andrew Rich) in L.A. Pal and R.K. Weaver (eds.) The Government Taketh Away: the Politics of Pain in the United States and Canada (Washington,

D.C.: Georgetown University Press, 2003) ®

"From Master to Partner to Bit Player: The Diminishing Capacity of Government Policy" D. Taras, et al.(eds.) How Canadians Communicate (Calgary: University of Calgary Press, 2003)®

"Dancing Around the Digital Divide: The Broadband Access Debate@ in G. Bruce Doern (ed.) How Ottawa Spends, 2003-2004 (Toronto: Oxford University Press, 2003)®

"Canadian Communications and Globalization: Just another word..." in David Taras et al. (eds.) How Canadians Communicate Vol.2 (Calgary: University of Calgary Press 2007)

"Evil Empires? Nonsense- A Case for Eliminating Restrictions on Foreign Ownership of Canadian Media Properties" in Josh Greenberg and Charlene D. Elliott (eds.) *Communication In Question: Competing Perspectives on Controversial issues in Communications Studies* (Thomson Nelson, Toronto 2008)

"Telecommunications: What a Difference a Minister can Make" in Alan Maslove (ed.) How Ottawa Spends 2008-2009 (Montreal: McGill-Queen's University Press, 2008) ®

D) Papers and Lectures

"The Development of Regulation in Canada", McGill University Centre for the Study of Regulated Industries, Working Paper 1978-11.

"The Politics of Regulation and the Politics of Competition", Notes for a Panel on Competition, Annual Meeting of the Canadian Telecommunications Carriers Association, St. Andrews-By-The-Sea, New Brunswick, June 1979.

"Planning for the 80's: The Regulatory Environment", Montreal Society of Economists and the North American Society for Corporate Planning, Montreal, March 1980. Published as "Regulations, Regulations, Regulations", Executive (October 1980).

"Competition as a Trojan Horse". Paper presented to Project GAMMA, Seminar Series on Canadian Telecommunications Policy, 1976-1981, Toronto, June 23, 1981.

"Telecommunications: A Chosen Instrument", in The Innsbrook Papers (edited proceedings of a Northern Telecom Senior Management Conference on Issues and Perspectives for the 1980's, October, 1981).

"Foreign Investment Regulation and Canadian-American Relations". Paper presented to Canadian-American Seminar, North American Studies, Harvard University, November 1981.

"Regulatory and Policy Trends in Canada and the United

States". Canadian Industrial Communications Assembly, Annual Convention, Vancouver, September 22, 1982.

"Regulatory Reform and Telecommunications". Conference on Regulatory Reform: Canada and the United States, Columbia University School of International and Public Affairs, New York, April 1983.

"Re-regulation: Canada's Gift to the United States?" Roundtable on Comparative Regulation of Business, American Society for Public Administration, Annual Conference, New York, April 1983.

"Telecommunications: Under Siege or Already Prisoners?" Canadian Industrial Communications Assembly, Annual Convention, Toronto, September 13, 1983.Published in Communications News (November 1983).

"Canadian Telecommunications Policy", Program on Telecommunications Policy, George Washington University, Washington, February 1985.

"Canadian-American Telecommunications Issues" International Communications Issues Seminar, United States Information Agency, Washington, July 1985.

"Telecommunications Regulation in Canada: Halfway Up the

Stairs - Or is it Down?" Keynote Address to Conference, The Regulation of Deregulation, Toronto, February 1986.

"Getting Ready for the Information Age". Annual meeting of Canadian Business Equipment Manufacturers Association, Toronto, May 1986.

"The Case for Meaningful Two-Tier Regulation in Canadian Telecommunications". Annual Meeting of Canadian Business Telecommunications Alliance, Montreal, September 1987.

"A Canadian Perspective on the Free Trade Agreement", Presentation to Working Group, "Trade and Telecommunications Services Project", Center for Strategic and International Studies, Washington, DC, May 1989.

"A Clash of Regimes: A Canadian Perspective on the GATT-Uruguay Round", Presented to McGill-University of Vermont Third Telecommunications Policy Seminar "Emerging International Telecommunications Regimes: Their North American Impact", Montreal, October 15-17, 1989.

