

PETITION TO THE GOVERNOR IN COUNCIL

Pursuant to s. 28(1) of the *Broadcasting Act*

To Set Aside or Refer Back for Reconsideration

Broadcasting Decision CRTC 2022-165

Issued by the Canadian Radio-television and Telecommunications Commission (CRTC)

Submitted by:

The Canadian Media Producers Association (CMPA)

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A. Executive Summary

1. This is a Petition by the Canadian Media Producers Association (“**CMPA**” or the “**Petitioner**”) to Her Excellency the Governor in Council pursuant to section 28 of the *Broadcasting Act* (Canada), S.C. 1991, c. 11 (the “**Broadcasting Act**”). This Petition is made with respect to the decision of the Canadian Radio-television and Telecommunications Commission (“**CRTC**” or the “**Commission**”) to renew the broadcasting licences for the English- and French-language audiovisual and audio services of the Canadian Broadcasting Corporation (the “**CBC**”) in Broadcasting Decision CRTC 2022-165¹, which was made on June 22, 2022 (the “**Decision**”).
2. The CMPA respectfully requests that the Governor in Council refer the Decision back to the Commission for its reconsideration and hearing. The Decision itself is contentious, supported by a slim majority of Commissioners (i.e. 3 to 2).² While the majority opinion in the Decision (the “**Majority**”) establishes a significant and unexpected shift in the Commission’s licensing framework, strongly-worded dissents from Vice-Chair Simard and Commissioner Lafontaine provide detailed critiques of the approach espoused by the Majority. Dissents in Commission decisions, especially for licence renewal decisions, are extremely rare. The assessment of this Petition should pay particular attention to the concerns expressed in these dissenting opinions.
3. We certainly share many of their concerns.
 - i. Baseline thresholds for the exhibition of Canadian programming have been eliminated. The CBC is now the only Canadian broadcaster with no such licensing conditions.
 - ii. New expenditure requirements are introduced. However, as they are based on total programming expenses, not revenues, they are inconsistent with existing licensing policy and prior decisions.

¹ Broadcasting Decision CRTC 2022-165, *Canadian Broadcasting Corporation – Various audio and audiovisual services – Licence renewals*, online: <https://crtc.gc.ca/eng/archive/2022/2022-165.htm> (the “*CBC Renewal Decision*”).

² Voting is limited to the five Commissioners involved in the public hearing process.



- iii. There is no expenditure requirement for the independent production of Canadian programming, not even for under-represented programs (i.e., Canadian Programs of National Interest, or “PNI”). Other broadcaster groups have those requirements, but not the CBC.
 - iv. The Decision imposes specific commitments for Canadian programming by and from equity- and sovereignty-seeking communities. While laudable, these new requirements are not indexed to any measurable factor. The Majority sets them as a percentage of total independent production, even though there is no such licensing condition overall. As a result, these new requirements lack transparency and accountability from the very start.
 - v. While the Majority introduces a cross-platform approach that blends the revenues and expenses of the CBC’s exempted digital media services with that of its licensed services, there is no baseline expenditure requirement remaining in effect for the licensed services themselves. As a result, the Majority eliminates all minimum expenditure requirements for the CBC’s licensed television services, and the CBC is able to direct any or all of its Canadian programming expenditures to unregulated online platforms.
4. For their part, the dissenting opinions strongly criticize the validity of this new framework, emphasizing that it is inconsistent with the Commission’s existing approach, which has been developed, over time, in response to the policy objectives in the *Broadcasting Act*. They also question why the majority has essentially replaced a number of measurable and enforceable conditions with expectations and reporting requirements, establishing a framework that had not been proposed by the CBC, nor any of the other industry intervenors in the public hearing process.
 5. The Commission is required to protect and promote the objectives of Canada’s broadcasting policy. To attain these objectives:
 - i. the CBC must provide programming that is “predominantly and distinctively Canadian”;³

³ Broadcasting Act, S.C. 1991, c. 11 (the “*Broadcasting Act*”), broadcasting policy objective set out in subpara. 3(1)(m)(i).

- ii. the CBC must make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of Canadian programming;⁴
 - iii. the CBC must contribute significantly to the creation and presentation of Canadian programming;⁵ and
 - iv. the CBC must provide programming that includes a significant contribution from the Canadian independent production sector.⁶
6. The CMPA recognizes that the Canadian broadcasting system is changing and evolving, and that all key stakeholders in the system need to adapt. That also includes the Commission. It too must also adapt existing regulatory policies and practices to this changing reality.
7. However, the Commission has jumped the gun. The new licensing framework for the CBC goes too far, too soon. We cannot help but question the Majority's elimination of even the most basic of threshold requirements in these key areas of broadcasting policy. It is premature to implement a regulatory shift of this magnitude, removing licensing conditions that have proven to support Canada's broadcasting policy objectives, without a full-scale policy review of any kind.
8. The Decision is particularly problematic given the CBC's unique role as Canada's public broadcaster. The CBC receives \$1.4 billion annually in government funding⁷ to fulfill its statutory mandate under the *Broadcasting Act* and invests these resources for the development and production of high-quality Canadian content. The CBC is the largest commissioner of English-language independently-produced programs in Canada. Its investments in Canadian programming are critical to the health of our domestic production and broadcasting industries.
9. Although the Decision applies only to the CBC, elements of it will undoubtedly impact Canadian broadcast licensing more generally. There is little doubt that other broadcasters will seek to avail themselves of this same framework by also eliminating existing licensing conditions. With the licences

⁴ The *Broadcasting Act*, policy objective set out in para. 3(1)(f).

