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21 April 2021

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

Dear Mr. Doucet,

Re: Part 1 application asking the CRTC to stabilize the funding of the Broadcasting Participation Fund

Please find attached an application made under Part 1 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* by the Public Interest Advocacy Centre and the Forum for Research and Policy in Communications (FRPC) asking the CRTC to stabilize the finances of the Broadcasting Participation Fund until such time as Parliament amends the 1991 *Broadcasting Act* to provide for the award of costs for public-interest participation.

Sincerely yours,

A handwritten signature in blue ink, appearing to be 'John Lawford'.

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BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

IN THE MATTER OF AN APPLICATION BY

THE PUBLIC INTEREST ADVOCACY CENTRE and

THE FORUM FOR RESEARCH AND POLICY IN COMMUNICATIONS

(APPLICANTS)

REGARDING THE FINANCIAL STABILIZATION OF

THE BROADCASTING PARTICIPATION FUND

PURSUANT TO SECTION 5

of THE *BROADCASTING ACT*

and

PART 1 and SECTION 3 of the *CRTC RULES OF PRACTICE AND PROCEDURE*

DIRECTED TO

Sirius XM Canada Inc.

and

Broadcasting Participation Fund (BPF), Inc./Le fonds de participation à la radiodiffusion (FPR), inc.

21 April 2021

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I. Nature of this Part 1 application

- 1 This is an application by the Public Interest Advocacy Centre (PIAC) and the Forum for Research and Policy in Communications (FRPC) under subsections 5(1) and (3) of the *Broadcasting Act* and Part 1, section 3 of the *Canadian Radio-television and Telecommunications Rules of Practice and Procedure* asking the CRTC to initiate a public proceeding with the purpose of stabilizing the funding of the Broadcasting Participation Fund (BPF), Inc./Le fonds de participation à la radiodiffusion (FPR), inc. – or BPF – an organization established with the support of the CRTC ten years ago.
- 2 PIAC is a national non-profit organization and registered charity that provides legal and research services on behalf of consumer interests and, in particular, vulnerable consumer interests, concerning the provision of important public services. FRPC is a non-profit and non-soliciting organization that provides legal and research services on behalf of the public with a special focus on Parliament’s broadcasting and telecommunications policies for Canada. PIAC and FRPC are public interest stakeholders in the BPF.
- 3 The concept of the BPF was approved by the CRTC in early 2011 as a means of facilitating the participation of consumer and public interest groups across Canada in CRTC broadcasting proceedings. The intent was to provide, as much as possible, a public interest funding mechanism that paralleled the Commission’s jurisdiction in telecommunications matters to award public interest intervenors costs of their participation in proceedings and related matters.
- 4 The intent was to provide, as much as possible, a public-interest funding mechanism like that established by the CRTC in telecommunications matters to award public-interest participants costs of their participation in proceedings and related matters.
- 5 Decisions about costs applications are made by the BPF’s Board of Directors, consisting of a Broadcasting Industry Director, a Consumer/Public Interest Director and a Jointly Approved Director. The BPF retains Welch LLP in the role of Costs Officer to the BPF¹ and a third-party accounting firm to audit its financial accounts.
- 6 Consumer and public-interest groups that intervene or make submissions to the CRTC may apply to the BPF for the representation, research and advocacy costs of their participation. The BPF’s Board of Directors may grant or deny such applications in whole or in part.

¹ BPF, *Organizational Structure of the BPF*, <http://www.bpf-fpr.ca/en/bpfstructure.html>.

- 7 The BPF's operations over the past nine years have been funded by \$6.6 million in tangible benefits payments required by the CRTC following its approval of three ownership transactions (one in 2011, one in 2013 and one in 2018).
- 8 In the seven years from 2013 to 2020 the BPF received 221 applications seeking costs of just over \$5 million. By the end of 2020 the Board had reviewed the applications, approving some or all of the amounts in 200 applications.
- 9 By March 31, 2021 \$1 million remained in the BPF for claims to be made in 2021.
- 10 The BPF's recently issued *Annual Report* for 2020 warns that it is at risk of running out of funds within the next year and a half.
- 11 This year and 2022, moreover, are likely to involve a number of important broadcasting proceedings. The CRTC concluded a long and complex proceeding to consider CBC's licensing applications in March 2021. Its proceeding to review its commercial radio policy – including its postponed review of its policy for French-language vocal music – is due to end at the end of April 2021. Along with a proceeding on new regulations for accessibility, the Commission has also announced its intention of rewriting its policy for Indigenous broadcasting. The television programming licences of Canada's largest ownership groups end in August 2022.
- 12 If the BPF lacks funding and therefore ceases operations, consumer and public-interest organizations will no longer have the resources to pay for representation, legal advice, research and advocacy on behalf of consumers and the public interest before the CRTC. The CRTC will lose this well-organized and efficient consumer perspective and return to the days of well-funded commercial interests facing off against individual, uncoordinated members of the public, which originally drove the need for the BPF.
- 13 PIAC and the Forum are therefore urgently requesting that the Commission take steps to stabilize the BPF's funding. We set out three possible avenues that could be pursued together: requiring Sirius XM Canada to make its outstanding payments to the BPF forthwith; initiating a public proceeding to revise the CRTC's regulations for radio and distribution programming services, and amending its tangible benefits policy to include ownership transactions involving profitable undertakings to provide the BPF with stable annual financial support to the end of 2023 (if Bill C-10 is enacted and allowing for time for the Commission to run a proceeding to design the public interest cost rules and issue a decision) or beyond 2023 (if new broadcasting legislation is not enacted).

II. Facts

A. 2011 proposal for and CRTC's 2012 approval of the BPF

- 14 In early 2011 PIAC intervened in the CRTC proceeding considering Bell's application to acquire control of CTV to ask that a portion of the transaction's tangible benefits for the

broadcasting system be allocated to the establishment of a ‘Canadian Broadcasting Participation Fund’ (CBPF).²

- 15 PIAC noted that its proposal would parallel the costs-award process established in CRTC telecommunications proceedings.³
- 16 When it approved Bell’s application in March 2011 the CRTC also approved the CBPF proposal, requiring Bell to file a proposal for the CBPF within a few months of the CRTC’s decision.⁴
- 17 Bell and PIAC filed a joint proposal for Broadcasting Participation Fund (BPF) in May 2011.⁵
- 18 The CRTC called for public comment on the proposal in August 2011⁶ and approved the proposal for establishing and operating the BPF on 26 March 2012.⁷
- 19 The BPF was incorporated under the *Canada Not-for-profit Corporations Act* on 6 September 2012.⁸ Its Articles of Incorporation stipulated that it would “[s]upport research, analysis and advocacy in the official language of the applicant’s choice in CRTC broadcasting proceedings under the Broadcasting Act (Canada)”.⁹
- 20 The BPF first accepted costs awards applications in April 2013 for costs incurred on or after 26 March 2012.¹⁰

B. Payments to the BPF by two broadcasters (Bell and Sirius XM Canada)

- 21 To date the BPF’s operations in the past decade have been funded by tangible benefits paid by two broadcasters seeking the CRTC’s approval of three changes in ownership of

² Transcript, ([Gatineau, 2 February 2012](#)) at paragraphs 2172-2201 (see Appendix 1).

³ *Ibid.* PIAC pointed out at paragraph 2201 that

Both PIAC and the CRTC have been supporters of enabling public interest participation in broadcasting proceedings in the past, with the vehicle of choice being a model based on the cost award procedure under the Telecommunications Act. The need for such participation remains, but the model has yet to take root. This proposal provides an alternative to the model, in an effort to attain the objectives of levelling the regulatory playing field and providing a more comprehensive record for decision-makers.

CRTC, Transcript, ([Gatineau, 2 February 2011](#)).

⁴ *Change in effective control of CTVglobemedia Inc.’s licensed broadcasting subsidiaries*, [Broadcasting Decision CRTC 2011-163](#) (Ottawa, 7 March 2011), at paragraphs 46 and 48.

⁵ BPF, *Annual Report 2013*, “Chronology of Key Events”, at 1.

⁶ *Call for comments on the Canadian Broadcasting Participation Fund*, [Broadcasting Notice of Consultation CRTC 2011-524](#) (Ottawa, 24 August 2011).