"Time to Look at Two-Tier Regulation?" Presentation for Panel "An Information Infrastructure at the Crossroads" at Canadian Institute Conference "Canadian Telecommunications

into the 1990s and Beyond", Toronto, October 19-20, 1989.

"Beware the New Monopolists", Presentation to Insight Conference "Canadian Telecommunications Regulation and Competition", Toronto, October 23, 1989.

"The Business, Political and Regulatory Outlook for the 90's", Presentation to Northern Telecom Seminar, "Winning the Competitive 90's: Serving Users' Applications through the Network", St. Andrew's By-The-Sea, New Brunswick, June 1990.

"Shrinking or Recasting the State? Implications of Privatization and Deregulation for Public Administration", Keynote Opening Address to Annual Conference of the International Association of Schools and Institutes of Administration, University of Bath, September 1990.

"International Telecommunications Deregulation: Myth Today - Reality Tomorrow", Paper presented to InterComm 90- Global Telecommunications Congress, Vancouver, October 1990.

"The Power of Choice in Telecommunications", Presentation to Canadian Payments Association, Annual Conference, May 1991.

"Regulation, Deregulation and Competition: What are the Alternatives?" Presentation to Telecommunications Executive Management Institute of Canada, Senior Management Program, Vancouver, May 1991.

"Privatization, Regulation, Competition: Canada: An Archetypical Case Study", Presentation to Telecommunications Senior Management Program, Telecommunications Executive Management Institute of Canada, Toronto, February 1992.

"The 'New' Canadian Telecommunications Legislation", Paper prepared for Canadian Institute Conference, "Canadian Telecommunications: From Strategy to Structure to Competitive Advantage", Toronto, April 1992.

"Forward to the Past - The Sequel: The New Canadian Telecommunications Legislation", Paper presented to Center for International Affairs and Program on Information Resources Policy, Harvard University, November, 1992.

"The Naive meet the Disingenuous: American Debates over Industrial Policy", Paper for Annual Meeting, American Political Science Association, Washington, September, 1993.

"Regulatory Implications of the General Agreement on Trade in Services on Telecommunications" Commonwealth Telecommunications Organization Seminar "Regulatory Frameworks: The Lessons of Experience for Developing

Countries" Kuala Lumpur, Malaysia, May 16-20, 1995.

"Confronting the Technological Revolution in Communications: Canada and the Ninety Percent Solution" Paper prepared for Annual Meeting of the American Political Science Association, Chicago, September 1995

"Regulatory Design: Issues and Options" Paper for South Africa Telecommunications Regulatory Authority Training Program Organized by Consulting and Audit Canada and the Canadian Radio-television and Telecommunications Commission Montreal October 22, 1996

"(Re)Inventing Regulatory Institutions: Problems and Prospects for Institutional Design", Paper presented to Indian Institute of Management Workshop on Telecommunications Policy Research, Ahmadabad, India, February 28-March 1, 1997

"A New Telecom Act: Are You Crazy?" Luncheon Address to Angus Telemanagement Group Conference "Reinventing Canadian Telecom", Toronto April 29-30, 1997

"The Canadian Experience" Presentation to American Institute for Contemporary German Studies Workshop "Telecommunications and Competition in the European Union: Is the North American or British Experience a Guide?" Berlin,

May 16, 1997

"United States Telephone Pricing and Universal Service: Recent Developments and Implications for Canadian Telecom Policy" Paper for Office of Consumer Affairs, Industry Canada Workshop "Consumer Telecommunications Issues in the 1990s and Beyond" Ottawa May 21, 1997

"Regulation and Deregulation in North America" Paper Presented to Conference "Competition Policy in the Transition Process", Organized by University of Erlangen-Nürnberg, Budapest Oct. 9-11, 1998.

"Limited Jurisdictions- Maximum Pain: The Radical Restructuring of Telecommunications"
(With Andrew Rich) Paper presented at Conference of the Association for Canadian Studies in the United States, Pittsburgh, Nov. 18, 1999.