⁵ Policy objective in subpara. 3(1)(s)(i).

⁶ Policy objective in subpara. 3(1)(i)(v).

⁷ CBC Annual Report for 2020-2021.



of private broadcasters to be reviewed within the next two years, the ramifications of this Decision will be exponential, negatively impacting the production of Canadian programming, including independent production, to the detriment of Canadian audiences, the Canadian broadcasting system and the more than 82,000 people with high-quality jobs in film and television production.⁸

10. This Decision comes at a time when the Commission may soon initiate a large-scale policy review of the Canadian broadcasting system. Legislative amendments to the *Broadcasting Act* (Bill C-11) will have a significant impact on that system, not only for the potential integration of foreign online services, but even more so because of the extensive review of existing regulatory policies that will flow from it.
11. The Majority's licensing framework has the real potential to undermine the important work being undertaken by the federal government in its re-examination of the *Broadcasting Act*. The Majority has issued a contentious decision whose impact will be felt by much more than just the CBC, all before parliamentarians, industry stakeholders and the Canadian public have had their say. This is a needless distraction from the government's forward-thinking focus on modernizing federal cultural policy for the digital age.
12. For all of these reasons, the CMPA respectfully requests that the Governor in Council refer the Decision back to the Commission for reconsideration and hearing, with a direction to articulate a licensing framework for the CBC that also includes the following conditions:
 - i. a baseline requirement for the exhibition of Canadian programming, including programs from under-represented categories (i.e., PNI, kids and youth programs, feature films and documentaries);
 - ii. a baseline expenditure requirement for the proportion of Canadian programming to be produced by Canadian independent production companies;

⁸ Canadian Media Producers Association (CMPA) - *Profile 2021: Economic Report on the Screen-Based Media Production Industry in Canada* ("CMPA Profile 2021"), produced in collaboration with the Association québécoise de la production médiatique (AQPM), the Department of Canadian Heritage and Telefilm Canada, (Ottawa: CMPA, 2021); online: <https://cmpa.ca/wp-content/uploads/2022/04/Profile-2021-EN.pdf>



- iii. within a cross-platform framework, a baseline requirement that a proportion of Canadian expenditures be spent on Canadian programming for the CBC's licensed services (thereby capping the amount that can be redirected to its exempt digital services); and
 - iv. a requirement for the CBC to enter into terms of trade agreements with the CMPA and AQPM, respectively.
13. Any such reconsideration and hearing would not affect the renewal term for the CBC services. As it has done in past decisions, the Commission could impose these new conditions as of the date of its reconsideration decision. Any additional licensing conditions would come into force at that time, apply only for the balance of the renewal term, and not on a retroactive basis.⁹
14. In the alternative, the CMPA respectfully submits that the Governor in Council could instead set the Decision aside, with a direction to administratively renew the CBC's existing licences for a term of two years (to then expire on August 31, 2024). That extension would then ensure that the licences for the CBC would expire at the same time as those for the large private groups (in August 2024), all following a full-scale policy proceeding initiated by the legislative amendments to the *Broadcasting Act* proposed in Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*.

B. The Petitioner

15. The CMPA represents more than 600 screen-based media companies engaged in the development, production and distribution of English-language television programs, feature films and digital content in all regions of Canada. The CMPA's member companies are significant employers of Canadian creative talent, assume the financial and creative risk of developing original content for Canadian and international audiences and are key programming suppliers to the CBC.
16. In preparing our Petition, we have discussed our concerns with a number of organizations and provincial associations that support the development and production of Canadian programming.

⁹ *Reconsideration of licence renewal decisions for the television services of large English-language private ownership groups*, Broadcasting Decision CRTC 2018-335, dated August 30, 2018.



They include the Black Screen Office and the Indigenous Screen Office as well as the Alberta Motion Picture Industry Association; the Documentary Organization of Canada; FilmOntario; On Screen Manitoba; the Saskatchewan Motion Picture Industry Association; and Screen Nova Scotia. They have indicated their support for the Petition and have provided it with letters to that effect. Their letters are together attached as Appendix A.

17. The CMPA acknowledges that a petition has also been filed by l'Association québécoise de la production médiatique ("**AQPM**"), and that a joint petition has been filed by the Directors Guild of Canada ("**DGC**") and the Alliance of Canadian Cinema, Television and Radio Artists ("**ACTRA**"). In both cases, the petitioners are requesting the Governor in Council refer the Decision back to the Commission for its reconsideration and hearing. The CMPA supports these organizations in their respective processes and supports the petitions they have filed.