⁷ *Broadcasting Participation Fund*, [Broadcasting Regulatory Policy CRTC 2012-181](#) (Ottawa, 26 March 2012).

⁸ BPF, *Organizational Structure of the BPF*, <http://www.bpf-fpr.ca/en/bpfstructure.html>.

⁹ BPF, *Annual Report 2016*, at page 1 of 5.

¹⁰ Welch LLP, *Broadcasting Participation Fund (BPF), Inc./le fonds de Participation à la Radiodiffusion (FPR), Inc.: Annual Report 2016*, (Ottawa, 1 March 2017), <http://www.bpf-fpr.ca/en/press/BPFAnnualReport2016.pdf>, Appendix 1, at note 1.

radio and television programming undertakings. The first of these, in 2011, involved Bell’s purchase of CTV; the second involved Bell’s purchase of Astral and the third involved a change in the ownership structure¹¹ of Sirius XM Canada. Sirius XM Canada is now the licensee of two national satellite subscription radio undertakings – Sirius Canada and XM Canada.¹²

22 . Altogether the CRTC has directed tangible benefits of \$6.6 million to the BPF:

Decision	Broadcaster	Purchase of	Tangible benefits	BPF (% of tangible benefits)
2011-163 ¹³	BCE	CTV	\$245 million	\$3,000,000.00 (1.2%)
2013-310 ¹⁴	BCE	Astral	\$247 million	\$2,000,000.00 (0.8%)
2018-91 ¹⁵	Sirius XM	Sirius FM	\$28.7 million	\$1,596,666.00 (5.6%)
Total	2 broadcasters	3 transactions	\$520.7 million	\$6,596,666.00 (1.3%)

23 The CRTC’s first decision approving tangible benefits for the BPF required a single payment that was made in 2012; its second and third decisions requiring tangible benefits required payments to be made over seven years:

¹¹ The CRTC noted that the transaction involved “a series of significant changes” in ownership structure ... the proposed transaction involves a series of significant changes to the ownership structure of Holdco:

- The proposed transaction would have the effect of taking Holdco private, meaning that there would no longer be a public float;
- one of the larger Canadian shareholders, the Canadian Broadcasting Corporation (CBC) (9.63%) is exiting the company;
- Sirius US would see its equity interest increase from 36.77% to 70%; and
- overall, the number of shareholders of Holdco would decrease from six to three.

19. Furthermore, the constitution of its Board and the mechanisms for nominating board members would also change. As per the current governance agreements, Holdco’s existing shareholders may nominate nine board members to the Board, of which three are independent. The right of shareholders to nominate board members is established on the basis of voting interest. Shareholders who own a 10% voting interest in Holdco can nominate two members to the Board.

Tangible benefits proposal by Sirius XM Canada Inc., [Broadcasting Decision CRTC 2018-91](#) (Ottawa, 16 March 2018), at paragraph 18, footnote omitted.

¹² CRTC, *Ownership Chart 214*, “[Sirius XM Subscription Satellite Radio](#)” at 1 and 3.

¹³ *Change in effective control of CTVglobemedia Inc.’s licensed broadcasting subsidiaries*, [Broadcasting Decision CRTC 2011-163](#) (Ottawa, 7 March 2011), at paragraphs 46 and 48.

¹⁴ *Tangible benefits proposal by Sirius XM Canada Inc.*, [Broadcasting Decision CRTC 2018-91](#) (Ottawa, 16 March 2018), at paragraph 38:

**In light of all of the above, the Commission:
approves Sirius XM’s proposal to contribute \$1 million to the BPF paid in two equal installments of \$500,000 in year 1 and 2;**

denies Sirius XM’s proposal to allocate \$3.79 million to the Proposed Fund;
directs Sirius XM to contribute \$1,596,667 to FACTOR and \$1,596,667 to MUSICACTION, expended in equal amounts over seven consecutive broadcast years **and to contribute an additional \$596,666 to the BPF expended in equal amounts over five consecutive broadcast years starting in year 3.**

[bold font added]

¹⁵ *Astral broadcasting undertakings – Change of effective control*, [Broadcasting Decision CRTC 2013-310](#) (Ottawa, 27 June 2013), at Appendix 3.

Decision	2011-163[1]	2013-310[2]	2018-91[3]
Broadcaster	BCE	BCE	Sirius XM
Purchase of	CTV	Astral	Sirius FM
Tangible benefits	\$245 million	\$247 million	\$28.7 million
BPF (% of tangible benefits)	\$3.0 million	\$2.0 million	\$1.6 million
% of tangible benefits	1.2%	0.8%	5.6%
Scheduled payments			
Year 1	2013: \$3,000,000.00	2014: \$285,714.29	2018: \$500,000.00
Year 2		2015: \$285,714.29	2019: \$500,000.00
Year 3		2016: \$285,714.29	2020: \$119,333.20
Year 4		2017: \$285,714.29	2021: \$119,333.20
Year 5		2018: \$285,714.29	2022: \$119,333.20
Year 6		2019: \$285,714.29	2023: \$119,333.20
Year 7		2020: \$285,714.29	2024: \$119,333.20
Total		\$3,000,000.00	\$2,000,000.00

24 Bell's two sets of tangible benefits have been made in full and have ended.

25 Sirius has made its first three of seven payments in full, made its fourth payment in part (75%) and has not yet made the remaining three payments:¹⁶

Scheduled payment	Date payment made	Required amount	Sirius' payments
Year 1 (2018/19)	24 May 2018	\$500,000	\$500,000
Year 2 (2019/20)	21 May 2019	\$500,000	\$500,000
Year 3 (2020/21)	31 December 2019	\$119,333	\$119,333
Year 4 (2021/22)	30 December 2020	\$119,333	\$89,499
Year 5 (2022/23)	Payments not yet made	\$119,333	
Year 6 (2023/24)		\$119,333	
Year 7 (2024/25)		\$119,333	
Total		\$1,596,666.00	\$1,208,832

26 The BPF's 2020 *Annual Report* notes that Sirius XM Canada reduced its Year 4 payment by \$29,834 (from \$119,333 to \$89,499) because "[d]ue to COVID-19, CRTC allowed for delayed payments and, as a result, a reduced payment of \$89,500 was received in 2020."¹⁷

27 It is unknown when Sirius XM Canada will make up its 2020 payment shortfall of \$29,834 or whether it will make its remaining payments totalling \$357,999.

28 The CRTC has not required any other broadcasters to support the BPF, despite numerous calls by PIAC and other parties in other acquisition approval proceedings to

¹⁶ BPF, *Annual Report 2020, Notes to the Financial Statements*, at 9, Note 5.

¹⁷ *Ibid.*

direct ½ of 1% of tangible benefits to both of the BPF and the Broadcasting Accessibility Fund (BAF) (that is, 1% in total to the two funds). As a result, BPF's funding has been thin and unpredictable, leaving it vulnerable to disruptions such as non-payment by the parties to the few contributing transactions or to the relative paucity of deals requiring tangible benefits payments.

C. Impact of the BPF

29 Since 2013 the BPF has altogether considered more than 220 applications for costs and has granted 200 applications in whole or in part. It has denied 20 or more applications.

30 The existence of the BPF has enabled 18 consumer and public-interest organizations to participate in 38 CRTC proceedings by reimbursing their costs of participation (Appendix, Table 1).

31 The proceedings have included both policy and licensing matters (Appendix, Table 2).

D. March 2021 warning that BPF may be unable to perform in 2022

32 In early 2021 the BPF published a financial update for the fourth quarter of 2020¹⁸ and more recently for the first quarter of 2021.¹⁹

33 On March 18, 2021 the Board of Directors of the BPF warned that "by the end of 2022, the BPF would be unable to fulfill its mandate which would likely result in its probably termination."²⁰ Its *Annual Report 2020* noted that as its "existing funds are finite ... the Fund may lack sufficient funds to approve and pay costs awards in respect of costs awards applications received by the Fund."²¹

The BPF's most recent (unaudited) [Financial Update to December 31, 2020](#) shows that the Fund retained \$732,204 in cash after accounting for claims it had received but not yet approved by the end of 2020. While it anticipates receiving four deferred payments from Sirius in the amount of \$387,832, three of these payments will only be received in 2022 and beyond: Sirius XM Canada may remit just \$29,833 to the BPF in May 2021.²²

III. Grounds

34 PIAC and FRPC submit several grounds in support of this application.

35 **First**, the BPF provides the CRTC with a mechanism to support its impartiality by providing for informed participation in CRTC proceedings on behalf of consumers and the public, a tangible benefit for the broadcasting system as a whole. **Second**, public

¹⁸ BPF, [Financial Update to December 31, 2020](#).

