



Coalition  
for the Diversity of  
Cultural Expressions

Brief by the Coalition for the Diversity of Cultural Expressions  
in the context of the  
Broadcasting and Telecommunications Legislative Review  
submitted to the  
Broadcasting and Telecommunications Legislative Review Panel

January 11, 2019

## Executive Summary

This brief is the result of a collective reflection by the members of the Coalition for the Diversity of Cultural Expressions (CDCE). It reports on the upheavals caused by the increasing circulation of cultural content online and proposes short-term and long-term solutions in the context of the revision of broadcasting and telecommunications laws.

The development of the Internet has strongly disrupted the business models of cultural industries. Online programming services have led to changes in the way cultural content is consumed, made money, produced, distributed and marketed in Canada and around the world.

While their market shares are steadily increasing, these companies are not required to comply with the conditions to which conventional broadcasters are subject, including the requirements to contribute to the financing and promotion of Canadian content in both French and English.

Similarly, telecommunications services providers are seeing their revenues increase as a result of increasing access to online cultural content, with no obligation to contribute to the financing of Canadian content.

In short, these companies benefit from cultural content, but do not contribute to the development of Canadian content.

The CDCE makes several recommendations as part of the legislative review.

First, they aim to better distinguish the regulation of telecommunications activities from that of cultural content activities.

The recommendations also aim to ensure that all actors who benefit from the Canadian system contribute to the financing of Canadian content. They also emphasize the responsibility for the promotion of Canadian content and the transparency of all programming services, whether Canadian or foreign. Finally, regulation should promote a balanced environment for the creation, production and dissemination of diversified local cultural content. The diversity of cultural expressions must be materialized in the environment allowing access to cultural content through the Internet.

The CDCE makes 14 recommendations to translate these broad objectives. Some of these recommendations can be implemented now.

## Table of Contents

<b>Executive Summary</b>	<b>2</b>
<b>List of acronyms</b>	<b>4</b>
<b>1. Presentation</b>	<b>5</b>
<b>2. Introduction</b>	<b>6</b>
<b>3. The urgency to restore the balance</b>	<b>6</b>
3.1. Assessment of the situation	6
3.2. Industries in difficulty	7
3.3. Contribution to the financing and promotion of Canadian content	9
3.4. The promotion and discoverability of Canadian cultural content	9
<b>4. Delineate more clearly the areas of each of the laws</b>	<b>11</b>
4.1. Problems related to the current situation	11
4.2. For a genuine adaptation to technological changes	12
<b>5. Establish a contribution by telecommunications services providers to the financing of Canadian content</b>	<b>13</b>
5.1. Why this contribution	13
5.2. Ensure the participation of TSPs in the short term	15
5.3. Long-term changes	16
5.4. Determine the contribution to the financing of Canadian content	16
<b>6. The contribution of online programming services</b>	<b>17</b>
6.1. The time has come for subjection	17
6.2. Proceed quickly with an instruction order from the GIC	19
6.3. Obligations of online programming undertakings	20
6.3.1. Promotion of Canadian content	20
6.3.2. Contribution to the financing of Canadian content	23
6.3.3. Access to data:	23
6.4. Legislative change	25
<b>7. Other changes to the <i>Broadcasting Act</i></b>	<b>27</b>
7.1. Canadian Broadcasting Policy	27
7.2. Destination of Canadian content support funds	28
7.3. The Canadian Broadcasting Corporation	28
<b>8. Spectrum auctions</b>	<b>28</b>
<b>9. Conclusion</b>	<b>29</b>
<b>Appendix 1: Reminder of Short- and Long-Term Recommendations</b>	<b>31</b>
<b>Appendix 2: Consistency with the questions set out in the terms of reference</b>	<b>33</b>

## List of acronyms

AI: Artificial Intelligence

BDU: Broadcasting distribution undertaking

CDCE: Coalition for the Diversity of Cultural Expressions

CRTC: Canadian Radio-television and Telecommunications Commission

DCS: Data Collection System

DTH: Direct-to-home satellite broadcasting

GIC: Governor in Council

ISED: Innovation, Science and Economic Development Canada

MTM: Media Technology Monitor

OCCQ: Observatoire de la culture et des communications du Québec

TSP: Telecommunications Services Provider

UNESCO: United Nations Educational, Scientific and Cultural Organization

## 1. Presentation

The Coalition for the Diversity of Cultural Expressions (CDCE) brings together the main French- and English-speaking professional organizations in the cultural sector in Canada. It is composed of 29 organizations that collectively represent the interests of 200,000 professionals and 2,200 companies in the book, film, television, new media, music, performing arts and visual arts sectors. The CDCE speaks as a Coalition, after consultation with its members. If necessary, the latter have full latitude to specify their positions and qualify certain elements.

Equally concerned about the economic health of the cultural sector and the vitality of cultural creation, the CDCE works mainly to ensure that cultural goods and services are excluded from trade negotiations and that the diversity of cultural expressions is present in the digital environment.

It promotes the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* and ensures its implementation to give it full force of application at the national level.

It also ensures that the government's capacity to implement policies to support local cultural expressions is properly preserved and deployed; that trade liberalization and technology development do not systematically lead to a standardization of content and a disruption of local ecosystems in the face of foreign investment; and that the CDCE also provides the secretariat of the International Federation of Coalitions for Cultural Diversity (IFCCD).

## 2. Introduction

On June 5, 2018, the Government of Canada announced that it would conduct a review of the *Telecommunications Act*, the *Broadcasting Act* and the *Radiocommunication Act*. A committee of independent experts, chaired by Mrs. Janet Yale, has been appointed to review this legislative framework and assess how best to adapt it to the development of Internet technologies that have transformed the way Canadians communicate with each other, discover content, access and use it.

This brief is part of the consultation plan established by the committee of experts to hear the expectations and concerns of representatives of the industrial, cultural, media, creative sectors as well as those of Indigenous peoples, minority communities and the two official language communities.

The Coalition for the Diversity of Cultural Expressions presents its reflections, analyses, figures and data at its disposal, in order to best assist the committee of experts in its task. More specifically, it addresses one of the themes identified by the committee: “Supporting creation, production and discoverability of Canadian content.” It thus makes the voice of the professionals and companies in the cultural sector it represents heard, for whom the review of the legislative framework is essential.

In the following sections, we will begin by presenting a picture of the situation that justifies the revision of the legislative framework from the perspective of the CDCE. Then, we will detail our main recommendations. The reader will find in Appendix 1 all the recommendations and, in Appendix 2, the list of questions asked during the review of the legislative framework to which the CDCE responds in the context of this brief. A short text will accompany each of these questions to provide a brief answer and, above all, a reference to the corresponding sections of the brief.

## 3. The urgency to restore the balance

We will briefly examine the changes that we believe justify the current exercise of revising the legislative framework, as well as the most pressing issues for artists, creators and producers. We could have addressed the often similar challenges faced by CDCE members in other sectors. However, in this section we will focus on the cultural activities covered by the laws in force.

### 3.1. Assessment of the situation

The first Canadian Broadcasting Act was passed on May 26, 1932 and created the Canadian Radio Broadcasting Commission, which became the Canadian Broadcasting Corporation in 1936. From the outset, the Act set out “the principle that the broadcasting system should be Canadian in content and character.”<sup>1</sup> During the second half of the twentieth century, the law underwent several changes as a result of societal changes. However, one of its challenges remains: that of preserving national culture.

In recent years, the emergence of major digital platforms has profoundly transformed the ways in which cultural content is accessed and consumed. Canadians are increasingly consuming via the Internet and are turning to international online services, which are already deeply integrated into the broadcasting landscape.

---

<sup>1</sup> Dewing, M., 2011, « La politique canadienne de radiodiffusion », Bibliothèque du parlement, n2011-39-F.