C. The Mandate of the CBC

18. The CBC is foundational to the health of our domestic production and broadcasting industries, specifically for the creation and presentation of Canadian programming. As Canada's national public broadcaster, the CBC plays a special role in our broadcasting system. It receives \$1.4 billion annually in government funding to fulfill its statutory mandate under the *Broadcasting Act* and invests those resources for the development and production of high-quality Canadian content.
19. The CBC is the largest commissioner of English-language independently-produced programs in Canada. Most of the CBC's biggest recent hits are independent productions, including shows such as *Sort Of*,¹⁰ *The Porter*, *Schitt's Creek*,¹¹ *Kim's Convenience*, *Workin' Moms*, *Heartland*, *Murdoch Mysteries*, *Still Standing* and *Diggstown*.
20. When the Government of Canada launched the Broadcasting and Telecommunications Legislative Review (BTLR) in June 2018, it emphasized its continued support for the CBC's mandate, stating that it should continue to play a leading role among Canada's cultural organizations, in showcasing

¹⁰ Winner of a Peabody Award in 2022.

¹¹ Winner of nine Emmy Awards in 2020, the most ever for a comedy in a single year.



Canadian cultural content.¹² In its final report, the expert panel conducting that review (the “Yale Panel”) also noted that such a “broad mandate has established CBC/Radio-Canada as a key cultural institution in Canada, with Canadian content as its central focus;” and “[s]ince its inception, it has played an important role in producing and promoting all types and genres of television [...] programming.”¹³

21. The CBC ought to be held to a higher standard. After all, it is Canada’s national public broadcaster and is subject to an institutional legislative mandate to provide programming that is “predominantly and distinctively Canadian”. As noted by Vice-Chair Simard:

*From a broader perspective, this regulatory burden is commensurate with the role of the national public broadcaster. As reiterated during the hearing, the CBC’s activities and programming are the cornerstone of the notion of the public element.*¹⁴

D. The Commission’s Licensing Framework

22. The Commission imposes licensing conditions on broadcasters to ensure they contribute to the attainment of the policy objectives set out in the *Broadcasting Act*. These conditions include requirements for Canadian programming, including designated sub-genres of under-represented programs (e.g. PNI), which are articulated as exhibition or expenditure obligations, often as both.
23. This combination of licensing conditions has formed the foundation of the Commission’s framework. Exhibition obligations ensure that Canadian programs are made available and promoted to Canadians, especially during the prime-time evening broadcasting period, when most linear television viewing still occurs. Expenditure obligations ensure that an appropriate proportion of funding resources are committed to the development and production of high-quality Canadian content.
24. The Commission’s licensing framework also requires that a certain proportion of Canadian programming be commissioned from Canadian independent production companies. The Canadian broadcasting system seeks to reflect a diversity and variety of cultural expression articulated by

¹² Innovation, Science and Economic Development Canada. “Terms of Reference.” Available online: <http://www.ic.gc.ca/eic/site/110.nsf/eng/00001.html>

¹³ *Canada’s Communications Future: Time to Act*, 3.7 Strengthening the national public broadcaster. Available online: <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>

¹⁴ The *CBC Decision*, page 6 of the dissenting opinion by Vice-Chair Simard.



contributors who are independent from those who control the commissioning and exhibition of Canadian programming (in this case: the CBC). Independence helps to counter excessive market power by limiting self-dealing, monopolistic or oligopolistic power, and instead encourages a much greater variety of cultural expression. This, in turn, helps to ensure that a diversity of voices within the system is reflected and represented as at least some of the programs are produced by entities that are different from the platforms that exhibit them.

25. Without appropriate regulatory measures, and the proper implementation and enforcement of those measures, the Canadian broadcasting system risks representing too few concentrated voices, both in terms of the amount of programming available to Canadians and the ownership of Canadian programs developed and produced to reflect their interests and concerns. Independence in our system at least guarantees that not all programming is created and controlled by those who also commission and exhibit the programming.

E. The Petition to Federal Cabinet

26. When the Commission launched the proceeding to consider the CBC licence renewal applications, it noted:

*While the Corporation's activities are conducted at arm's length from Parliament, it remains accountable to all Canadians for its programming and other activities. As part of this accountability, **the Commission currently ensures that the Corporation meets its mandate by imposing a variety of conditions of licence on its traditional broadcasting services and monitoring whether the Corporation has met these conditions** through various means, such as public reporting requirements, the monitoring of program logs and the publication of financial data. **[Emphasis added.]***

In its submission, the CBC acknowledged the basis for the use of the current regulatory framework (in contrast to any reform outlined in legislative amendments to the *Broadcasting Act* now being considered):

In the absence of these legislative changes, we believe it is necessary to continue with the regulatory approach currently in place under the Broadcasting Act[... [Our proposals for a

*transitional regime are based on this regulatory framework and go as far as we believe is reasonable in the current context.*¹⁵

Yet, in the Decision, the Majority chose to depart dramatically from the Commission's longstanding licensing framework and the CBC's own proposals.

27. In fact, the Majority:

- eliminated almost all of the CBC's existing licensing conditions regarding the exhibition of Canadian programming, including PNI and independent productions;
- imposed new expenditure requirements for independent productions by and from equity- and sovereignty-seeking communities, without any overall baseline requirement for independent production;
- approved a cross-platform approach that combines the revenues and expenses of the CBC's licensed services with its exempt online services, without also imposing *de minimus* requirements for its licensed services; and
- ignored a pre-existing condition of licence requiring the CBC to enter into terms of trade agreements with the CMPA and the AQPM.