¹⁹ BPF, [Financial Update to March 31, 2021](#).

²⁰ BPF, *Annual Report 2020*, "Report from the Board of Directors".

²¹ *Ibid.*, at 6 (Notes to the Financial Statements, note 1).

²² BPF, ["Financial Update to December 31, 2020"](#).

participation merits support in the same way that private broadcasters affected by the Covid-19 pandemic merited support through the return or rescission of the annual fees they pay by regulation. **Third**, the failure of the BPF to ensure adequate future funding is due not to its own actions but to the fact that interveners' requests that the BPF receive additional funding have not been granted. **Fourth**, the BPF's financial instability places public-interest and consumer participation at risk – either by denying applications due to a lack of funds or by discouraging such participation due to the risk that its costs will not be reimbursed. **Finally**, the CRTC has already scheduled several major broadcast proceedings for 2020; whether or not Bill C-10 – proposing to amend the 1991 *Broadcasting Act* – is enacted, the CRTC is likely to continue to seek public participation in licensing and policy proceedings for the foreseeable future.

A. The tangible benefit of informed participation by consumer and public-interest organizations

1. BPF ensures the CRTC's impartiality by enabling informed participation on behalf of consumers and the public interest

- 36 The 1991 *Broadcasting Act* declares that the CRTC's role is to regulate and supervise Canadian broadcasting to implement Parliament's broadcasting policy for Canada while having regard to Parliament's regulatory policy.

Broadcasting Act, section 5 (1)

Subject to this Act and the Radiocommunication Act and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

- 37 The challenge for the Commission is not just that Parliament's broadcasting and regulatory policies are complex, but that the *Broadcasting Act* does not expressly require the CRTC to serve the public interest or to give foremost consideration to the public interest in its determinations. There is only one exception: the CRTC must resolve conflicts between objectives of the national public broadcaster (the Canadian Broadcasting Corporation) and any other broadcasting undertaking in the public interest:

Broadcasting Act, section 3(1)(n)

[W]here any conflict arises between the objectives of the Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m)

- 38 Few of the CRTC's thousands of proceedings involve the CBC, however, and of these proceedings, an equally small number involve conflicts with other broadcasters.

- 39 The CRTC has in fact argued before the Federal Court of Appeal (FCA) that its role is to “balance competing interests among a variety of stakeholders”²³ and the FCA has agreed with this view. In 1999 it noted that Parliament’s broadcasting policy for Canada has “about forty sometimes conflicting objectives”, which lead “to a polycentric adjudication process, involving numerous participants with opposing interests...”.²⁴ In 2011 the same Court noted that the *Broadcasting Act* is “intended to ensure these competing interests” – of “the originators of television signals” and “the public”- “are properly balanced.”²⁵ In other words, the CRTC is not expected as a matter of law either to represent the public interest in its own deliberations or to grant the public interest any special weight when it makes decisions.
- 40 Without public participation, however, the CRTC’s proceedings would consist entirely of current and/or prospective applications and itself. The record of such proceedings would provide very little evidence from or argument on behalf of the public interest. The CRTC could not be expected to fill these gaps in evidence and argument because its enabling statutes and its status as a quasi-judicial decision-making tribunal require it impartiality.
- 41 In this context it is unsurprising that the CRTC has encouraged public participation in its proceedings since it was established. This is due in part to the 1991 *Broadcasting Act*: it specifically requires the CRTC to hold public hearings to issue or amend broadcasting licences, while granting the CRTC the discretion to hold public hearings to renew such licences.
- 42 The CRTC has also generally invited comments from the public about the policies and regulations it issues. In 2017 the CRTC’s Chairperson and CEO noted that the Commission’s procedures “ensure the broadest possible public participation”:²⁶ public participation provides the CRTC with evidence and arguments it might otherwise not receive from current or prospective licensees.
- 43 The complexity of policy and licensing issues in CRTC proceedings requires expertise, however. More than forty years ago the CRTC said that in telecommunications it had
- ... concluded that if the objective of informed participation in public hearings is to be met, some form of financial assistance must be available to responsible interveners, both active and potential, who do not have sufficient funds to

²³ *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, 2003 FCA 381 (CanLII), [2004] 2 FCR 3, at paragraph 21. The Court noted that “[t]he respondent Shaw concurs with this submission.” *Ibid.*

²⁴ *Société Radio-Canada v. Métromédia Cmr Montréal Inc.*, [1999 CanLII 8947 \(FCA\)](#), at paragraph 5.

²⁵ *Canadian Radio-television and Telecommunications Commission's Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168 (Re)*, [2011 FCA 64 \(CanLII\)](#), at paragraph 29.

²⁶ Ian Scott, [Speech](#), IIC Canada communications Law and Policy Conference, (Ottawa, 14 November 2017).

properly prosecute their cases, particularly where such interveners represent the interest of a substantial number or class of subscribers.²⁷

44 Three years later (1981) the Commission commented in the context of dismissing an appeal against an award of costs in a telecommunication proceeding that “the proper purpose” of costs “awards is the encouragement of informed public participation in Commission proceedings.”²⁸

45 Until 2011, however, only public-interest organizations making submissions in CRTC telecommunications proceedings were able to seek reimbursement of their costs. The absence of a funding mechanism for broadcasting proceedings placed consumer groups and public-interest organizations at a disadvantage, as the CRTC explained to the Broadcasting and Telecommunications Legislative Review Panel in 2019:

The CRTC makes its decisions based on the evidence presented on the public record of its proceedings. The communications companies that participate in CRTC proceedings generally have substantial internal resources and can afford to retain external consultants and lawyers, as well as to commission research to put forward their views and evidence in a proceeding. Consumer groups and public interest organizations are typically not-for-profit, volunteer-run organizations with limited monetary resources to develop similarly sophisticated submissions.²⁹

46 The existence of the BPF enables public-interest organizations to represent and advocate for the public interest in broadcasting matters.

2. *Funding of the BPF is a tangible benefit that advances the public interest*

47 The BPF’s operations in the past decade have been funded by only three payments made by just two broadcasters in accordance with the CRTC’s longstanding broadcasting policy that changes in broadcast ownership and/or control must benefit the broadcasting system through identifiable ‘intangible’ and/or ‘tangible’ benefits.

48 The CRTC has considered applications seeking its approval of changes in the ownership and/or control of broadcasting undertakings since it was established. In 1969 it said that its role was to ensure that such transactions benefitted Canadians.³⁰

²⁷ *CRTC Procedures and Practices in Telecommunications Regulation*, Telecom Decision CRTC 78-4 (Ottawa, 23 May 1978), Canadian Radio-television and Telecommunications Decisions and Policy Statements, 4 CRT, Part 1, Decisions, April 1, 1978 to March 31, 1979, at page 104.

²⁸ Telecommunications Decision CRTC 81-5 (Ottawa, 9 March 1981).

²⁹ CRTC, *CRTC Written Public Submission to the Legislative Review Panel*, [Cat. No.: BC92-102/2019E-PDF](#) (Ottawa, 2019) at 18.