There is a “shift in household cultural spending from direct purchases of cultural products (books, records, DVDs, cinema or theatre tickets, etc.) to expenditures on:

- a) services: cable television, Internet access, mobile telephony, online programming to access digitized cultural products;
- b) equipment: purchase of video equipment (TVs, players, home theatre), computers, laptops, tablets, game consoles, readers, smart phones. [our translation]”<sup>2</sup>

This transformation in consumption patterns and access to cultural content is directly linked to the evolution of digital technologies. The Internet offers an unlimited choice of on-demand content with personalized offers and the ability to upload content yourself. This content is available on several types of mobile media, which accompany the user and can be synchronized.

The development of these new services has not yet been monitored. Unlike "traditional" radio and television services, online services do not require a licence, but are regulated through exemption orders, including the new media exemption order. They are thus exempt from Canadian content requirements:

- They are not required to contribute to the financing and promotion of Canadian content. For their part, broadcasting distribution undertakings (BDUs) and direct-to-home satellite distribution undertakings (DTH) must contribute at least 5% of their annual gross revenues from broadcasting activities to the creation and presentation of Canadian programs
- They are not required to contribute to the production and distribution of Canadian content. Under the 1991 *Broadcasting Act*, all television stations must include a minimum of 60% Canadian content on an annual basis or 50% in prime time. Quotas have since been slightly revised, but they have been maintained at 50% during prime time - from 6pm to 11pm. Broadcasters' licences also include significant Canadian program spending obligations that vary among companies. Radio stations, on the other hand, must ensure that at least 35% of the popular music they broadcast each week is Canadian content. French-language radio stations must devote at least 65% of their programming to French-language music, at least 55% of which must be devoted to prime time.
- Many of these online services are managed by foreign companies, which generate significant revenues in Canada. Yet their social and cultural responsibility associated with their activity in Canada is not recognized.

This has important implications for the economy of the cultural sector and for the diversity of cultural content.

### 3.2. Industries in difficulty

According to the CRTC report *Harnessing Change. The Future of Programming Distribution in Canada*, released on June 1, 2018, the growth of broadband Internet is largely driven by video and audio consumption.

In the fall of 2017, the Media Technology Monitor (MTM) noted that video and audio represent the vast majority of time spent online for Canadians:

- Video: 38%
- Audio: 34%
- Other activities: 28%<sup>3</sup>

---

<sup>2</sup> SODEC, 2013, *De L'œuvre à son public - Rapport du groupe de travail sur les enjeux du cinéma*, Montreal, SODEC.

<sup>3</sup> <https://crtc.gc.ca/eng/publications/s15/mar1.htm#f10>

It also notes that online programming services are becoming increasingly popular:

- Subscriptions to online audiovisual services, e.g. Netflix, accounted for 17% of the market in 2012 compared to 54% in 2017;
- Music streaming services, e.g. Spotify, accounted for 9% of the market in 2012, compared to 32% in 2017<sup>4</sup>.

Behind the audio and audiovisual content consumed by Canadians is a whole chain of actors: authors, creators or designers, performers, publishers, technicians, producers, distributors, broadcasters, all of whom represent an important part of the Canadian cultural industry. These actors have so far relied on a system for the distribution of works regulated by law, which favours in particular the production of such works. The arrival of new unregulated services, many of them non-Canadian, and the development of instant, personalized access to a globalized supply of content, have totally disrupted existing ecosystems.

In the sector, the commercialization of music content has undergone a major upheaval: for each artist, a personalized strategy in traditional media and a comprehensive digital strategy are now required, both of which involve a significant investment in money and human resources. The increase in streaming music services was accompanied by a decline in album sales – physical sales and digital downloads – which were a central part of the business model. For their part, online music services have distinguished themselves through their interfaces and no longer through their catalogues: subscription prices, design, functionalities, ability to make the best possible recommendations for each user using algorithms and metadata. Julianne Schultz, Editor-in-Chief and Founder of the Griffith Review, Professor at the Griffith Centre for Creative Arts Research (Griffith University, Australia) observes, “we are seeing a massive redistribution of wealth from the cultural sector, where meaning is created, to the technology sector, which has figured out how to market, distribute, reach and make money out of it in ways the cultural industries never imagined possible.”<sup>5</sup>

In the audiovisual sector, the budgets of foreign productions are staggering. Canadian broadcasters are increasingly facing unregulated online competitors who are gradually conquering Canadian audiences. In 2013, total web advertising revenues exceeded television advertising revenues in Canada<sup>6</sup> and the gap has widened in subsequent years. Broadcasters are experiencing both a decline in audiences and a decline in advertising revenues. Their investments in programming depend on their revenues, but they have less money to produce even though there are more specialized channels to feed with new content. Then, as cable companies' revenues, which feed the Canada Media Fund (CMF), decline, the CMF budget, a key source of funding for independent Canadian productions, was cut by 5.8% in 2017<sup>7</sup>, at the expense of the entire sector.

There are therefore several challenges facing cultural industries. On the one hand, as mentioned above, online programming services remain exempt from the regulatory and economic obligations that apply to traditional broadcasting services. This creates a clear competitive advantage for online services. On the other hand, telecommunications service providers (TSPs), which allow for the distribution of content online, capture part of the economic value of the sector, without having to make a contribution either. To the extent that the content consumed by Canadians is predominantly audio and video, they benefit from the distribution of cultural content, without contributing to its financing.

In its 2017 *Communications Monitoring Report*, the CRTC shows how the convergence of broadcasting and telecommunications activities has served companies that were previously concentrated in a single sector:

---

<sup>4</sup> <https://crtc.gc.ca/eng/publications/s15/mar1.htm#f1>

<sup>5</sup> <http://theconversation.com/australia-must-act-now-to-preserve-its-culture-in-the-face-of-global-tech-giants-58724>

<sup>6</sup> <https://crtc.gc.ca/eng/publications/s15/mar3.htm#f26>

<sup>7</sup> <https://cmf-fmc.ca/en-ca/news-events/news/march-2017/cmf-announces-2017-2018-program-budget,-guidelines>



“Over the past five years, revenues from the cable-based carriers and the incumbent telecommunications service providers (TSPs), as a percentage of total communications revenues, have remained more or less stable at approximately 33% and 49%, respectively. During this period, cable-based carriers’ telecommunications revenues increased by 5.1% annually, from \$13.3 to \$16.2 billion. Traditional telephone companies, however, increased their BDU revenues 8.2% annually, from \$2.4 billion in 2012 to \$3.2 billion in 2016.”<sup>8</sup>

It is also noted that the rules introduced in the early 1990s were designed for an essentially national framework, with little or no consideration given to the weight of foreign undertakings. The development of the Internet on a global scale and the multiplication of content distribution flows across borders has reconfigured the Canadian broadcasting landscape. In the music sector, for example, several foreign platforms, including the Swedish Spotify platform, offer online music content by subscription, without there being a Canadian competitor in the market. Like Canadian online services, foreign platforms are not subject to the regulatory obligations that apply to conventional broadcasters. They are also exempt from tax obligations, as they generally do not have a head office in Canada.

### **3.3. Contribution to the financing and promotion of Canadian content**

While television and radio continue to play an important role in the lives of Canadians, “traditional television and radio services are at best mature and that some segments are in decline,” the CRTC explains. However, a declining traditional system “may be unable to support production, promotion or discoverability.”<sup>9</sup> Specific content (programs of national interest, local news, content for linguistic minorities, fiction, documentaries, children’s works) is likely to be increasingly difficult to produce.

The case of issues of national interest is significant. Licensed services trigger the financing and production of programs of national interest. Without adequate budgets to produce them and in a context of increased competition from online platforms, the number of such programs is likely to decrease. Canadians could then lose access to many types of content that they currently enjoy, including French-language content. Appropriate regulation and funding would make it possible to maintain a diversified supply of cultural content.