28. The Majority has replaced previously existing licensing conditions, which had served to successfully attain the objectives of the broadcasting policy set out in section 3(1) of the *Broadcasting Act*, with non-binding reporting and consultation obligations for which there is no evidence will achieve the same result.

29. The CMPA recognizes the scope and extent of progress in the audiovisual sector. We are supportive of regulatory changes that provide greater flexibility and adaptability. That said, we cannot help but question the Majority's elimination of even the most basic of threshold requirements in these key areas of broadcasting policy. We agree with Vice-Chair Simard's concluding comments, in her dissent:

¹⁵ Paragraph 6 of the CBC / Radio-Canada's Supplementary Brief, dated September 30, 2019.

As a general principle, I was open to the idea of exploring different models that combine or do not combine exhibition and expenditure requirements for the CBC to meet its regulatory obligations. However, I believe that the exhibition-expenditure model adopted in the majority decision has, on the one hand, prematurely and unnecessarily sacrificed the requirements for the exhibition of Canadian content on traditional platforms and, on the other hand, given the CBC excessive latitude through expenditure requirements without real limits.¹⁶

30. By removing exhibition conditions, implementing cross-platform flexibility without conditions on CBC's linear services and replacing licensing conditions with reporting obligations, the Majority fails to ensure that its new framework can continue to fulfill these same policy objectives. In so doing, the Commission has effectively abdicated its mandate to supervise all aspects of the broadcasting system.
31. In and of itself, the Decision is of concern. However, its potential impact could be further accentuated by the very likely scenario that private broadcasters will soon be seeking the very same type of regulatory relief.

F. Standard to Apply for Appeal to the Federal Cabinet

32. The test to set aside or refer a decision back to the Commission is set out in section 28(1) of the *Broadcasting Act* which states that:

Where the Commission makes a decision to issue, amend or renew a licence, the Governor in Council may, within ninety days after the date of the decision, on petition and in writing of any person received within forty-five days after that date or on the Governor in Council's own motion, by order, set aside the decision or refer the decision back to the Commission for reconsideration and hearing of the matter by the Commission, if the Governor in Council is satisfied that the decision derogates from the attainment of the objectives of the broadcasting policy set out in subsection 3(1).

33. The Broadcasting Act also provides that an order that refers a decision back to the Commission shall set out the details of any matter that the Governor in Council considers material to the reconsideration and hearing.¹⁷

¹⁶ The *CBC Renewal Decision*, page 9 of the dissenting opinion by Vice-Chair Simard.

¹⁷ The *Broadcasting Act*, ss. 28(2).



G. Derogation from the Attainment of the Objectives of Canada's Broadcasting Policy

34. Given the significant influence of our national public broadcaster on the creation and presentation of Canadian programming, the CBC's licence obligations are of particular import to achieving Canada's broadcasting policy objectives.

35. Broadly speaking, the Majority derogates from the attainment of these objectives by eliminating longstanding licensing conditions that support the creation and presentation of Canadian programming, all with little in the way of real and effective transparency, measurement or enforceability.

(i) The Majority has failed to implement transparent, measurable and enforceable legal obligations to support the creation and presentation of Canadian programming.

36. Canada's broadcasting policy includes specific objectives relating to the creation and presentation of Canadian programming. They include the following:

- the CBC, as an element of the Canadian broadcasting system, shall contribute in an appropriate manner to the creation and presentation of Canadian programming;¹⁸
- the CBC should contribute significantly to the creation and presentation of Canadian programming;¹⁹ and
- the CBC shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of Canadian programming.²⁰

37. Exhibition obligations ensure that Canadian programs are discoverable by Canadians and that these programs are effectively scheduled and promoted by broadcasters.

38. The Majority removes virtually all of the CBC exhibition licensing conditions. Such a drastic action is not limited to those conditions relating to specific programming sub-categories (e.g., kids and youth programming) or licensed services (e.g. documentary channel). Rather, the Majority removes even

¹⁸ The *Broadcasting Act*, para. 3(1)(e).

¹⁹ Subpara. 3(1)(s)(i).

²⁰ Para. 3(1)(f).



the most basic of threshold requirements for Canadian programming, PNI and independently produced programs. These significant changes are made in spite of the fact that the CBC consistently proposed the maintenance of various exhibition requirements for its licensed television services.

39. The Majority fails to recognize the importance of making Canadian programming, PNI and independently-produced programs available on television, especially when most Canadians are watching (i.e. during the prime-time evening broadcast hours).²¹ The Majority also disregards the evidence before it that 11% of Canadians cannot or do not access broadband services, with a disproportionate concentration of that segment of the population living in rural, remote and/or First Nations communities, and among older and younger viewers.²²

40. The CBC is now the only Canadian broadcaster with no exhibition requirements.²³ Not only did the Majority remove these conditions, but they are also not replaced with any other equivalent mechanism. The private broadcaster groups are sure to follow, as they too will seek to similarly implement elements of the Majority's new approach.