³⁰ *On the Pricing of Broadcasting Undertakings*, CRTC Public Announcement (Ottawa, 10 July 1969): It is ... the policy of the Commission to scrutinize applications for transfer of assets of licences or for transfer of control of licensees in a manner comparable to the examination of applications for licences for new undertaking

- 49 In 1977 the CRTC stated that “in cases of transfers of ownership and control there must be significant and unequivocal benefits demonstrated to advance the public interest.”³¹ The onus for demonstrating such benefits lay with the broadcaster.³²
- 50 The CRTC’s requirements for benefits from broadcast ownership transactions have evolved over time. In 1993 it described this concept as a ‘benefits test’ in the context of changes in ownership or control:³³

...an applicant is expected to propose a specific package of significant and unequivocal benefits that will yield measurable improvements to the communities served by the broadcasting undertaking and to the Canadian broadcasting system. The Commission must be satisfied that the proposed benefits package is commensurate with the size and nature of the transaction and takes into account the responsibilities to be assumed, the characteristics and viability of the broadcasting undertakings in question and the scale of programming, management, financial and technical resources available to the purchaser.³⁴

- 51 In discussing the participation fund proposed by PIAC in 2011 the CRTC said that it “should facilitate the participation of public interest and consumer groups across Canada in both official languages.” It added that the “fund should be used to assist in the representation, research and advocacy of these interests.”³⁵
- 52 The BPF has, as intended, assisted in the representation, research and advocacy of the public interest. In 2016 the CRTC noted that
- [t]he participation of interest groups in Commission proceedings has been made easier since the establishment of the Broadcasting Participation Fund (BPF) in 2012. This Fund enables certain groups representing OLMCs to receive financial support to participate in Commission proceedings.³⁶
- 53 In 2018 the CRTC approved tangible benefits payable by Sirius for BPF, “given the relevance and importance of the BPF as a tool to promote the participation of Canadians in Commission radio proceedings”.³⁷

³¹ Decision CRTC 77-456 (Ottawa, 28 July 1977).

³² *Ibid.*

³³ *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, [Public Notice CRTC 1993-68](#) (Ottawa, 26 May 1993).

³⁴ *Ibid.*, “2. The Communication’s Determination with Respect to Application of the Benefits Test”.

³⁵ *Change in effective control of CTVglobemedia Inc.’s licensed broadcasting subsidiaries*, [Broadcasting Decision CRTC 2011-163](#) (Ottawa, 7 March 2011), at paragraph 48.

³⁶ CRTC, *Review of the Implementation of Section 41 of the Official Languages Act 2015-2016*, (2016) “Training offered to group members”.

³⁷ *Tangible benefits proposal by Sirius XM Canada Inc.*, [Broadcasting Decision CRTC 2018-91](#) (Ottawa, 16 March 2018), paragraph 38:

In light of all of the above, the Commission:

54 The BPF has enabled the participation of a variety of consumer and public-interest organizations in the CRTC's broadcast licensing and policy proceedings. It has, moreover, operated efficiently with a lean administrative structure that generally makes decisions about and issues payments for costs applications within two months of their submission to the BPF. As the Covid-19 pandemic grew, it responded promptly to requests that it amend its administrative procedures by forgoing the requirement for the notarization of documents and by remitting payments to applicants via electronic fund transfers, while continuing to review applications.

B. Support for private broadcasters affected by Covid-19

55 The Federal government has provided financial support to broadcasters which is described in the CRTC's *Departmental Plan 2021-2022*:

In response to the crisis resulting from the COVID-19 global pandemic, the Government of Canada provided financial relief to broadcasters. As a result, the CRTC's forecasted net expenditures increased significantly in 2020–21 in comparison to previous fiscal years. The measures put forward were two debt remissions in respect to fiscal year 2020–21. The first one targeted the remission of the Part I broadcasting licence fees for all broadcasters, which reduced the CRTC's revenues netted against expenditures. The second one resulted in the reimbursement of the Part II broadcasting licence fees to eligible local television and radio stations, which increased the CRTC's expenditures. The combined impact of these measures totals an increase of \$47.7 million in net expenditures, compared to 2019–20.³⁸

56 PIAC and FRPC respectfully submit that it would be inequitable to allow an organization that promotes the representation of the interests of consumers and the public to fail, while simultaneously helping to ensure broadcasters' financial wellbeing.

C. CRTC has denied five previous requests to stabilize the BPF

57 The CRTC has been asked on five other occasions to provide the BPF with more funding, but has not granted these requests.

58 Commission has unfortunately missed one chance to consider, and in other cases has denied, proposals by public interest intervenors to direct some portion of tangible benefits to the Broadcasting Participation Fund and the Broadcasting Accessibility Fund (BAF) through restrictive interpretations of the change of ownership and control or the

approves Sirius XM's proposal to contribute \$1 million to the BPF paid in two equal installments of \$500,000 in year 1 and 2;
denies Sirius XM's proposal to allocate \$3.79 million to the Proposed Fund;
directs Sirius XM to contribute \$1,596,667 to FACTOR and \$1,596,667 to MUSICACTION, expended in equal amounts over seven consecutive broadcast years and to contribute an additional \$596,666 to the BPF expended in equal amounts over five consecutive broadcast years starting in year 3.

³⁸ CRTC, [Departmental Plan 2021-2022](#), at 18.

tangible benefits policy despite repeated calls by intervenors to use these opportunities to fund the BPF.

- 59 For example, when Bell Media applied in 2017 to acquire control of Corus' Historia and Séries+ French-language discretionary³⁹ PIAC intervened to request that a small portion of tangible benefits (1%) be directed to the BPF (0.5%) and BAF (0.5%), noting that these were continuing funds with direct benefits to broadcasting consumers and warning of a real risk in funding shortfalls.⁴⁰
- 60 PIAC justified the reasonableness of this possible percentage to the BPF by noting that in the proceeding that created the BPF (Bell's acquisition of CTV), the CRTC had awarded 1.25% of the tangible benefits package to the BPF alone.⁴¹
- 61 Noting finally that the total amounts directed to the two Funds would be only just over \$2 million (\$1 million each), PIAC argued that these very small amounts (relative to the size of the transaction) would support much unsupported direct consumer advocacy and facilitate the presentation of a range of arguments and evidence before the Commission going forward.⁴²

³⁹ *Notice of application received*, [Broadcasting Notice of Consultation CRTC 2018-95](#) (Ottawa, 20 March 2018), Application 2017-1060-9:

Application by Bell Media Inc. (Bell), on behalf of Corus Entertainment Inc. (Corus), for authority to effect a change in the ownership and effective control of 8504644 Canada Inc. (8504644) and 8504652 Canada Inc. (8504652), the respective licensees of the French-language discretionary services Historia and Séries+.

⁴⁰ PIAC intervention, Application 2017-1060-9, at paragraph 59:

One element notably missing from BCE Inc.'s tangible benefits package was any contribution to the recently approved Broadcasting Participation Fund or the Broadcasting Accessibility Fund. Both of these funds are designed to help promote participation in and access to the broadcasting system, including the regulatory process. The Commission specifically stated in relation to both funds that the funds should be funded from tangible benefits packages going forward. As both funds are meant to be continuing funds, the prospect of eventual shortcomings in funding are real and therefore tangible benefits packages present a very real opportunity to ensure the future of these funds without undue hardship on the broadcasting industry.

⁴¹ *Ibid.*, at paragraph 60:

In the Bell-CTVglobemedia decision which led to the creation of both funds, the Commission required \$3M to be set aside for the Broadcasting Participation Fund. The total revised tangible benefits plan in that transaction was set at \$239.3 million. Therefore, just under 1.25% of the tangible benefits package was dedicated to broadcasting participation. PIAC submits that although the Commission may have intended some of the Bell-CTVglobemedia decision package to go to the start-up costs of the BPF, that it is nonetheless reasonable to require Bell to contribute 1% of total tangible benefits package in this transaction to the Broadcasting Participation Fund and the Broadcasting Accessibility Fund.

⁴² *Ibid.*, at paragraph 62:

PIAC submits that this revised contribution from Bell to the two funds would help to alleviate, somewhat, the troublesome lack of true public interest aspects in Bell's proposed tangible benefits plan. The BPF in particular supports advocacy and research on behalf of the public interest and consumer interest in broadcasting. The broad base of consumer interests in this field are underrepresented and the general public does not adequately fund, through donations, organizations such as PIAC and others to professionally represent their interests before the CRTC. In contrast, service providers such as Bell can simply raise prices on captive consumers and hire professionals (lawyers, experts, consultants) to conduct regulatory proceedings

62 The Commission was unable to rule on these arguments, however, as the Competition
Bureau signaled it would oppose the transaction and the application was abandoned.