To address these new challenges and ensure greater equity among stakeholders, the CDCE calls for all stakeholders who benefit from content distribution in Canada to contribute to its funding. In the following sections, we will propose ways to rebalance contributions among stakeholders so that they all participate in the financing and promotion of Canadian content. In some cases, public funding may be required to ensure the profitability of Canadian cultural industries and to enable the production of domestic content. However, we will let the sectoral organizations provide the necessary explanations in this regard.

### **3.4. The promotion and discoverability of Canadian cultural content**

The financing and promotion of Canadian content requires support for creation and production. It is also based on the promotion and discoverability of quality content.

The current Broadcasting Act provides that “the Canadian broadcasting system should:

- serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

---

<sup>8</sup> 2017 Communications Monitoring Report, CRTC, p.80

<sup>9</sup> <https://crtc.gc.ca/fra/publications/s15/pol1.htm>

- encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
- through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of Indigenous peoples within that society [...].”<sup>10</sup>

The CRTC also calls in its report for “ensuring that Canadians continue to have access to high quality audio and video content and that is made by and for Canadians, as well as the best content from around the world, regardless of the platform, device or technology they wish to use.”<sup>11</sup>

Without a legal framework that encourages and provides support to Canadian content creators and producers, there will be less Canadian content available, or of lower quality; Canadians will see less of themselves on screen and less content that represents their values, needs and interests. This will have an impact on the way Canadian society perceives itself and the way it is perceived around the world. It is therefore essential to continue to invest financially in the production of Canadian content, to support our artists, creators and producers in their mission to share our stories and perspectives with Canadian and global audiences.

According to research conducted by EKOS and presented in the CRTC report, Canadians themselves are in favour of supporting national cultural content:

78% of Canadians consider content made in Canada to be of moderate or high importance to them personally. In addition, “[m]any focus group participants said they support a government role in the development of Canadian content. Some view Canadian content as helping to strengthen unity and shared identity. Others noted that financial support to ensure the production of Canadian content helps to develop talent of actors, writers, and producers and creates employment throughout Canada.”<sup>12</sup>

To guarantee this access, the content must be made visible and discoverable.

Online content programming services are investing heavily in their interfaces and recommendation mechanisms. By using the possibilities offered by artificial intelligence, they compete in ingenuity to ensure that their platforms best meet the tastes of users. This customization of the offer gives them a major advantage over traditional services that cannot adapt on the same scale. By constantly offering new content, they create new expectations among users that traditional services cannot meet in the same way.

However, the novelty seems illusory. A Pew Research Center study published in November 2018 examined the YouTube recommendation algorithm in depth. Only 5% of the videos recommended to the researchers who conducted the study had less than 50,000 views at the time they were recommended, while 64% of the recommendations had more than 1 million views.<sup>13</sup> On Spotify, in the United States and Canada, listening focuses on a tiny portion of the available catalogue.<sup>14</sup>

---

<sup>10</sup> <https://laws-lois.justice.gc.ca/eng/acts/B-9.01/page-1.html#h-4>

<sup>11</sup> <https://crtc.gc.ca/eng/publications/s15/pol1.htm>

<sup>12</sup> <https://crtc.gc.ca/eng/publications/s15/pol1.htm#pr1>

<sup>13</sup> <https://pewrsr.ch/2FdzmSj>

<sup>14</sup> <https://usbeketrica.com/article/comment-algorithmes-illusion-gouts-musicaux>

The functioning of recommendation algorithms poses a problem with regard to the discoverability of content: the algorithm anticipates the user's desires by proposing (through a data collection technique) content similar to that which he or she has already seen or heard. The risk is therefore that it does not make the diversity of the cultural content available to the user known, but that it confines him, on the contrary, to his tastes. Another problem is the configuration of algorithms that do not take into account national cultures: on Spotify, for example, one cannot do a search by country.

The algorithm is first and foremost a tool; it is its handling that must also be questioned. It acts on the basis of usage data that is collected according to strategies implemented by online services. Data from foreign undertakings – which dominate the online content distribution market – are not available and content recommendation practices are opaque and exempt from any form of regulation.

UNESCO itself is calling for more transparent access to data. In its *Operational Guidelines on the Implementation of the Convention in the Digital Environment*, the Conference of Parties to the 2005 Convention on the Protection and the Promotion of the Diversity of Cultural Expressions recommends that measures be taken to “promote dialogue between private operators and public authorities in order to encourage greater transparency in the collection and use of data that generates algorithms, and encourage the creation of algorithms that ensure a greater diversity of cultural expressions in the digital environment and promote the presence and availability of local cultural works.”

There is still much to be said about the upheavals that have occurred in the various sectors. The many CDCE members who will be participating in these consultations will undoubtedly provide a more detailed analysis of the situation. We could also discuss in more detail the impacts of artificial intelligence on the diversity of cultural expressions. Our first publication on the subject<sup>15</sup> will give the reader tools to better understand the context.

We will now focus on the proposals we wish to put forward in order to contribute to the review of the legislative framework for broadcasting and telecommunications.

## **4. Delineate more clearly the areas of each of the laws**

Our first proposal is to delineate more clearly the areas of broadcasting and telecommunications laws, in order to better separate the content of its transport vehicle. While an undertaking could be subject to both laws, its various activities should only be subject to one or the other. What must be eliminated, in our view, is the association of cultural objectives with a mode of transmission linked to a specific technology.

### **4.1. Problems related to the current situation**

The powers vested in the CRTC under the *Telecommunications Act* and the *Broadcasting Act* give it control over the following providers:

Telecommunications:

- Telecommunications common carriers
- Telecommunications service providers
- Mobile wireless service providers

---

<sup>15</sup> <https://cdcc-dcde.org/en/ethical-principles-for-the-development-of-artificial-intelligence-based-on-the-diversity-of-cultural-expressions/>

Broadcasting:

- Distribution undertakings
- Broadcasting licensees (television and radio) in terrestrial mode
- Programming undertakings

Although the same regulatory body makes the decisions, the legislator has knowingly chosen to create two autonomous laws.<sup>16</sup> The *Canadian Telecommunications Policy* is an instrument of economic development. The *Canadian Broadcasting Policy* is one of protecting and promoting cultural sovereignty. It may be criticized, perhaps even rightly so, that in the 1980s the legislator chose to use the technological differences between these two industrial sectors as a differentiator rather than openly recognizing the complementarity of each other's ideological approach.

The result remains, and is now the starting point for the ongoing legislative review: we have two laws whose playgrounds must be well defined to have an optimal impact. Yet the two fields have been gradually merging into each other for more than twenty (20) years, at a rate that is constantly accelerating. It is now necessary to separate cultural objectives from a specific mode of transmission, namely broadcasting.

In 2012, the Supreme Court recognized the dichotomy between broadcasting undertakings and telecommunications carriers under the CRTC's regulatory framework. Attempting once again to disguise the concept of a telecommunications carrier as a broadcasting service is very likely to lead to the same dead end. However, this does not mean that telecommunications carriers have no responsibility when carrying cultural content.

The way in which its powers have been delegated to it, through two separate acts, leaves the CRTC no choice: it must follow the regulatory classification provided by Parliament. An undertaking, depending on the type of service it offers, will be subject to the *Broadcasting Act* or the *Telecommunications Act*. The provision of any service cannot be subject to both laws at the same time, nor can we choose the regulatory framework we like based on a desired policy objective.

#### **4.2. For a genuine adaptation to technological changes**

Distinguishing between content and its transport vehicle is the best way to ensure that future developments in communications technologies will cause less disruption to the promotion of Canadian content. Besides, the idea is not new. The architects of the current version of the *Broadcasting Act* believed they had put in place a preventive measure to ensure that new methods of transmission did not result in circumvention of the objectives of the Act, which they considered to be a priority with respect to transportation arrangement issues.

The preventive measure in question is paragraph 9(1)(f) of the Act which states the following:

- 9 (1) Subject to this Part, the Commission may, in furtherance of its objects,
- f) require any licensee to obtain the approval of the Commission before entering into any contract with a telecommunications common carrier for the distribution of programming directly to the public using the facilities of that common carrier;

---

<sup>16</sup> Broadcasting Distribution Regulation, SOR/97-555.