41. Exhibition requirements serve a vital purpose in making Canadian programming available and discoverable by Canadian audiences. Deleting them almost entirely, while providing no substitute for such proven and effective regulatory tools, is a clear derogation from the attainment of Canada's broadcasting policy objectives.

(ii) *The Majority ignores the policy objective of supporting a significant contribution from the Canadian independent production sector.*

42. Canadian independent producers have long played a fundamental role in Canada. They develop and produce entertaining programming that is seen by millions of viewers, employs tens of thousands of

²¹ While audiences increasingly access programs on-demand, it is usually for programs that have been aired in prime time and that have been promoted as prime time viewing, or have at least been watched during those hours. Broadcasters' marketing dollars remain focused on prime-time programming. Canadian programs will only succeed if they are given an opportunity to be discovered by large Canadian audiences.

²² The *CBC Renewal Decision*, page 9 of the dissenting opinion by Commissioner Lafontaine.

²³ Greater flexibility has been granted to other private broadcasters by the Commission. However, general exhibition requirements do remain in place. By regulation, licensed conventional television stations have an overall requirement for the evening broadcast period. By condition of licence, discretionary services are subject to an overall broadcast day requirement.

artists, technicians and other cultural workers and generate billions of dollars in economic activity. In 2020-21, there was \$2.75 billion in independent film and television production volume in Canada, generating work for 82,120 jobs across all regions of the country and contributing \$3.399 billion to the national GDP.²⁴

43. This high level of domestic creation and production and its impact on the Canadian economy is directly linked to the rules the Commission has historically put in place to ensure that licensed broadcasting services support the creation and presentation of Canadian programming, including that which is independently produced.
44. While the Majority introduces new expenditure requirements, they do so only for Canadian programming and PNI, not for independent production. As a result, the Majority provide no baseline conditions supporting Canadian independent production, not for the exhibition of independently-produced Canadian programming (i.e., its presentation), nor the expenditures to develop and produce that content (i.e., its creation).
45. All of this in spite of the fact that baseline conditions for independent production were supported by the CBC itself, as well as numerous industry stakeholders involved in the hearing process. Without baseline threshold levels of any kind, it is impossible to objectively assess and hold the CBC accountable to a standard for Canadian independent production.
46. Commitments relating to Canadian independent production have been established to ensure that broadcasters like the CBC fulfill specific legislative objectives of Canada’s broadcasting policy. Being an important contributor to the Canadian broadcasting system, the CBC must provide programming that:
 - includes a significant contribution from the Canadian independent production sector;²⁵ and

²⁴ Canadian Media Producers Association (CMPA) - *Profile 2021: Economic Report on the Screen-Based Media Production Industry in Canada* (“CMPA Profile 2021”), produced in collaboration with the Association québécoise de la production médiatique (AQPM), the Department of Canadian Heritage and Telefilm Canada, (Ottawa: CMPA, 2021); online: <https://cmpa.ca/wp-content/uploads/2022/04/Profile-2021-EN.pdf>

²⁵ The *Broadcasting Act*, subpara. 3(1)(i)(v).

- is drawn from local, regional, national and international sources.²⁶

47. Canada's independent producers play a critical role in strengthening Canadian identity in the digital age and in establishing a vibrant content marketplace. They are dynamic trade and cultural ambassadors who actively showcase Canadian communities to Canadians and to the world.

48. More than that though, independent producers provide audiences with a distinctly Canadian perspective on our country, our world, and our place in it. They help foster Canadian cultural choices and they reflect the rich diversity of this country. Through independently produced programming, Canadians “see themselves, their interests, their values, and their country come alive.”²⁷ As communications borders increasingly dissolve and a greater volume of content from every corner of the world becomes more accessible to Canadian audiences, it is even more crucial to ensure that Canada's distinct and diverse voice continues to be heard.

49. Plainly, the Majority fails to ensure a significant contribution from the independent production sector. The Majority leaves independent producers, and the thousands of writers, directors, actors, and crew they employ every year, without any idea of how much Canadian content will be commissioned by the CBC, and how much Canadian content will be broadcast on the CBC’s licensed television services. Instead of exercising its regulatory authority to ensure a diversity of creative voices through a significant contribution from the independent production sector, the Majority adopts a laissez faire approach for even the most basic of threshold commitments to Canadian programming.

50. The Majority also deletes a condition of licence requiring that the CBC have Terms of Trade agreements in place with the CMPA and the AQPM). In choosing to remove this condition, the Majority is ignoring the policy concerns involved with increasing broadcaster consolidation and the resulting imbalances in negotiating power between those larger broadcasters and independent producers. Terms of Trade can function as a code of conduct and provide basic deal terms to guide negotiations for program licensing between broadcasters and independent producers. At the very

²⁶ Subpara. 3(1)(i)(ii).

²⁷ CBC Website “Independent Producers.” Available online: <https://www.cbc.ca/independentproducers/>.

²⁷ Innovation, Science and Economic Development Canada. “Terms of Reference.” Available online: <http://www.ic.gc.ca/eic/site/110.nsf/eng/00001.html>.

least, deals between these parties would reflect certain basic principles of fairness, and provide Canadian independent producers with basic rights and protections.