1. *2012 – BCE/RCI’s acquisition of discretionary programming services*

63 After the CRTC approved the BPF’s formation it considered the change in ownership of
five discretionary programming services involving BCE and RCI.⁴³

64 PIAC intervened to propose that the BPF continue to receive a portion of tangible
benefits payments. The CRTC denied this proposal because it related to a broader policy
discussion that would require a policy review. It did not, however, then discuss,
propose or schedule such review.⁴⁴

2. *2013– Shaw’s’ acquisitions of Corus discretionary programming services*

65 In the various decisions around the acquisition of Historia and Series+ as well as the
TELETOON properties, and subsequent shuffling of half of these assets from Shaw to
Corus, the Commission elided the question of tangible benefits payments by refusing to
analyze not only the legal control arguments but also by using this tactic to avoid
considering PIAC and other intervenors’ consistent calls for funding to the BPF and BAF
out of tangible benefits payments.

66 In 2013⁴⁵ when Shaw and Corus initially acquired these programming services PIAC –
along with Consumers’ Association of Canada (CAC), Council of Senior Citizens’
Organizations of British Columbia (COSCO), National Pensioners and Senior Citizens
Federation (NPSCF) and Option consommateurs (OC) – argued that the entire
transaction should yield full tangible benefits and that 1% should be directed to the BPF:

109. Corus’s tangible benefits package does not include an allocation to the
Broadcasting Participation Fund, which is critical to allowing public interest
groups who promote consumer interests to participate in broadcasting
proceedings.

110. In transactions to date, since the creation of the BPF, applicants have
generally proposed, or been encouraged to propose, approximately 1% of the

⁴³ *Leafs TV, Gol TV, NBA TV Canada, Mainstream Sports and Live Music Channel – Change in effective control*, [Broadcasting Decision CRTC 2012-443](#) (Ottawa, 16 August 2012).

⁴⁴ *Ibid.*, at paragraph 62:

As noted above, PIAC submitted that all tangible benefits packages, including that for the present transaction, should include a contribution that is equal to 1% of the tangible benefits package and that would be directed to the CBPF. The Commission notes that the tangible benefits proposed by the applicants are consistent with current policy given that the Commission has accepted the establishment of self-administered funds in previous decisions of this nature; all the money will flow to third parties, specifically, independent producers; and the applicants will be required to file annual reports. The Commission further notes that PIAC’s submission relates to a broader discussion that would need to be dealt with through a policy review. Consequently, the Commission does not consider it appropriate to impose such a requirement in regard to the present transaction”

⁴⁵ *Notice of hearing*, [Broadcasting Notice of Consultation CRTC 2013-448](#) (Ottawa, 5 November 2013).

total tangible benefits package go to the Broadcasting Participation Fund. This amount is appropriate to encourage and support public input into the regulation of broadcasting and to ensure a consumer voice in proceedings such as this Notice of Consultation.

67 The CRTC not only agreed that Shaw-Corus' unique structure allowed the transaction to avoid half the tangible benefits otherwise payable, but dismissed the consumer groups' request for funding for the BPF without analysis. In fact, the consumer groups' proposal is not mentioned in the CRTC's decision.

3. *2016 – Corus' acquisition of Shaw's discretionary programming services*

68 In the 2016 follow-up proceeding to move broadcasting assets out of Shaw and into Corus the CRTC again allowed Shaw and Corus to rely on the fiction of not transferring assets while somehow being two separate entities, and also dismissed PIAC's entreaties to put 1% towards the BPF.⁴⁶ It did not acknowledge this request, implicitly denying it by permitting Shaw and Corus to avoid paying tangible benefits due to their "unique" ownership structure.⁴⁷

4. *2016 – BCE's acquisition of MTS*

69 When BCE applied to acquire MTS' BDU and other assets in 2016,⁴⁸ PIAC intervened. It argued that despite the CRTC's general policy of not requiring tangible benefits payments for BDU mergers, the Commission should make an exception given the nature of the transaction and given the concentration of the BDU market represented by the deal, the effect on consumers in Manitoba, the goals of the broadcasting system and the need of public interest groups to challenge mega-mergers in the broadcasting space. PIAC therefore requested 2% of the value of the transaction be allocated to the BPF and BAF each (4% of the transaction in total).

⁴⁶ *Notice of application received, [Broadcasting Notice of Consultation CRTC 2016-22](#), as amended (Ottawa, 21 January 2016) – Application 2016-0055-2 by Shaw Communications Inc. on behalf of Shaw Media Inc. and its licensed subsidiaries. Intervention of PIAC, at paragraph 27:*

PIAC believes that a transaction of this size and its impact on viewers and creators requires the proposal of a benefits package, regardless of whether the technical nature of the transaction triggers the Tangible Benefits Policy. Given the impact of this transaction on viewers, PIAC believes that public interest participation will only become more critical in the future, and that a percentage of the value of the transaction should be allocated to both the Broadcasting Participation Fund and Broadcasting Accessibility Fund.

⁴⁷ *Various television services and stations - Corporate reorganization (transfer of shares), [Broadcasting Decision CRTC 2016-110](#) (Ottawa, 23 March 2016), at paragraph 25:*

Consistent with the Tangible Benefits Policy, given that the proposed transaction will not change the effective control of the licensees or the undertakings, the Commission is not imposing tangible benefits. Moreover, the Commission sees no reason to make an exception to the Tangible Benefits Policy in this instance.

⁴⁸ *Notice of application received, [Broadcasting Notice of Consultation CRTC 2016-349](#) (Ottawa, 30 August 2016), Application 2016-0602-1:*

Application by MTS Inc. (MTS) for authority to effect a change in the ownership and effective control of the terrestrial broadcasting distribution undertaking (BDU) serving Winnipeg and surrounding areas, Manitoba, currently licensed to MTS, to Bell Canada (Bell), pursuant to section 4(4)(a) of the Broadcasting Distribution Regulations.

- 70 The Commission denied the application, stating that any concern about concentration of ownership in BDU services would be offset by the increased choice that it expected to flow from its *Let's Talk TV* policies:

The application before the Commission is solely for the change in control of the licensed BDU and does not raise concerns with applicable Commission policies and regulations. Accordingly, consistent with the Tangible Benefits Policy, this transaction does not trigger the payment of tangible benefits and the Commission is of the view that an exception requiring the payment of tangible benefits would be unwarranted for this transaction. Furthermore, the Commission considers that the flexibility and pricing concerns raised by CAC Manitoba and PIAC to justify imposing tangible benefits are mitigated by the regulatory measures intended to maximize choice for television viewers and foster a healthy and dynamic television market announced in Broadcasting Regulatory Policy 2015-96.⁴⁹

- 71 The Commission did not directly address PIAC's additional argument that:

... the BPF in particular faces serious financial pressures due to inadequate "refilling" to date and is at risk of disappearing despite its extreme usefulness to public interest participation in CRTC broadcasting proceedings.

5. *2020 – Bell's acquisition of V Interactions*

- 72 In May 2020 the CRTC acknowledged PIAC's request that the Bell be required to direct 1% of all tangible benefits in this transaction to the BPF (0.5%) and the Broadcasting Accessibility Fund (0.5%) – but did not require Bell to make this allocation, without explanation.⁵⁰

- 73 The result of these dismissals of and missed opportunities to meet the needs of the BPF and BAF is the present funding crisis for the BPF. It is, we submit, eminently reasonable to direct a small percentage (up to 1% for the BPF and BAF) of tangible benefits payments to the interests of the general public and Canadians with disabilities, while directing the greatest share of the tangible benefits to on-screen initiatives.

⁴⁹ See *Terrestrial broadcasting distribution undertaking serving Winnipeg and surrounding areas – Change of effective control*, [Broadcasting Decision CRTC 2016-487](#) (Ottawa, 20 December 2016), at paragraph 32.

⁵⁰ *V Interactions inc. – Change in ownership and effective control*, [Broadcasting Decision CRTC 2020-154](#) (Ottawa, 19 May 2020):

170. In addition, several interveners requested changes to the tangible benefits package. PIAC submitted that it would be reasonable to require Bell to direct 1% of all tangible benefits that are allocated to the Bell Fund (\$252,045) to the Broadcasting Participation Fund (0.5%) and the Broadcasting Accessibility Fund (0.5%). According to the intervener, the public interest would be better protected and served by this proposal.

...

177. Bell's proposal is consistent with the Tangible Benefits Policy. Specifically, the proposed tangible benefits package represents 10% of the value of the transaction, and the funds would be allocated between the CMF and the Bell Fund, paid over a seven-year period.