On reading the note prepared by the Department of Communications in August 1988, as part of its clause-by-clause analysis of Bill C-136<sup>17</sup>, it is clear that this provision is in fact the tool put in place to prevent technological changes, which were already anticipated, from undermining the effectiveness of the regulations adopted to achieve Canadian broadcasting policy objectives.

## Recommendation 1

**The CDCE recommends that the necessary adjustments be made to the *Broadcasting Act* and the *Telecommunications Act* to clearly distinguish the regulation of modes of transmission and telecommunications activities from that of cultural content, which can be transmitted by various technical means.**

## 5. Establish a contribution by telecommunications services providers to the financing of Canadian content

Our second proposal is to ensure that all telecommunications service providers (TSPs) involved in the transmission of cultural content contribute to the financing of Canadian content.

Currently, BDUs, broadcasters and the Canadian government contribute to Canadian content support funds. Despite an increase in the government contribution in 2017 in some funds, it is clear that a new structure to support Canadian content must be put in place so that these funds can continue to play their role for all sectors.

### 5.1. Why this contribution

The issue of concern to the CDCE is undoubtedly the fragmentation of media undertakings' revenues, which leads to a reduction in the revenues of BDUs and radio stations. Since these undertakings - let us call them the "alpha" contributors - are the only ones in the Canadian communications services ecosystem that must contribute directly and continuously to Canadian content support funds<sup>18</sup>, the resources of these funds are inexorably decreasing. This is what forced Canadian Heritage to increase its contribution to the Canada Media Fund in 2017.

Moreover, the income shortfall suffered by these alpha contributors turns into income growth for other providers who deliver similar content and who, in turn, escape this obligation to contribute, not because the purpose of their activities is different, but because they use a different transport technique from that of BDUs and radio stations.

The October 2018 OCCQ publication<sup>19</sup> revealed that cellular and Internet access services accounted for 41% of Quebec households' cultural spending in 2015, while 37% of cultural spending was dedicated to the purchase of cultural products. The evolution of the trend between 2010 and 2015 leads the authors to hypothesize that spending on cultural content will be transferred to TSPs in order to access them.

---

<sup>17</sup> See notes from the Department of Communications, August 1988, prepared in support of the clause-by-clause analysis of Bill C-136, as cited in Grant, Peter S. et Grant Buchanan, *Canadian Broadcasting Regulatory Handbook*, McCarthy Tétrault, 13<sup>th</sup> ed., 2016, p. 34.

<sup>18</sup> Broadcasting Distribution Regulation, SOR /97-555, Art. 34 and 35, *Radio Regulations*, 1986, SOR/86-982, Art. 15.

<sup>19</sup> <http://www.stat.gouv.qc.ca/statistiques/culture/bulletins/optique-culture-62.pdf>

The dematerialization of cultural content, and its increasing consumption via the Internet, is certainly at the root of the increased household spending on various telecommunications services. Currently, these are mainly Internet connection services and mobile telephony services. Moreover, TSP revenues have been growing since 2012<sup>20</sup> and their profit margins are very high, ranging from 37% to 39.8% between 2014 and 2016.<sup>21</sup>

In the conclusion of its report on the future of programming distribution in Canada, the CRTC proposed various options. One of them recommends restructuring the funding of Canadian content, including a contribution from TSPs. The CRTC justifies this proposal as follows:

With this approach, the burden of supporting content by and for Canadians would be partly reallocated within the system to include appropriate telecommunications services, while continuing support for broadband deployment. This approach recognizes the fact that the vast majority of the demand for telecommunications services and the associated growth in their revenues is driven by video and audio content. It further recognizes that most telecommunications services in Canada are part of highly vertically integrated companies that also include BDUs and often programming services of various types.

Preliminary analysis suggests that such an integrated fund could potentially be revenue-neutral across the entire system. Given the growth in revenues in certain telecommunications sectors, an integrated fund could also ensure continued support for audio and video content. This would include all beneficiaries of existing funds without the need for additional costs for Canadians, who ultimately fund the contributions of all players. Any potential for retail cost increases would be further mitigated by competition in the connectivity markets.<sup>22</sup>

Article 7 of the *Telecommunications Act* “affirm[s] that telecommunications performs an essential role in the maintenance of Canada’s identity and sovereignty” and highlights its contribution in “safeguard[ing], enrich[ing] and strengthen[ing] the social and economic fabric of Canada and its regions.”

As part of the debates surrounding the review of the Broadcasting Act, parliamentarians were concerned about the possibility that programming undertakings might find alternatives to broadcasting undertakings (BDUs) to deliver their content:

At present, CRTC regulations require cable companies to own the crucial parts of their plant (the head-end and the lines from the telephone pole into the home) but permit leasing of the remainder from the telephone companies, as long as these arrangements do not compromise the reliable delivery of broadcast services to cable subscribers. If the cable facilities were entirely leased from the phone companies, which under existing law as no authority to give priority to broadcasting services, the Commission would have no assurance that authorized cable system transmissions would in fact be delivered to subscribers’ homes.

New technologies such as fibre optics could lead to new types of arrangements based on the sharing of telephone companies’ fibre optic facilities with cable operators. It could therefore be beneficial to adopt a technology neutral regulation which allows the Commission to regulate regardless of the technology chosen for delivery. The new Act will give the Commission explicit authority to regulate these new types of arrangements. To ensure that broadcasting objectives are

---

<sup>20</sup> CRTC, 2017 Communications Monitoring Report, p. 212.

<sup>21</sup> CRTC, 2017 Communications Monitoring Report, p. 217.

<sup>22</sup> <https://crtc.gc.ca/eng/publications/s15/pol1.htm#pr2>

accorded priority under any such new arrangement, a consequential amendment of the Railway Act is included in this Bill. [our emphasis]<sup>23</sup>

Indeed, TSPs have implemented new services for the delivery of programming on the web. But these services have not been regulated under the *Broadcasting Act*. This text also reveals that broadcasting objectives should take priority over choices of delivery mode. One of these objectives states that “each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming.”<sup>24</sup>

## 5.2. Ensure the participation of TSPs in the short term

According to a Supreme Court decision in 2012<sup>25</sup>, given the context of the wording of the *Broadcasting Act* and the purpose of the Act, the terms “broadcasting” and “broadcasting undertaking” are not intended to apply to an entity that provides only the means of transmission. The CDCE understands that this represents an obstacle to imposing contributions to TSPs. In section 5.3, we will suggest amendments to the *Broadcasting Act* to remove this barrier in the longer term.

In the meantime, as discussed in the previous section, there are many reasons to require TSPs to contribute to the financing of Canadian content and the situation has changed significantly since 2012. We propose to use the *Telecommunications Act*, this time as the legal basis for a short-term measure.

A Governor in Council (GIC) order may require the CRTC to adopt regulations to ensure a contribution by TSPs to the financing of Canadian content by issuing instructions to the CRTC. Indeed, under the *Telecommunications Act*, the GIC may “by order, issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives.”<sup>26</sup>

The Cabinet could therefore direct the CRTC to adopt, through regulatory policy that will then be transformed into regulations, measures to ensure that telecommunications carriers contribute to the financing of Canadian content, thereby “serv[ing] to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions,”<sup>27</sup> and reaffirming their “essential role in the maintenance of Canada’s identity and sovereignty.”<sup>28</sup>

Since Canadian content is at the heart of the social structure and Canadian identity, such action seems to us not only justified, but necessary. The regulatory framework has already been modified in this way in the past. By issuing its Direction in 2006,<sup>29</sup> the GIC severely limited the Commission’s discretion by imposing on it a validation mode for its decisions that provided for an order of priority among the objectives of the *Canadian Telecommunications Policy*.