51. In truth, there is nothing novel about our request or this kind of an approach. Terms of Trade regimes have been successfully implemented in other countries, and have provided the foundation for the development of better-capitalized independent production companies in those jurisdictions. Of note, it has been the public broadcaster that has led the way in these countries. We believe it is because other public broadcasters see the establishment of fair and reasonable terms of trade as being in the public interest. In Canada, the opposite has occurred. The CBC has lagged behind and consistently refused to resolve the concerns involved, let alone address its non-compliance with an exiting licensing condition to that effect.

52. Of note, there are already examples where the Commission has established specific codes to address similar concerns around bargaining power. *The Wholesale Code* provides guidance as to some of the terms and conditions included in the agreements between programming services and broadcasting distribution undertakings (BDUs).²⁸ *The Television Service Provider Code* is a mandatory code of conduct to help Canadian subscribers better understand their television service agreements. Much like we are proposing for Terms of Trade, these Commission provide general guidelines that apply to the agreements between the parties involved.²⁹

53. A number of intervenors in the CBC hearing expressed specific concerns about the ongoing imbalance in market power, emphasizing that commercial deals and production negotiations are becoming increasingly difficult.³⁰ Despite this evidence, the Majority removed the legal obligation for the CBC to enter in terms of trade agreements with Canadian independent producers. As noted by Commissioner Lafontaine, the omission of a terms of trade condition, “may further diminish the bargaining power of all Canadian independent producers vis-à-vis the Corporation, thereby impacting

²⁸ Broadcasting Regulatory Policy CRTC 2015-438.

²⁹ Broadcasting Regulatory Policy CRTC 2016-1.

³⁰ While the Majority references intervenors' submissions that commercial deals and production negotiations are increasingly difficult, it does not even acknowledge, let alone comment on, the fact that intervenors called for Terms of Trade to address these concerns.

on program rights ownership and potentially weakening the Canadian independent sector domestically and internationally”.

54. Canada’s independent production sector is critical to a properly balanced broadcasting system that reflects a diversity of expression, voices, and range of opinions representing what it means to be Canadian. The elimination of a Terms of Trade licensing condition, and the Majority’s disregard of very real concerns about bargaining power in production and programming rights negotiations, is inconsistent with the objectives of Canada’s broadcasting policy.

(iii) New Canadian programming expenditure requirements for productions by and from equity- and sovereignty-seeking communities are ineffective and unaccountable.

55. Of note, while there are no expenditure licensing conditions for overall Canadian independent production, the Majority did impose specific new requirements for certain subsets. For example, by 2023-2024, at least 30% of the CBC’s expenditure on independent production must be spent on programming produced by Indigenous producers, OLMC producers, racialized producers, producers with disabilities or producers who self-identify as LGBTQ2.³¹

56. The Commission establishes these commitments to ensure that the CBC’s programming reflects the multicultural and multiracial nature of Canada.³²

57. The CMPA fully and wholeheartedly supports new expenditure requirements for the creation of Canadian programming by members of equity- and sovereignty-seeking communities. However, with no general independent production requirement, it is impossible to assess what these new requirements will actually entail. The Majority only imposes a numerator for these programming expenditures for these new requirements, not a denominator. As a result, unlike all other expenditure conditions imposed not only on the CBC, but all other broadcasters, this new requirement provides no certainty, nor accountability, as to the actual programming spend at the CBC. Its impact is entirely conditional on the discretionary programming decisions made at the CBC.

³¹ The *CBC Renewal Decision*, para. 134

³² The *Broadcasting Act*, subpara. 3(1)(m)(viii).

58. The Commission is unanimous in its support for the imposition of these Canadian programming licensing conditions. However, the Majority's implementation of this policy initiative is inconsistent with the Commission's existing policies and practices. As a result, these new requirements are unnecessarily vague and lack basic transparency. In so doing, they do not further Canada's broadcasting policy objectives to the extent they should have, had the Majority also insisted on a basic threshold spend for Canadian independent production.

(iv) The Majority abandons children and youth programming as well as feature films.

59. The Decision imposes a minimum obligation of one-hour per week of original first-run Canadian programming aimed at children under the age of 13 years. That is now the only remaining licence obligation relating to children's programming at the CBC, considerably less than had been the case for its previous licence, as well as the fifteen hours per week of children's programming proposed by the CBC and urged by other intervenors.

60. At the CBC's last licence renewal, the Commission highlighted the importance of children's and youth programming as part of CBC's mandate to serve all Canadians, especially since this programming has largely been abandoned by other broadcasters:

The national public broadcaster has a mandate to serve all Canadians. As such, the Commission considers that the CBC has a responsibility to provide informative, educational and entertaining programming to Canadian children and youth. This obligation is not only part of the CBC's public service mandate, but is also vital to building its future audience across multiple platforms. While provincial educational broadcasters provide children's programming, such programming has largely been abandoned by private conventional broadcasters. As a result, limited children's and youth programming is available over-the-air across the country. Accordingly, the Commission considers that an appropriate commitment by the CBC to children's and youth programming is all the more significant.³³

61. Commitments relating to children's programming at the CBC have been developed in response to specific broadcasting policy objectives. Being an important contributor to the Canadian broadcasting system, the CBC should:

³³ Broadcasting Decision CRTC 2013-263, *Canadian Broadcasting Corporation – Licence renewals*, para. 72.