74 Absent the presence of such transactions in the current climate, and given the Commission's "missed opportunities" to direct a portion of previous tangible benefits transactions towards the funds, it falls, we submit, on the Commission to devise a new, interim plan to fund the BPF and BAF during the transition to the new costs regime promised by Bill C-10.

D. The BPF's financial instability places consumer and public-interest organizations' participation in CRTC proceedings at risk

75 The BPF lacks financial stability. The current financial challenge caused by Sirius XM Canada's decision to reduce payments to the BPF – and the possibility that it may continue to do so absent CRTC action – is the fourth such challenge since it began operating nine years ago.

76 In 2016 the BPF's Board of Directors "advised the CRTC and BPF Stakeholders that, based on current estimates the BPF will run out of cash around December 31, 2017, subject to receiving three annual payments of \$285,714.29 commencing in the spring or summer of 2018."⁵¹

77 In 2017 a "[c]aution note [was] posted to the BPF website alerting stakeholders that based on current estimates, a significant risk exists that the Fund will not be in a financial position to award costs in early 2018."⁵² The BPF's *Annual Report 2017* noted that

As of the release date of these financial statements, the working capital of the Fund is diminished to the point that it is likely that costs awards may need to be suspended within the coming year unless new sources of funding are approved by the CRTC or are obtained through other sources. There are no committed new sources of funding known to the Fund at this time. ...⁵³

78 In 2018 the BPF's *Annual Report* projected based on its historical disbursement rate that if no additional financial support was provided, "the Fund could be materially depleted by early 2018" with the result that "cost awards from the Fund could cease in whole or in part...."⁵⁴

79 Meanwhile, the BPF's (unaudited) [Financial Update to December 31, 2020](#) showed that the Fund retained \$732,204 in cash after accounting for claims it had received but not yet approved by the end of 2020. While it anticipates receiving four deferred payments

⁵¹ BPF, *Annual Report 2016*, Appendix III, "Chronology of Key Events".

⁵² BPF, *Annual Report 2017*, Appendix III, "Chronology of Key Events".

⁵³ *Notes to the Financial Statements*, note 3 ("Liquidity Risk"), at page 6 of 9.

⁵⁴ Welch LLP, *Broadcasting Participation Fund (BPF), Inc./le fonds de Participation à la Radiodiffusion (FPR), Inc.: Annual Report 2017*, (Ottawa, 1 March 2018), <http://www.bpf-fpr.ca/en/press/BPFAnnualReport2017.pdf>, at Section 6.0

from Sirius in the amount of \$387,832, three of these payments will only be received in 2022 and beyond: Sirius XM Canada may remit just \$29,833 to the BPF in May 2021.⁵⁵

80 In March 2021 the BPF warned that “... the Fund may lack sufficient funds to approve and pay costs awards in respect of costs awards applications received by the Fund.”⁵⁶ It added that it “will not incur any liabilities, including the approval of costs awards, beyond the availability of its working capital.”⁵⁷

81 The BPF’s financial instability arises because it has had to rely solely on two broadcasters’ annual payments, and the only broadcaster now required to make payments to the BPF decided to reduce its 2020 payment. While the CRTC ‘directed’ Sirius XM Canada to make payments to the BPF, the Commission did not impose this direction in a condition of licence.

82 The absence of conditions of licence mandating the BPF payments and the CRTC’s apparent approval of Sirius’ reduction of its 2020 BPF payment raise the real and very troubling possibility that without any other CRTC intervention Sirius XM Canada may simply choose to stop making payments to the BPF.

83 Even if the payments are made, moreover, it is unclear whether they will suffice to maintain the BPF’s purpose past December 2021. As noted previously, a major licensing proceeding concluded in March 2021. A two-phase proceeding for commercial radio, the Indigenous broadcasting review, the accessibility proceeding and other CRTC proceedings that may touch on the public interest throughout this year would also normally engage public-interest organizations’ involvement.

E. Despite Bill C-10 CRTC proceedings likely to continue in 2021 and through to 2023

84 The November 2020 introduction in the House of Commons of Bill C-10 highlighted the Federal government’s commitment to ensuring the availability of resources for public-interest organizations to provide the CRTC with arguments and evidence regarding regulatory matters in broadcasting. (Bill C-10 proposes to give the CRTC the authority to make regulations about the expenditures made by broadcasters to support participation in CRTC proceedings by individuals, groups or organizations representing the public interest.⁵⁸)

85 Bill C-10 has passed second reading in the House of Commons and is currently being studied by the House of Commons Standing Committee on Canadian Heritage. Once the

⁵⁵ BPF, “[Financial Update to December 31, 2020](#)”.

⁵⁶ BPF, *Annual Report 2020*, at 6 (Notes to the Financial Statements, note 1).

⁵⁷ *Ibid.*, at 7 (Notes to the Financial Statements, note 3).

⁵⁸ Bill C-10, s. 10.

Committee reports to the House it may be adopted in third reading and sent to the Senate.

- 86 The Senate would then presumably direct the proposed legislation to the Senate Standing Committee on Transport and Communications for study, following which the Senate would or would not pass the bill as is or amended. If passed, Royal Assent would be obtained and the legislation would enter into force on the date it names. Or it may die on the Order Paper if an election is called, which is a distinct possibility.
- 87 If the government's proposed legislation is nonetheless passed, and the public interest costs-award provision is retained (also not assured) the CRTC would presumably then wish to consider how to implement new regulations for a broadcasting costs process and may initiate a public proceeding to do so, or include the issue in other proceedings needed before implementing a new *Broadcasting Act's* requirements.
- 88 Simply put, the BPF remains necessary until a new broadcast costs regulation is in place.
- 89 Meanwhile the Fund is likely to receive applications in 2021 and 2022 that are likely to be higher than in the past several years.
- 90 Four proceedings have ended or are likely to end in 2021, which may result in costs applications of \$450,000 or more:

Estimated costs for 2021	
CBC's licence applications (2019-379)	\$350,000
Accessibility regulations (2021-69)	\$15,000
Commercial Radio (and French-language Vocal Music) review (2020-374)	\$60,000
Indigenous Broadcast Policy	\$30,000
<hr/>	
Subtotal	\$455,000

- 91 Other licensing and policy proceedings are likely to arise. The Shaw-Rogers ownership transaction is expected to involve changes in control of broadcasting distribution undertakings which will require a CRTC proceeding. The television licences of large ownership groups expire in August 2022 and while the enactment of Bill C-10 in the next 12 months may lead the CRTC to renew the licences administratively to address the regulatory issues raised by the new legislation, Bill C-10 may also not be enacted at all (or as currently presented).
- 92 The Minister of Canadian Heritage has moreover indicated that apart from Bill C-10 (to amend the 1991 *Broadcasting Act*) he may introduce legislation to address news and online hate speech. If Parliament enacts Bill C-10 and related legislative proposals, the CRTC may in 2022 (and 2023) call for public comment on a number of different issues.

Amount remaining in BPF and applications for costs as of:	31 March 2021
Cash available in BPF for claims prior to May 2021	\$1,017,495
Claims received but not yet considered	\$158,156
Amount remaining in BPF if claims are granted	\$859,339
Estimated costs for 2021	
CBC's licence applications (2019-379)	\$250,000
Accessibility regulations (2021-69)	\$15,000
Commercial Radio (and French-language Vocal Music) review (2020-374)	\$60,000
Indigenous Broadcast Policy	\$30,000
Subtotal	\$355,000
Amount remaining in BPF if these estimated costs are granted	\$504,339
Estimated costs for 2021/22	
Shaw-Roger ownership transaction	\$75,000
Licence renewals of major private television groups ⁵⁹	\$100,000
	\$329,339

Proceedings to implement Bill C-10 if these are enacted by Parliament, including

- regulations for costs process
- registering online broadcasters
- regulatory approach to ensure equitable contributions to Canadian content
- policy for administrative monetary penalties in broadcasting

Proceedings to implement follow-up Bills, including

- social media and hate speech
- online news and information

93 Additional funding will be required for the BPF to continue to function in 2022.

IV. Proposal for CRTC action to provide stability, certainty and promote fairness

94 In this application PIAC and FRPC are urging that the Commission take reasonable steps to provide the BPF and the consumer and public-interest organizations it supports with financial stability and certainty in 2021 and 2021.