## Recommendation 2

**The CDCE recommends that the GIC issue instructions under the *Telecommunications Act* to the CRTC to adopt and implement measures to ensure a contribution by telecommunications carriers to the financing**

---

<sup>23</sup> August 1988 notes of the Department of Communications prepared in support of the clause-by-clause analysis of Bill C-136 concerning section 9(1)(f) of the *Broadcasting Act*.

<sup>24</sup> Article 3 (1) (e) of the *Broadcasting Act*.

<sup>25</sup> Reference relating to *Broadcasting Act*, 2012 SCC 4.

<sup>26</sup> *Telecommunications Act*, S.C. 1993, c. 38, Art. 8.

<sup>27</sup> *Telecommunications Act*, S.C. 1993, c. 38, Art. 7(a).

<sup>28</sup> *Telecommunications Act*, S.C. 1993, c. 38, Art. 7.

<sup>29</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy objectives*, SOR/2006-355.



of Canadian content, thereby “serv[ing] to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions,” and reaffirming their “essential role in the maintenance of Canada’s identity and sovereignty”.

### 5.3. Long-term changes

This direction will of course have to be confirmed in the appropriate legislative vehicle, the *Broadcasting Act*. This contribution clearly applies to the distribution and dissemination of cultural content – which is regulated by the *Broadcasting Act* – and not to all TSP activities. Moreover, the contributions made by BDUs will continue to be made under the *Broadcasting Act*.

According to a Supreme Court decision in 2012, the terms “broadcasting” and “broadcasting undertaking,” interpreted in the context of the language and purposes of the *Broadcasting Act*, are not meant to capture entities which merely provide the mode of transmission.<sup>30</sup> Appropriate amendments to the law will therefore have to be made to ensure that all links that benefit from the dissemination of cultural content contribute to the financing of Canadian content. It should be recalled once again that Article 3 (1) (e) of the *Broadcasting Act* states that “each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming.”

### Recommendation 3

**The CDCE recommends that amendments be made to the *Broadcasting Act* to ensure and regulate the contribution of TSPs to the financing of Canadian content.**

### 5.4. Determine the contribution to the financing of Canadian content

We propose that TSPs contribute to existing Canadian content support funds, which are currently supported by BDUs and broadcasters. This contribution should be made in continuity with the processes already in place, and therefore on the basis of a percentage of gross annual income. Other options could have been considered; for example, dedicating part of the sales tax to the financing of Canadian content, if such a sales tax were finally to be imposed on all the actors in the system.

Nevertheless, in order to ensure the continuity and sustainability of Canadian content funding, it seems to us wiser to favour the levy of a direct contribution on the basis of the share of gross revenues of TSPs attributable to access to cultural content. This will therefore essentially apply to the TSPs’ residential service revenues.

Finding an objective and universal method to establish the contribution of each telecommunications carrier is certainly a challenge, but it cannot be insurmountable. Rather than focusing on real-time observation of bandwidth usage, longer-term analyses would likely identify the average consumption of cultural content and the contribution that TSPs should make to support Canadian content based on gross revenues<sup>31</sup> Above all, it would reduce the risk of invasion of privacy.

---

<sup>30</sup> Reference re *Broadcasting Act*, 2012 SCC 4.

<sup>31</sup> In August 2018, the British regulatory authority, OFCOM, published its annual Communications Market Report. The data presented in this report can certainly offer avenues for research to come up with a solution that will take into account trends and evolution in subscribers' use of wired and wireless data services.



An exercise will have to be undertaken to determine the level of contributions. We do not have a specific proposal to make in this regard. Nevertheless, we believe that the following parameters are relevant to consider when this exercise is carried out:

- As we have seen, TSP profits appear to be more than sufficient to ensure that contributions to the financing of Canadian content do not translate into increases in subscriber fees for Canadians, who are already paying a significant – and increasing – price for telecommunications;
- Contributions collected should be redirected to existing funds in all sectors covered by the *Broadcasting Act*;
- The objective must be to provide sufficient funds to meet the objectives of the Canadian broadcasting policy, and not to maintain the current level of funding. In particular, funding must be adequate to ensure diversified and well referenced content.

#### **Recommendation 4**

**The CDCE recommends that the CRTC implement an appropriate methodology to determine the contribution of TSPs to the financing of Canadian content.**

## **6. The contribution of online programming services**

The main objective of the changes we are proposing to the *Broadcasting Act* is to promote the adaptation of Canadian broadcasting policy to the digital age. The foundations of this policy are as important as they were more than 20 years ago, or even more so because of the multiplication and penetration of the supply of content, and particularly foreign content.

Foreign online service undertakings cannot continue to be treated more favourably than Canadian broadcasters who must comply with Canadian broadcasting policy, as is currently the case. Given the growth in their market shares in the provision of online services, foreign undertakings cannot be exempted from the objectives of Canadian broadcasting policy, as otherwise this policy cannot realistically be implemented.

The CDCE therefore considers it essential that Canada fully exercise its right to implement a broadcasting policy that allows the maintenance and enhancement of national identity, cultural sovereignty, quality programming in both official languages and the pursuit of other public interest objectives.

The starting point for changes to the *Broadcasting Act* is to ensure that programming undertakings become a focal point of the Act. In addition, the CRTC must have the mandate and tools to exercise control over the system that has developed online and will continue to evolve.

### **6.1. The time has come for subjection**

Online programming undertakings, both foreign and Canadian, are still subject to the new media exemption order and are exempt from complying with the legal framework applicable to other undertakings in the Canadian broadcasting system.<sup>32</sup> As we have already seen in Section 3, these services

---

<sup>32</sup> Broadcasting Order CRTC 2009-660, Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings, October 22, 2009.

are growing at a steady pace. It is now time to ensure that these undertakings meet obligations as programming services.

All these services are programming undertakings within the meaning of the *Broadcasting Act* and must be considered as such in the regulatory exercise for which the Commission is responsible. We consider that the definitions of “programming undertakings” and “broadcasting undertaking” are sufficient to integrate these services. Let us use the definition of a programming undertaking to support our point:

*“programming undertaking means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus.”*<sup>33</sup>

First, it should be noted that this definition is technologically neutral. Second, it should be noted that a broadcasting undertaking includes a distribution undertaking, a programming undertaking and a network.<sup>34</sup>

From 1999 to 2009 – and even today since Order CRTC 2009-329 is still in effect – the Commission has introduced and maintained a regulatory imbalance between two categories of broadcasting undertakings: on the one hand, those that used the radio frequencies of the frequency bands allocated to broadcasting by ISED<sup>35</sup> and BDUs to reach their audiences; and on the other, all those that had found a new transmission medium.

At first, this approach seemed, or was, the best approach to meet the CRTC’s obligation to exercise its regulatory and supervisory powers, while allowing the broadcasting system to “*be readily adaptable to scientific and technological change.*”<sup>36</sup> This allowed programming undertakings to use new technologies without constraints, in the hope that this would improve accessibility to Canadian content.

Today, this mode of transmission – new in 1999 and now commonplace – stands out as an equal to the other two for listeners. But at the same time, it is emerging as a competitor for BDU and radio frequency transmission modes; a competitor who has the advantage of the game because many necessary rules that apply to others do not apply to it.

In addition, a general exemption, or the abolition of all rules, would also run counter to Canada’s obligation to implement the objectives of the *UNESCO Convention on Cultural Diversity*,<sup>37</sup> which, it should be recalled, was first ratified by Canada.

There is therefore only one method compatible with the Yale Committee's terms of reference,<sup>38</sup> namely to regulate all programming services. If we want all elements of the broadcasting system to “*contribute in an appropriate manner to the creation and presentation of Canadian programming,*”<sup>39</sup> the rules imposed on them must be the same, or at least adapted enough to be described as equivalent to each other.