- through its programming [...], serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children;³⁴ and
- as the national public broadcaster, provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains.³⁵

62. Children’s television is essential for the early childhood development of language skills and the reflection and representation of cultural identity. The undisputed evidence before the Commission was that a majority of children aged 2+ and 42% of children aged 7 to 11 prefer linear television. The provision of linear programming by the CBC, as the national public broadcaster, is of the utmost importance to the development of young Canadians.

63. The Majority also removes the requirement that the CBC broadcast at least one feature film per month on its linear, regulated service. This deletion ignores existing Canadian cultural policy supporting the creation of feature films, and the CBC’s role, as our national public broadcaster, in supporting the presentation of films to Canadian audiences.

64. We question how the Majority’s new framework addresses these policy concerns and these stated policy objectives. Baseline exhibition licensing conditions are still an effective regulatory tool to support these important genres of Canadian programming. In deleting them, as it has in other areas noted above, the Majority has not provided an effective regulatory mechanism to replace the existing licensing conditions it has removed.

(v) *The Majority introduces a framework that includes exempted digital media services, while not ensuring that certain threshold requirements apply to the CBC’s licensed services.*

65. The Majority also imposes a cross-platform approach that blends together the revenues and expenses of the CBC’s online services with its licensed services. That blend is then used to establish cross-platform expenditure thresholds applicable to all services at the CBC. However, in so doing, there is no baseline threshold requirement remaining for the licensed services. As such, the CBC is able to

³⁴ The *Broadcasting Act*, subpara. 3(1)(d)(iii).

³⁵ Para. 3(1)(l).

direct as much of its Canadian programming and PNI expenditures to its entirely unregulated online platforms.

66. In effect, there are now no Canadian programming exhibition or expenditure requirements that apply to the CBC's licensed television services. A dearth of requirements on CBC's licensed services accomplishes nothing in furtherance of Canada's broadcasting policy.
67. These significant changes were made in spite of the fact that the CBC consistently proposed the maintenance of various exhibition requirements for its licensed television services. In the CBC's own words, exhibition requirements "ensure an equitable balance between content broadcast on linear television and on online audiovisual platforms for Canadian audiences".³⁶
68. While the CMPA recognizes the growing importance of online platforms and supports the government's intention to fully integrate them into the regulated broadcasting system, we must also emphasize that the CBC has historically invested far less production dollars and promotional resources in a Canadian program commissioned for online platforms like CBC Gem, than it has for the broadcast of programs on its licensed services. Thus, without specific exhibition and expenditures requirements that support licensed services, the cross-platform approach could very likely result in Canadians finding their stories being reduced to a much smaller scale, creatively and financially.

H. Additional Policy Concerns

69. There are also a number of concerns with other elements of the new licensing framework for the CBC established by the Majority. While these concerns do not directly implicate specific broadcasting policy objectives, they demonstrate how the Majority derogates from existing Commission policies and practices, without due consideration and evidence; and how these actions have the potential to impact other important elements of Canada's broadcasting policy.

Expectations and reporting obligations are not binding measurable targets for the CBC's commitment the creation and presentation of Canadian programming.

³⁶ The *CBC Renewal Decision*, page 17 of the dissenting opinion by Commissioner Lafontaine.

70. The Majority releases the CBC from a “critical mass” of previous conditions of licence. It replaces “binding measurable targets” with much more limited reporting and public opinion research requirements.

71. Replacing mandatory licensing safeguards with a nonbinding measurement framework does little to ensure that Canadians will have access to programming that fulfills the CBC’s mandate. Reporting and consultative measures do not ensure a minimum threshold commitment to ensure that high-quality and diverse Canadian programs will be commissioned and broadcast by the CBC. The lack of “objective and measurable targets” will cause a “net loss of transparency and objectivity” and ultimately undermines the public interest.³⁷

Expenditure requirements are inexplicably based on programming expenses, not revenues.

72. The Majority de-links the new expenditure requirements from total revenues. As a result, CPE will not be calculated on the basis of total revenues at the CBC. Instead, they will be calculated on the basis of total programming and production expenses.

73. The Majority’s new rule is contrary to established Commission policy and practice. Prior decisions, pertaining to private broadcast groups, have all specifically rejected the use of programming expenses. In so doing, the Commission concluded that such an approach has the potential to provide certain broadcasters with an inappropriate competitive advantage, since broadcast groups have greater control over their expenditures than their revenues. In addition, it has consistently recognized that expenditure requirements based on revenues (not programming expenses) make Canadian programming expenditures more predictable for the creative industry.³⁸

74. In attempting to justify this change for the CBC, the Majority simply notes that the CBC’s revenues are largely dependent on government funding and that the CBC’s goal is not to be profitable in the same way as most private broadcasters.

³⁷ The *CBC Renewal Decision*, page 4 of the dissenting opinion by Vice-Chair Simard.

³⁸ Broadcasting Decision CRTC 2017-143, *Renewal of licences for the television services of large French-language ownership groups – Introductory decision*, para. 42, as noted by Commissioner Lafontaine at page 14 of her dissenting opinion in the *CBC Renewal Decision*.