95 We suggest that the CRTC begin by asking Sirius XM Canada to provide information about its payments to the BPF and perhaps calling Sirius XM Canada to a public hearing if it does not confirm payment of the amounts required for 2020 and 2021.

⁵⁹ The CRTC renewed the licences of Canada's largest French-language and English-language legacy television broadcasters from September 2017 to August 2022 in *Quebecor Media Inc. – Group-based licence renewals for French-language television stations and services*, [Broadcasting Decision CRTC 2017-147](#) (Ottawa, 15 May 2017), *Bell Media Inc. – Licence renewals for English-language television stations and services*, [Broadcasting Decision CRTC 2017-149](#) (Ottawa, 15 May 2017), and *Corus Entertainment Inc. – Licence renewals for English-language television stations and services*, [Broadcasting Decision CRTC 2017-150](#) (Ottawa, 15 May 2017).

A. Seek information from Sirius about its payments to the BPF

96 The reasons offered by Sirius to the CRTC for reducing its 2020 tangible benefits payment to the BPF are unknown.

97 It is therefore unclear whether Sirius argued that Covid-19 made it impossible for it to pay the \$29,834 it did not pay the BPF in late 2020. This argument is difficult to confirm for two reasons. First, the company that owns Sirius XM Canada – Sirius XM Canada Holdings Inc. – is privately held and does not publish annual reports. Second, the CRTC’s [annual *Statistical and Financial Summaries for individual discretionary and on-demand services*](#) do not include information about Sirius Canada or XM Canada.

98 Some information is available through US-based Sirius XM, however. It holds 70% of the equity in Sirius XM Canada and 33% of the voting interests in Sirius XM Canada Holdings Inc. Sirius XM’s annual report for 2020 states that the number of Sirius XM Canada’s subscribers at the end of 2020 is 0.8% (22,000 subscribers) lower than in 2018, before the pandemic began:

December 31, 2018	2,644,000
December 31, 2019	2,707,000, and
December 31, 2020	2,622,000. ⁶⁰

99 Sirius XM Canada currently offers monthly subscription plans at prices from \$8/month to \$16.99 month. If each subscriber had paid \$8/month for the three years shown above, Sirius XM Canada’s subscription revenue would have amounted to more than a quarter of a billion dollars per year:

2018	\$253,824,000
2019	\$259,872,000
2020	\$251,712,000.

100 The annual tangible benefit payment of \$119,333 required from Sirius XM Canada by the CRTC represents 0.05% of the total subscriber revenues estimated above for 2020. The reduction of \$29,834 in Sirius XM Canada’s tangible benefits to the BPF authorized by the CRTC represents 0.012% of the same amount.

101 Sirius XM Canada has demands on its resources beyond the CRTC’s tangible benefits requirements. In 2017 Sirius XM Canada borrowed \$130.8 million (US) from Sirius XM with a 15-year term and bearing interest at 7.62% per annum.⁶¹ It pays royalties to,⁶²

⁶⁰ Sirius XM Holdings Inc., Form 10-K Sirius XM Holdings Inc.: Annual report [Section 13 and 15(d), not S-K Item 405], [published 2021-02-02 08:56:14](#) (“Key Financial and Operating Performance Metrics”).

⁶¹ *Ibid.* (“ITEM 7A. QUANTITATIVE AND QUALITATIVE DISCLOSURE ABOUT MARKET RISK”).

⁶² *Ibid.* (“SIRIUS XM HOLDINGS INC. AND SUBSIDIARIESNOTES TO CONSOLIDATED FINANCIAL STATEMENTS – Continued”).

and has a 30-year Services Agreement and an Advisory Services Agreement with, Sirius XM.⁶³ Sirius is also required to make tangible benefits payments to FACTOR and MUSICACTION, neither of which has reported shortfalls in Sirius' payments in their most recent annual reports.

- 102 The circumstances through which the CRTC is said to have allowed Sirius XM Canada to amend its payment schedule and amounts to the BPF are, therefore, largely unknown. No information about Sirius XM Canada's deferred or reduced payments to the BPF is available from the CRTC's website, making it unclear
- a when Sirius sought the CRTC's approval of its delays
 - b when the CRTC 'allowed' the delay
 - c how the CRTC decided that the payment amount being delayed was appropriate
 - d whether the CRTC was aware when it allowed Sirius to delay payments that the government would reimburse broadcasters' 2019 Part 1 and 2020 Part II licence fees
 - e whether the CRTC or Sirius XM Canada consulted the BPF Board of Directors to determine the impact of the 2020 delay in payment on the BPF' operations before approving it
 - f whether the CRTC issued this determination in writing (since it may represent an amendment to Broadcasting Decision CRTC 2018-91) and if the determination was provided in writing, where it is published on the CRTC's website
 - g whether Sirius XM Canada has changed any other of the tangible benefits payments that the CRTC requires
 - h whether Sirius XM Canada will delay or not make any of its payments to the BPF in 2021 or the years beyond, and
 - i whether Sirius XM Canada sought and did not receive the CRTC's approval to delay payments to other funds, or proposed only to reduce the payments to the BPF.
- 103 The CRTC's 2019 renewal decision for Sirius XM Canada specifies in condition of licence 19, however, that it must "provide the Commission with a response to any inquiry regarding the licensee's programming, ownership or any other matter within the Commission's jurisdiction that relates to the licensee's undertaking."⁶⁴

⁶³ *Ibid.* ("SIRIUS XM HOLDINGS INC. AND SUBSIDIARIES NOTES TO CONSOLIDATED FINANCIAL STATEMENTS – Continued", "Related Party Transactions").

⁶⁴ *Sirius Canada and XM Canada – Licence renewal and licence amendments*, [Broadcasting Decision CRTC 2019-431](#) (Ottawa, 19 December 2019), Appendix (Terms, conditions of licence, expectations and encouragements for the national satellite subscription radio undertakings Sirius Canada and XM Canada):

19. At the request of the Commission, the licensee shall provide the Commission with a response to any inquiry regarding the licensee's programming, ownership or any other matter within the Commission's jurisdiction that relates to the licensee's undertaking. licences held by Sirius XM Canada are for "national satellite subscription radio undertakings".

104 As the CRTC's tangible benefits policy is within its jurisdiction, the CRTC should ask Sirius XM Canada if it will commit to meet the requirements of Broadcasting Decision CRTC 2018-91 before or on 26 May 2021.

105 If Sirius XM Canada declines to respond to this inquiry, the CRTC could call it to a public hearing to account for itself under section 12 of the Act.⁶⁵ Depending on the evidence presented the CRTC could issue a mandatory order⁶⁶ to Sirius XM Canada requiring it to make the payments to the BPF as directed by the CRTC in 2018.

B. Call Sirius XM Canada to a public hearing

106 The CRTC's ability to add or amend Sirius XM Canada's conditions of licence is limited by section 9(1)(c) of the *Broadcasting Act*. It only permits such changes when "five years have expired since the ... renewal of the licence". As the CRTC renewed the Sirius XM Canada licences in December 2019,⁶⁷ it is now unable to amend Sirius XM Canada's current conditions of licence of its own motion.

107 In 2013, however, the CRTC required Rogers to submit applications to renew its OMNI licences earlier than its current licence terms required, to enable the CRTC to review programming concerns.⁶⁸ The CRTC effectively enabled itself to impose new conditions of licence within five years of Rogers' previous renewal.

⁶⁵ Section 12:

(1) Where it appears to the Commission that

(a) any person has failed to do any act or thing that the person is required to do pursuant to ... any r, licence, decision or order made or issued by the Commission under this Part, or has done or is doing any act or thing in contravention of this Part or of any such ... licence, decision or order,

...

(b) the circumstances may require the Commission to make any decision or order or to give any approval that it is authorized to make or give under this Part or under any regulation or order made under this Part, the Commission may inquire into, hear and determine the matter.

(2) 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, under any regulation, licence, decision or order made or issued by the Commission under this Part or under any of sections 42 to 44 of the Accessible Canada Act 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, to section 34.1 or to any of sections 42 to 44 of the Accessible Canada Act.

....

⁶⁶ Section 18:

(1) Except where otherwise provided, the Commission shall hold a public hearing in connection with

...

(d) the making of an order under subsection 12(2).

⁶⁷ *Sirius Canada and XM Canada – Licence renewal and licence amendments*, [Broadcasting Decision CRTC 2019-431](#) (Ottawa, 19 December 2019).