This includes foreign undertakings that deliver audiovisual or audio content to Canadian residents through Internet or wireless networks, or a combination of the two, and generate revenue from subscribers or customers residing in Canada. In our view, the preconceived idea that foreign undertakings, which are the

---

<sup>33</sup> *Broadcasting Act*, S.C. 1991, c. 11, Art. 2(1).

<sup>34</sup> *Broadcasting Act*, S.C. 1991, c. 11, Art. 2(1)

<sup>35</sup> Innovation, Science and Economic Development Canada.

<sup>36</sup> *Broadcasting Act*, S.C. 1991, c. 11, Art. 3(1) a) (iv).

<sup>37</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, October 20, 2005, accepted by Canada on November 28, 2005, entry into force March 18, 2007.

<sup>38</sup> Broadcasting and Telecommunications Legislative Review, Terms of reference, June 5, 2018, p. 1.

<sup>39</sup> *Broadcasting Act*, S.C. 1991, c. 11, Art. 3(1) (e).

cause of the dominant disruption in the financing model for audiovisual and audio cultural content in Canada, are “unattainable” and cannot be subject to Canadian laws is both wrong and misguided.

The case of Sirius is a good example of how foreign suppliers who want to access the Canadian market can implement business strategies that respect the specificities of Canadian regulations and public policies. Upon approval of Sirius' application by the CRTC in 2006, Sirius was required to comply with the Canadian ownership and control requirements of the *Broadcasting Act* and the *Direction*. Since then, there have been several corporate reorganizations and transfers of control. Nevertheless, Sirius is still a Canadian broadcasting undertaking today.<sup>40</sup>

We do not claim that the solution or its implementation is seamless, but since it is a question of affirming the importance of both our territorial and cultural sovereignty, we do not understand why we should be shy in our approach.

## 6.2. Proceed quickly with an instruction order from the GIC

We propose that the GIC adopt an order-in-council, pursuant to its authority under section 7 of the Act, requiring the Commission to adapt its regulations and to impose obligations on all programming undertakings, whether or not they hold a broadcasting licence, with the objective of subjecting to these obligations all programming undertakings that generate revenues from subscribers residing in Canada.

Thus, under the Broadcasting Act, the GIC would issue directions to the CRTC to:

1. Amend the exemption order for alternative programming services,<sup>41</sup> as well as all necessary regulations to impose contributions to the financing of Canadian content, the promotion of Canadian content, the collection of information and the obligation to register with the CRTC on all programming undertakings, even if they are not licensed or eligible to become licensed, and adopt any other regulations if necessary;
2. Harmonize CRTC information requests for all programming undertakings, with the appropriate adaptations.

Foreign programming undertakings that deliver cultural content to Canadians would thus have the same obligations as Canadian undertakings with respect to recording, contributing and providing information to the CRTC. Ultimately, the only difference will be the exemption from obtaining a licence if they use electronic means to transmit their programmes.

All the subjects mentioned above as a potential target for a direction order could be dealt with by the Commission on its own initiative, and some of them have been for several years. The GIC must take the lead so that the CRTC can get down to it without further delay. To ensure that the political will necessary for the adoption of such orders is materialized, the government may be reminded, if necessary, of the basis for paragraph 9(1)(f) of the *Broadcasting Act*, and shown that this Article has unfortunately not been sufficient to achieve the intended objective.<sup>42</sup>

---

<sup>40</sup> See in particular *Broadcasting Decision CRTC 2005-247*, SIRIUS Canada Inc, Satellite subscription radio undertaking, June 16, 2005. *Broadcasting Decision CRTC 2017-114*, Sirius Canada and XM Canada – Transfer of shares, April 26, 2017.

<sup>41</sup> *Broadcasting Order CRTC 2009-660*, Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); *Revocation of the Exemption order for mobile television broadcasting undertakings*, October 22, 2009.

<sup>42</sup> *Broadcasting Act*, S.C. 1991, c. 11, Art. 9(1)(f).

## Recommendation 5

The CDCE recommends that the GIC issue instructions to the CRTC to amend the new media exemption order, the relevant regulations and adopt any other regulations if necessary, in order to require all programming undertakings to make contributions to the financing of Canadian content, the promotion of Canadian content, the collection of information and the obligation to register with the CRTC. The GIC must also request the CRTC to harmonize its requests for information for all programming undertakings.

### 6.3. Obligations of online programming undertakings

In this section, we will focus on three obligations that any online programming service should be required to meet. It may be desirable that other obligations be imposed, but in this exercise we will focus on those that are essential to protect and promote the diversity of cultural expressions.

#### 6.3.1. Promotion of Canadian content

There are several provisions in the *Broadcasting Act* or related regulations requiring licensees to promote Canadian content.

First, let us mention some of the objectives listed in the Canadian Broadcasting Policy (emphasis added):

- d) *the Canadian broadcasting system should:*
  - (i) *serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,*
  - (ii) *encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,*
  - (iii) *through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of Indigenous peoples within that society, and*
  - (iv) *be readily available to scientific and technological change;*
- e) *each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;*
- f) *each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;*
- i) *the programming provided by the Canadian broadcasting system should*
  - (i) *be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,*
  - (ii) *be drawn from local, regional, national and international sources,*
  - (iii) *include educational and community programs,*
  - (iv) *provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and*
  - (v) *include a significant contribution from the Canadian independent production sector;*

- o) *programming that reflects the Indigenous cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose;*

Through these objectives, all elements of the system are being asked to do their part to promote, make accessible, enhance and prioritize Canadian cultural content. In theory, all these objectives can be met by online programming services, even foreign ones.

It is then up to the CRTC to determine how programming services will implement these objectives. At present, the directives take the form, in particular, of minimum content requirements.

For example, Article 4 (7) of the Canadian Programs section of the Television Broadcasting Regulations, 1987<sup>43</sup>:

- a) *a licensee holding a public licence shall devote not less than 60 per cent of the evening broadcast period to the broadcasting of Canadian programs; and*
- b) *a licensee holding a private licence shall devote not less than 50 per cent of the evening broadcast period to the broadcasting of Canadian programs.*

Or various paragraphs of section 2.2 of the Radio Regulations, 1986<sup>44</sup>:

- (9) *Except as otherwise provided under a condition of its licence and subject to subsection (6), an A.M. licensee, F.M. licensee or digital radio licensee that is licensed to operate a commercial station shall, between 6:00 a.m. and 6:00 p.m., in any period beginning on a Monday and ending on the Friday of that week, devote at least 35% of its musical selections from content category 2 to Canadian selections broadcast in their entirety.*
- (10) *Except as otherwise provided under a condition of its licence, an A.M. licensee, F.M. licensee or digital radio licensee that is licensed to operate a commercial station in the French language shall, between 6:00 a.m. and 6:00 p.m., in any period beginning on a Monday and ending on the Friday of that week, devote at least 55% of its vocal musical selections from content category 2 to musical selections in the French language broadcast in their entirety.*
- (13) *Except as otherwise provided under a condition of its licence, an A.M. licensee, F.M. licensee or digital radio licensee that is licensed to operate a station in the French language – other than a commercial station, community station or campus station – shall, in a broadcast week, devote at least 65% of its vocal musical selections from content category 2 to musical selections in the French language and schedule them in a reasonable manner throughout each broadcast day.*

If we understand the logic that currently prevails in online programming services, it is clear that traditional logic cannot be applied to enhance Canadian content. However, other techniques can be implemented to promote better access to Canadian cultural content in order to achieve the public interest objectives contained in the broadcasting policy.

We believe it would be useful to take advantage of this exercise to briefly explore these new ways of doing things in order to make this possibility more concrete.