"Breaking the Mould of Telecommunications Regulation in Canada: If not Now, When? If not the CRTC, Who?", Keynote Opening Paper for Conference: "Breaking the Mould: Re-conceiving Telecommunications Regulation", Faculty of Law, University of Toronto and Fasken Martineau, Walker, Toronto Feb. 17, 2000.

"Overview of Issues in Canadian Telecommunications", Concluding Panel for Canadian Telecommunications Policy Forum, Ivey School of Business, University of Western Ontario, Ottawa, April 19-20, 2000.

"Telecommunications- Insignificant or Linchpin to Successful Negotiations?" Paper presented to Conference "Services in NAFTA: A Decade Later", Organized by Michigan State University College of Law, University of Ottawa and Universidad Panamericana, Guadalajara, Mexico, Nov. 2004

"Measuring Media Diversity: Problems and Prospects" Research Paper for Shorenstein Center on the Press, Politics and Public Policy, Kennedy School of Government, Harvard University, May 2005.

"Media Mergers and Regulatory Rivals: Who Should Decide?" Paper for Canadian Communications Association Annual Meeting, Toronto, York University June 3, 2006.

"Comments on Papers for Panel Four: Taxation, Regulation and Instrument Choice" at "Policy: From Ideas to Implementation- A Conference in Honour of Professor G. Bruce Doern, National Arts Centre, Ottawa, Nov. 7, 2008.

"The End is Nigh: Technology and Regime Change in

Canadian Broadcasting Policy" Paper prepared for Max Bell Roundtable, Innovation and Implementation in Public Policy, McGill University March 26, 2009.

E. Consulting:

Royal Commission on Corporate Concentration (Bryce Commission)

Royal Commission on Financial Management and Accountability (Lambert Commission)

Economic Council of Canada, Regulation Reference

Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission)

Royal Commission on National Passenger Transportation (Hyndman Commission)

Individual consulting assignments with agencies and departments of the Governments of Manitoba, Ontario, Quebec and Saskatchewan, the Privy Council Office, Department of Justice, Department of Consumer and Corporate Affairs, Industry Canada, Office of Privatization and Regulatory Affairs, Atomic Energy Control Board, Canadian Radio-television and Telecommunications Commission, Senate of Canada, House of Commons Standing committee on Canadian Heritage, and with

private corporations.

F. Other

Member, Executive Committee, York University Transport Centre, 1974-75.

Rapporteur, Law Society of Upper Canada, Continuing Education Seminar, "The Conduct of Hearings by Federal Administrative Agencies" Ottawa, June 1976.

Member, Advisory Panel on Administrative Law, Canadian Centre for Justice Statistics, Statistics Canada, 1982-83.

Member, Organizing Committee, Eleventh Annual Telecommunications Policy Research Conference, 1982-83.

Member, Advisory Council, Institute of Intergovernmental Relations, Queen's University, 1982-1994

Associate Editor, Canadian Public Policy, 1980-1984.

Fellow, Council on Economic Regulation, Washington, 1985-90

Chairman, Organizing Committee for Annual Regulatory Studies Training Programme, sponsored by Canadian Association of Members of Public Utility Tribunals and CSRI, 1986-89

Member, Sectoral Advisory Group on International Trade to Minister for International Trade, Department of External Affairs, Ottawa, 1986-91

Organizer/Teacher, Training Program "Essentials of Telecommunications Regulation in a Changing Environment" Ghana Post and Telecommunications Corporation, Accra, July 1992 and Seychelles, June 1993 (Sponsored by Commonwealth Telecommunications Office)

Technical Coordinator, Commonwealth Telecommunications Office Conference "Regulatory Frameworks: Lessons of Experience for Developing Countries" Kuala Lumpur Malaysia. May 16-20, 1995

Associate Member, UNESCO-Bell Chair in Communications and International Development, University of Quebec at Montreal, May 1997-2000

Chair, Program Committee, International Telecommunications Society, Biennial Conference, Montreal June 2008.