75. Other broadcasters such as the Aboriginal Peoples Television Network (APTN) and Accessible Media Inc. (AMI-TV) face similar operational constraints. They have a public interest mandate and are largely reliant on subscription revenues generated from mandatory carriage orders issued by the Commission. However, much like private broadcasters, they too calculate their Canadian programming expenditure requirements on the basis of total revenues. Many of them even operate on a not-for-profit basis.
76. We see no reason to differentiate the CBC from all other broadcasters in terms of using revenues as a proxy for expenditure requirements. In recent years, private broadcasters have experienced revenue fluctuations. But the model still works. If revenues decline, so do the calculated expenditure requirements.
77. In no way does the Majority address the longstanding policy approach already in place, nor why it is no longer appropriate. Moreover, it does not review and evaluate how its change in approach would affect the benefits already acknowledged by the Commission as its policy rationale for applying an expenditure requirement based on total revenues.

Elements of the Majority's deregulated framework will establish an unnecessary precedent that other private broadcasters will follow, creating the potential for an exponential impact from this Decision.

78. Although the Decision applies only to the CBC, elements of it will undoubtedly impact Canadian broadcast licensing more generally. Should the Decision stand, there is little doubt that other broadcasters will seek to similarly avail themselves of CBC's new framework.
79. If the CBC itself is not subject to Canadian programming exhibition requirements, nor Canadian independent production conditions of any kind, private broadcasters will want the same treatment. Given the Majority's opinion, the Commission is unlikely to subject private broadcasters to any more rigorous level of licensing conditions. In fact, in a market like Quebec, where Radio-Canada fiercely and successfully competes for market share, its competitors will undoubtedly argue that similar treatment will be required to ensure that Radio-Canada does not accrue an unfair regulatory advantage which would then translate into a competitive advantage.

80. As the licences of private broadcaster groups are to be reviewed within the next two years, the ramifications of the Decision will be exponential, negatively impacting the production of Canadian programming, including independent production, to the detriment of Canadian audiences and the Canadian broadcasting system.

The Commission did not follow its existing framework, nor establish a process to consider a new one.

81. Given the Commission's past practice and the currency of the group licensing framework³⁹ as well as the Let's Talk TV Create Policy,⁴⁰ all stakeholders would have reasonably expected that the Commission would not undertake regulatory changes of this magnitude without the prior review and consideration of a new policy framework. As noted in the by Commissioner Lafontaine, not only is the Decision unprecedented, but so is the process used to arrive at it:

It should be noted that over the last twenty-five years, any fundamental changes to the Commission's licensing approach to television broadcasting took place within the context of a full-scale policy review where input was provided from Canadians, experts, and a broad range of industry stakeholders. At the conclusion of the policy proceedings, the Commission issued detailed public policies, and, where required, updated its regulations. The Commission then applies the new policy frameworks, as appropriate, at the ensuing television broadcasting licence renewal hearings.⁴¹

82. The Decision does not reflect existing policies and frameworks, even though both policies remain in effect and ought to have guided the Commission's decision-making. While the Commission is not bound by precedent, it must nevertheless give regard to continuity and consistency in its decision-making so as to provide both a reasonable degree of regulatory predictability and in order to achieve the objectives of Canada's broadcasting policy.

A comprehensive policy review is just around the corner.

³⁹ Broadcasting Regulatory Policy CRTC 2010-167, online: <http://www.crtc.gc.ca/eng/archive/2010/2010-167.htm>

⁴⁰ Broadcasting Regulatory Policy CRTC 2015-86, *Let's Talk TV: The way forward – Creating compelling and diverse Canadian programming*.

⁴¹ The *CBC Renewal Decision*, page 6 of the dissenting opinion by Commissioner Lafontaine.

83. This Decision is also coming at a time when the Commission may soon initiate a large-scale policy review of the Canadian broadcasting system as a result of amendments to the *Broadcasting Act*.

84. The Majority made its decision without regard to the process currently being deliberated in Parliament. As such, it has the real potential to undermine the important work being undertaken by the federal government in its re-examination of the *Broadcasting Act*.

85. The CMPA recognizes that the Canadian broadcasting system is changing and evolving, and that all key stakeholders in the system need to adapt. So too does the Commission in terms of the adaptability of existing regulatory policies and practices. However, the Commission has jumped the gun. It is premature to implement a regulatory shift of this magnitude, removing licensing conditions that have proven to support Canada's broadcasting policy objectives, without a full-scale policy review.

J. Conclusion

86. For all these reasons, the CMPA respectfully requests that the Governor in Council direct the Commission to reconsider the Decision with direction to articulate a clear licensing framework for the CBC that includes the licensing conditions and requirements set out above in paragraph 13.

87. In the alternative, the CMPA respectfully submits that the Governor in Council could instead set the Decision aside, with a direction to administratively renew the CBC's existing licences for a term of two years, to then expire on August 31, 2024, at the same time as the licences for the large private broadcaster groups (which were recently by two years to that date).

All of which is respectfully submitted this 5th day of August 2022.

The Canadian Media Producers Association (CMPA)