First, minimum content presence requirements may be required for online programming services. At least this is the challenge Europe took up with its revision in 2018 of the Audiovisual Media Services Directive,<sup>45</sup>

---

<sup>43</sup> <https://laws-lois.justice.gc.ca/eng/regulations/SOR-87-49/index.html>

<sup>44</sup> <https://laws-lois.justice.gc.ca/eng/regulations/SOR-86-982/index.html>

<sup>45</sup> European Parliament legislative resolution of 2 October 2018 on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016)0287 – C8-0193/2016 – 2016/0151(COD)).

which allows Member States to impose between themselves measures to protect and finance national audiovisual content on a non-discriminatory basis. This Directive applies mainly to broadcasting service providers, both linear and on-demand. The 2018 revision of this Directive extended its scope to video-on-demand services that have no connection with programming or broadcasting distribution undertakings.<sup>46</sup> The aim here is, openly, to impose rules on American undertakings, such as Google and Youtube, in order to distribute the requirements fairly among undertakings providing audiovisual content, regardless of their nationality. The promotion of national content is at the heart of this dynamic and the Directive requires online programming undertakings to offer at least a 30% share of European works in their catalogues and to ensure prominence of those works.<sup>47</sup>

With this legislative framework, France was able to quickly adapt its legislative requirements to cover all suppliers generating revenue in this state. It manages to impose a financial contribution by means of a 2% tax on physical and online video broadcasting under the *Code général des impôts*, paid to the Centre National du cinéma et de l'image animée.<sup>48</sup> It also provides for higher quotas (60% for European works and 40% for “original French-language works”).<sup>49</sup>

But France also requires measures to encourage the recommendation of content: “On their home page, service publishers shall at all times reserve a substantial proportion of works – the display of which is ensured other than by the mere mention of the title – for European works or original French-language works, in particular by displaying visuals and making trailers available. [our translation]”<sup>50</sup>

The logic is as follows: we cannot expect the population to access local or national cultural content if it is not online, or if it is drowned in a catalogue containing thousands of titles without being promoted. Minimum requirements for the presence of content are important, but so are minimum recommendation requirements to achieve cultural objectives.

The CRTC will be able to consider the best ways to regulate the presence and promotion of Canadian content on services. Europe has charted a course, and the reflection can continue. For example, objectives could be identified in terms of the proportion of access to Canadian content, allowing services to work as they wish to achieve these objectives. Alliances with national programming services could also be encouraged to match catalogues, integrate recommendations to other services, and offer joint subscription packages. Care should probably be taken to ensure an appropriate distribution between new and older Canadian content.

Finally, and let us insist once again on this aspect, the emergence of foreign online programming services is already forcing a major compromise in the context of cultural policies. The promotion of Canadian programming is the highest priority of the legal and regulatory arsenal currently in place in Canada. We believe that the promotion of Canadian content must be one of the priorities of the current modernization process if Canada is to continue, as it has committed to do, to protect and promote the diversity of cultural expressions. To this end, the regulations that will apply to all online programming services must contain targeted and binding measures.

In addition, the Yale committee must consider the role and impact of the multiple hardware interfaces (terminals) through which people access cultural content, such as smart speakers, smart phones, playback

---

<sup>46</sup> See Fact Sheet: Digital Single Market: Commission Updates EU Audiovisual Rules and Presents Targeted Approach to Online Platforms, European Commission, May 25, 2016, [http://europa.eu/rapid/press-release\\_MEMO-16-1895\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1895_en.htm), accessed November 25, 2018.

<sup>47</sup> Article 13 (1) of Directive 2010/13/UE as revised.

<sup>48</sup> Under the Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande.

<sup>49</sup> Article 12, Promotion - Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande

<sup>50</sup> Article 13, Promotion - Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande

devices (iPads, tablets and readers), multimedia streaming devices (Apple TV) that limit access to programming services, or treat them differently.<sup>51</sup>

We believe it is essential that terminals be neutral and that the people who use them can access the programming services they want and not only those linked to the company that builds them.

### **Recommendation 6**

**The CDCE recommends that the CRTC determine the best ways to ensure the presence and promotion of Canadian content on online programming services through targeted and binding measures, including issues of access to content by terminals.**

#### 6.3.2. Contribution to the financing of Canadian content

We propose that online programming undertakings also contribute to the financing of Canadian content, as do other programming undertakings in their sector.

We could repeat here what we have said in section 5.4. This contribution should be made in continuity with the processes already in place.

Online programming companies will of course be able to invest locally, as some are already doing, to develop content. However, these investments cannot replace a marked-up contribution allowing the development of independent Canadian productions, through a contribution to Canadian content support funds or through Canadian program spending requirements, depending on the sector of activity.

### **Recommendation 7**

**The CDCE recommends that the CRTC implement an appropriate methodology to determine the contribution of online programming undertakings to the financing of Canadian content.**

#### 6.3.3. Access to data:

Online service undertakings collect a lot of data on who subscribes to or uses their services. As we have seen, recommendation algorithms fuel this data and allow undertakings to guide users to specific content based on particular interests. This wealth of data is jealously guarded by these undertakings for whom they represent a fundamental source of wealth<sup>52</sup>. However, it is currently impossible to access certain data of public interest that would allow society as a whole to be aware of the state of health of its cultural diversity in the digital environment.

The CRTC's report on the future of programming distribution in Canada also supported this imperative, for different and equally important reasons, when it proposed that "[...] the government could consider developing, in consultation with stakeholders, national and cross-sectoral strategies intended to: [...]"

---

<sup>51</sup> See the ARCEP report and its recent opinion:

[https://www.arcep.fr/uploads/tx\\_gspublication/rapport-terminaux-fev2018.pdf](https://www.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018.pdf)

[https://www.arcep.fr/uploads/tx\\_gsavis/18-1204.pdf](https://www.arcep.fr/uploads/tx_gsavis/18-1204.pdf)

<sup>52</sup> Tchéhouali, D. ; Plamondon, J. (2018). *Données d'usage et Usage des données à l'ère des plateformes : De la nécessité d'un encadrement réglementaire pour une meilleure affirmation de notre souveraineté numérique*, Montréal, ISOC Québec, Coalition pour la Culture et les Médias (CCM), 32 p.

develop improved data collection programs for audio and video content that use new technologies to better manage and monitor exploitation and monetization of content rights.<sup>53</sup>

As part of the amendments it will undertake to bring online programming undertakings within the legal framework, the CRTC will have to address several issues related to cultural content data. In particular, it faces new opportunities to collect data from these companies and report in a more detailed and sophisticated way on the diversity of online cultural expressions. It will have to consider the information, usage data or other data it needs from programming companies to provide a relevant and detailed picture of the consumption of cultural content by Canadians. The CRTC could even explore the possibility that the data that users consent to provide to programming undertakings could be made anonymous and then placed in a public database that could be used by researchers to advance knowledge and science.

Let us now look at the current limitations to data collection. In the case of Canadian undertakings, in general, the appropriate powers to formulate requirements to compel undertakings to provide the data necessary to assess access to content by the Canadian public are vested in either the CRTC, the GIC or Statistics Canada. In any case, they are not unlimited and cannot be exercised arbitrarily.

The CRTC has the power to make regulations requiring a broadcasting undertaking to provide it with information regarding “their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify.”<sup>54</sup> Information about access to content - that is, the frequency and duration of listening to Canadian content - probably does not fall into this category. Paragraph 10(1)(k) of the Broadcasting Act, on the other hand, may provide the Commission with the flexibility to broaden its search for information by allowing it to make regulations to “*respecting such other matters as it deems necessary for the furtherance of its objects.*”<sup>55</sup> We believe that the 1993 *Broadcasting Information Regulations* would be the preferred instrument to achieve this objective. Finally, the CRTC may impose obligations to provide information as licensing conditions, and as one of the compliance conditions for benefiting from regulatory exemption orders.