Appendix 10 - Similarities and differences between the *Competition Act*, the *Competition Tribunal Act*, and the *Telecommunications Act*

Topic	***Competition Act* ("CA") and *Competition Tribunal Act* ("CTA") provisions**	***Telecommunications Act* provisions**
General powers of tribunal	**CTA 8(2):** The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.	**55.** The Commission has the powers of a superior court with respect to (a) the attendance and examination of witnesses; (b) the production and examination of any document, information or thing; (c) the enforcement of its decisions; (d) the entry on and inspection of property; and (e) the doing of anything else necessary for the exercise of its powers and the performance of its duties.
Effect of tribunal order	N/A	**63.** (1) A decision of the Commission may be made an order of the Federal Court or of a superior court of a province and may be enforced in the same manner as an order of that court as if it had been an order of that court on the date of the decision.
Administrative monetary penalties	**CA 78(3.1)** (*re: abuse of dominance*): If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an	**72.001** *(general administrative monetary penalty)* Every contravention of a provision of this Act, other than section 17 or 69.2, and every contravention of a regulation or decision made by the Commission under this Act, other than a prohibition or a requirement of the Commission made under section 41, constitutes a violation and the person who commits the violation is liable

Topic	***Competition Act* ("CA") and *Competition Tribunal Act* ("CTA") provisions**	***Telecommunications Act* provisions**
	amount not exceeding $15,000,000. **CA 74.1** *(re: deceptive marketing practices)* (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person ... (c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding (i) in the case of an individual, $750,000 and, for each subsequent order, $1,000,000, or (ii) in the case of a corporation, $10,000,000 and, for each subsequent order, $15,000,000 **CA 123.1** (*re: completion of notifiable transaction prior to expiry of waiting period)* (1) If, on application by the Commissioner, the court determines that a person, without good and sufficient cause, the proof of which lies on the person, has completed or is likely to complete a proposed transaction before the end of the applicable period referred to in section 123, the court may […]	(a) in the case of an individual, to an administrative monetary penalty not exceeding $25,000 and, for a subsequent contravention, a penalty not exceeding $50,000; or (b) in any other case, to an administrative monetary penalty not exceeding $10,000,000 and, for a subsequent contravention, a penalty not exceeding $15,000,000. **72.01** *(re: unsolicited telecommunications)* Every contravention of a prohibition or requirement of the Commission under section 41 and every contravention of any provision of Division 1.1 of Part 16.1 of the *Canada Elections Act* constitutes a violation and the person who commits the violation is liable (a) in the case of an individual, to an administrative monetary penalty of up to $1,500; or (b) in the case of a corporation, to an administrative monetary penalty of up to $15,000.

Topic	***Competition Act* ("CA") and *Competition Tribunal Act* ("CTA") provisions**	***Telecommunications Act* provisions**
	(d) in the case of a completed transaction, order the person to pay, in any manner that the court specifies, an administrative monetary penalty in an amount not exceeding $10,000 for each day on which they have failed to comply with section 123, determined by the court after taking into account any evidence of the following:	
Warrantless inspection	N/A	**71 (4)** An inspector may, subject to subsection (5), for the purposes for which the inspector was designated an inspector, (a) enter, at any reasonable time, any place in which they believe on reasonable grounds there is any document, information or thing relevant to the purpose of verifying compliance or preventing non-compliance with this Act, any special Act, or Division 1.1 of Part 16.1 of the Canada Elections Act, and examine the document, information or thing or remove it for examination or reproduction; (b) make use of, or cause to be made use of, any computer system at the place to examine any data contained in or available to the system; (c) reproduce any document, or cause it to be reproduced, from the data in the form of a print-out or other intelligible

Topic	***Competition Act* ("CA") and *Competition Tribunal Act* ("CTA") provisions**	***Telecommunications Act* provisions**
		output and take the print-out or other output for examination or copying; and (d) use any copying equipment or means of communication in the place. (5) An inspector may not enter a dwelling-house without the consent of the occupant or under the authority of a warrant.
Privative clause	N/A	**52(1)** The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.
Right of appeal	**CTA 13 (1)**: Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court. (2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.	**64 (1)** An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.