⁶⁸ Broadcasting Decision CRTC 2013-657 (Ottawa,):

32. ... the Commission remains concerned by the extent of the programming changes and the impact of the changes on the communities served by the stations. In particular, the Commission is concerned by the apparent lack of local programming on some of the OMNI television stations and by the lack of information received regarding Rogers' consultations with the advisory councils.

108 Sirius XM Canada's licences currently end in August 2024. Nothing prevents the CRTC from calling this licensee to an early public hearing to determine whether it is meeting its current regulatory requirements.

109 If the CRTC calls Sirius XM Canada to a public hearing it could warn the company that the Commission is considering whether to issue a mandatory order. Section 12 of the *Broadcasting Act* requires the CRTC to hold a public hearing concerning Sirius XM Canada so as to then issue a mandatory order.

110 After calling Sirius XM Canada to a public hearing to renew its licences early the CRTC should renew the licences and include explicit payment requirements through conditions of licence, while also issuing mandatory orders to immediately pay any existing payment shortfalls to the BPF and to make remaining payments every six months (rather than every twelve months).

C. Consider alternative sources of funding for the BPF

111 PIAC and FRPC respectfully submit that even if Sirius XM Canada immediately remedies its current shortfall in payments to the BPF the CRTC should consider additional sources of funding for the BPF. It could do this by revising its regulations and seven-year old tangible benefits policy.

1. Revise radio and/or BDU regulations

112 The CRTC's regulations for radio and distribution require these broadcasters to remit payments to several designated funds.

113 Section 15(2) of the [Radio Regulations, 1986](#) requires radio licensees with total revenues above \$1.25 million to direct 0.5% + \$1,000 of their total revenues to eligible Canadian content development initiatives, of which 45% is to be directed to FACTOR or MUSICACTION. In 2019 radio stations' total contributions to Canadian content development amounted to \$41 million.⁶⁹

114 The CRTC could amend its regulations to require radio stations to allocate 44.75% of their CCD funding to FACTOR and MUSICACTION, and the remaining 0.25% (\$255,556) to the BPF.

115 Section 34 of the [Broadcasting Distribution Regulations](#) requires cable companies and other terrestrially based distribution undertakings to direct 4.7% of its gross broadcasting revenues to Canadian programming, of which 80% is to be directed to the

33. In light of this, although the licences for the OMNI stations expire 31 August 2015, the Commission has requested that Rogers submit licence renewal applications for the OMNI television stations early. By doing so, the Commission will be able to consider all of Rogers' television services at the same time.[1] It will also allow the Commission to review OMNI's programming issues at an earlier date; consider appropriate measures related to local programming; and synchronize the expiry dates for all of Rogers television services.

⁶⁹ CRTC, 2020 Monitoring Report, at 72, Infographic 3.3.

Canadian Media Fund. In the 2018/19 broadcast year this regulation directed \$191.4 million to the Canadian Media Fund.⁷⁰

116 The CRTC could amend its regulations to require BDUs to allocate 79.75% of the gross-revenue amount to the Canadian Media Fund, and the remaining 0.25% (\$593,750) to the BPF.

117 When or if new broadcasting legislation is enacted and a new broadcast participation costs-application process is established, the CRTC could amend its regulations to remove these requirements.

2. *Update 2014 Tangible Benefits policy*

118 The CRTC's current tangible-benefits policy requires tangible benefits for ownership transactions involving radio or television programming services. In 2014 the CRTC declined to include BDUs in the policy because it did not call for comments on this point, and its public record did not justify including BDUs.⁷¹ The result is that although many CRTC broadcast proceedings involve matters related to BDUs and the CRTC's policies for BDUs, BDUs have not been required to provide any support for the BPF.

119 Meanwhile, a large transaction involving BDUs has been announced – Rogers' takeover of Shaw.

120 Rather than amending its radio or BDU regulations the CRTC could amend its 2014 tangible-benefits policy to include major BDU transactions, and to direct that ½ of 1% (*i.e.*, 0.5%) of all tangible benefits from the Rogers-Shaw transaction and all future transfers of ownership of broadcasters including BDUs be expected to be paid, in the usual to each of the BPF and BAF (for a total of 1% of tangible benefits of all of these transactions).

V. Conclusion

121 PIAC and FRPC respectfully request that the CRTC take swift action to address the potential failure in 18 months of the BPF by ensuring that Sirius XM Canada meets its commitments, and then either by requiring the majority of radio and BDU undertaking to each remit a fraction of a percentage of their broadcasting revenues to the BPF or by

⁷⁰ CRTC, [Broadcasting Distribution \(Cable, Internet Protocol Television \[IPTV\] and Direct-to-Home \[DTH\]\): statistical and financial summaries, 2015-2019](#), at 18.

⁷¹ *Simplified approach to tangible benefits and determining the value of the transaction*, [Broadcasting Regulatory Policy CRTC 2014-459](#) (Ottawa, 5 September 2014), at paragraph 52:

The Commission's current practice is to require tangible benefits for ownership transactions involving all broadcasting undertakings except for BDUs, and the Commission is of the view that this practice should be maintained. In this regard, the Commission notes that while the question of imposing tangible benefits on applications involving the change of ownership or effective control of a BDU was raised by certain interveners, Broadcasting Notice of Consultation 2013-558 did not expressly seek comment on this matter. Further, the Commission considers that the public record for this proceeding does not justify a reversal of that policy

amending the CRTC's 2014 tangible benefits policy to require BDUs to remit tangible benefits to the BPF.

Appendix Organizations and public proceeding supported by the BPF

Table 1: Organizations:

CACTUS
Canadian Association of the Deaf (CAD)
CHCO Community TV
CMAC
CNIB
Csur la télé
FRPC
ICTV - MTL
Ineligible - unidentified
Manitoba Coalition
Media Access Canada (MAC)
New West TV
Ontario Library Association (OLA)
PIAC
ReQIS
Télévision Communautaire Frontenac
Toronto Community Media Network (TCMN)
Union des Consommateurs

Table 2: Public proceedings

1. Demande de Licence de Radiodiffusion	2014-1167
2. Local and Community TV Policy Review	2015-421
3. English Language Closed Captioning Quality Standard	2015-325
4. Call for Radio Applications re: Aboriginal Urban Communities	2015-399
5. Policy Review	2015-421
6. Local and Community TV Policy Review	2015-421
7. Complaints Against Shaw	2016-0063
8. Non-compliance Complaint Against Shaw	2016-0063-5
9. Non-compliance Complaint Against Rogers	2016-0064-3
10. Non-compliance Complaint Against Eastlink	2016-0065-1
11. Non-compliance Complaint Against COGECO	2016-0067-7
12. Non-compliance Complaint Against Vidéotron	2016-0098-2
13. Review of the structure and mandate of the CCTS	2016-102
14. Licence Renewals By large Ownership Groups	2016-225
15. Giima Giigidoowin Communications	2016-465
16. OMNI Quebec	2017-0685
17. Ebox Inc.	2017-0909
18. Complaints Against Omni	2017-0975
19. TVA Group - Licence amendment	2017-1028
20. Exemption From National Public Alerting System	2017-1065
21. Renewal of Licences for Terrestrial Broadcasting Distribution Undertakings	2017-160

22. Renewal of Licences	2017-201
23. Call for Comments on Future Programming Distribution Models	2017-359
24. Renewal of Services with Mandatory Distribution	2017-365
25. Call for Comments - Proposed amendments for BD Regulations	2017-50
26. Cogeco Connexion - Amendment to Licence	2017-520
27. Sirius XM Canada	2017-560
28. Ebox Inc.	2017-0909
29. Application for a national, multilingual multi-ethnic TV service	2018-127
30. Retail Sales of Canada's Large Telecommunications Carriers	2018-246
31. Application by Bell Media on behalf of Corus Entertainment	2018-95
32. Television Licence Renewals	2019-1019
33. Application by Bell on behalf of Interactions Inc.	2019-358
34. Radio Licence Renewals - Corus, Rogers	2019-600
35. Call for Comments	2019-90
36. Call for Comments	2019-91
37. Provision of Paper Bills by Communications Service Providers	2020-336
38. Provision of Paper Bills by Communications Service Providers	2020-81