The Chief Statistician of Canada has the authority, but also the duty, to “collect, compile, analyze, abstract and publish statistics in relation to all or any of the [listed] matters in Canada,”<sup>56</sup> including foreign trade, communications, and “*any other matters prescribed by the Minister or by the Governor in Council.*”<sup>57</sup> The annual surveys conducted by the CRTC to obtain information from broadcasting undertakings and telecommunications carriers are conducted jointly with Statistics Canada. The Chief Statistician may, under Article 8 of the *Statistics Act*, decide on the mandatory nature of the requests for information he sends. In the event of default without lawful excuse, the person to whom the request was made would thus commit a summary conviction offence punishable by a maximum fine of five hundred dollars (\$500) under the provisions of Article 31 of the same Act. This penalty is certainly not a deterrent for situations involving requests for information made to undertakings.

The CRTC’s powers are, in our view, quite sufficient, and if not, they can be supplemented by those of the Chief Statistician of Canada or the GIC, in order to obtain the necessary information from Canadian undertakings, but it must make use of it. The difficulty here lies in the nature of the information requested. Currently, most of this information is not yet being requested from Canadian undertakings. The existing Form 560 in the CRTC’s Data Collection System (DCS) does not require any data with respect to the volume

---

<sup>53</sup> <https://crtc.gc.ca/fra/publications/s15/pol1.htm#pr2>

<sup>54</sup> *Broadcasting Act*, S.C. 1991, c. 11, Art. 10(1) (i).

<sup>55</sup> *Broadcasting Act*, S.C. 1991, c. 11, Art. 10(1) (k).

<sup>56</sup> *Statistics Act*, R.S.C. 1985, c. S-19, Art. 22.

<sup>57</sup> *Statistics Act*, R.S.C. 1985, c. S-19, Art. 22 (u).



of local, Canadian or foreign content viewed or transmitted by subscribers of alternative programming services.<sup>58</sup>

Therefore, the first step should be to plan to do so with Canadian undertakings, while complying with all the requirements of any other legislation regarding the privacy<sup>59</sup> of subscribers and customers of programming undertakings.

In addition, the data, however limited, that the Commission requires from Canadian undertakings are not provided by foreign undertakings about their Canadian subscribers and customers. Yet they operate their services under the same exemption order and should therefore comply with it. We know that the CRTC has already made a request for this data. But surprisingly, at the same time, it granted confidentiality not only to the information that could have been transmitted to it,<sup>60</sup> but also to the basic information that would confirm whether or not the foreign undertaking had transmitted anything to it. It is not only a matter of obtaining the information, but also of knowing whether it has been transmitted, and then it was to be collected by the CRTC and subject to publicly available analysis and reporting, while respecting the confidentiality consistently accorded to all companies.<sup>61</sup>

Moreover, some of the information that is coveted is already being collected by online programming undertakings. This data makes it possible to draw a portrait of the private life of subscribers in a more or less transparent way. The CRTC's powers to obtain information must always be exercised in a manner that respects the privacy of citizens. Recently, when he appeared before Parliament, the Privacy Commissioner took the opportunity to remind elected officials of an important principle: the collection of personal information must not turn into a fishing expedition. They must be targeted and justified.<sup>62</sup>

To give more weight to the CRTC's requests for information from foreign programming undertakings, the inclusion of penal sanctions in the *Broadcasting Act* seems to be the only possible option at this time. We will address this issue in the next section.

## Recommendation 8

**The CDCE believes that the regulation of online programming undertakings must be accompanied by an obligation to provide data on the cultural content accessed by Canadians. This data should be collected by the CRTC, under the *Statistics Act*, in collaboration with Statistics Canada, which has the power to impose sanctions if companies operating in Canada do not provide it.**

### 6.4. Legislative change

In the short term, a legislative amendment will be required to give new powers to the CRTC to ensure that online programming services are subject to the legal framework. It is necessary for the CRTC to obtain new powers so that it can ensure that programming undertakings that do not require a licence to operate comply with their new obligations.

---

<sup>58</sup> The term “new media” has been replaced by the CRTC for “over-the-top programming services” in its documents and communications since 2018. The meaning is always the same: they are programming services transmitted via the Internet.

<sup>59</sup> *Personal Information Protection and Electronic Documents Act*, S.C., 2000, c. 5.

<sup>60</sup> CRTC *Broadcasting Procedural Letter Addressed to Corie Wright (Netflix)*, 1011-NOC2017-0359, February 2, 2018.

<sup>61</sup> *Telecommunications Act*, S.C. 1993, c. 38. *Telecom Public Notice CRTC 2002-5, New procedure for telecom costs awards*, November 7, 2002. *Telecom Information Bulletin CRTC 2016-188, Guidance for costs award applicants regarding representation of a group or a class of subscribers*, May 17, 2016.

<sup>62</sup> *Appearance before the Standing Senate Committee on Banking, Trade and Commerce on the collection of financial information by Statistics Canada, Office of the Information Commissioner of Canada*, November 8, 2018.

In the previous sections, we have argued and reiterated that foreign undertakings that transmit programs to Canada by electronic means are precisely programming undertakings within the meaning of the definition of the Canadian *Broadcasting Act*. If they have customers or subscribers in Canada, it is because they are partly operating in Canada. They are therefore subject to the Act. Failure to comply with the Act, or to comply with the requirements imposed by the Commission, constitutes a violation of the Act.

In the same way that the CRTC has powers of penal sanctions in telecommunications to ensure compliance with certain provisions, it could be granted similar powers in broadcasting. In telecommunications, these powers exist to ensure, among other things, that any carrier, Canadian or foreign, complies with the rules limiting unsolicited telecommunications.<sup>63</sup>

In broadcasting, this power already exists, but only to sanction undertakings that charge fees to their customers who request a paper invoice for services rendered.<sup>64</sup> If monetary penalties of up to \$250,000 for a first offence and \$500,000 for a repeat offence are provided for a paper bill charge, there is nothing incongruous or shocking about the fact that refusing to cooperate on priority aspects of monitoring the system and achieving the objectives of the Act – such as making contributions to the financing of Canadian content, promoting Canadian content, providing the information required by the CRTC and registering a business with it – also entails severe monetary sanctions for the offenders.

These new powers would apply to both foreign and Canadian undertakings, when programs are carried other than by BDUs or through a CRTC licence with a broadcasting certificate issued under the *Radiocommunication Act*.<sup>65</sup>

The enforcement of sanctions against foreign undertakings could be problematic. But this difficulty can probably be overcome if the Canadian government also sets up a bonding system for foreign undertakings that have no assets in Canada.

To encourage foreign undertakings to comply with their new obligations, the Canadian government will also have to put in place appropriate tax or penal rules to ensure that contributions to the financing and promotion of Canadian content are collected from recalcitrant undertakings. This measure should be suspensive for all those who will respect the authority of the CRTC. Measures of this nature have been put in place in Europe, for example by France.

It is therefore necessary to allow the CRTC to order the payment of fees in broadcasting proceedings in the same way as in telecommunications. The existing provisions<sup>66</sup> are easily adaptable between the two laws, as are the rules for setting these fees. The Commission has long since acquired the competence to deal properly with these requests. The lack of symmetry between the two Acts in this regard leads to an asymmetry of democratic participation in the CRTC's consultation processes.

In addition, the CRTC must be granted powers to impose administrative penalties for refusing to provide the requested information or for non-compliance with conditions of licences or exemption orders. We believe that these proposals should be the subject of a sufficiently broad consensus to hope for the adoption of such measures in the short term.

---

<sup>63</sup> *Telecommunications Act*, S.C. 1993, c. 38, art. 41 et ss.

<sup>64</sup> *Broadcasting Act*, L.C. 1991, c. 11, art. 34.1 à 34.3.

<sup>65</sup> *Radiocommunication Act*, R.S.C., c. R-2.

<sup>66</sup> *Telecommunications Act*, S.C. 1993, c. 38. *Telecom Public Notice CRTC 2002-5, New procedure for telecom costs awards, November 7, 2002. Telecom Information Bulletin CRTC 2016-188, Guidance for costs award applicants regarding representation of a group or a class of subscribers, May 17, 2016.*

## Recommendation 9

The CDCE is seeking a legislative review to ensure that the CRTC has the same powers as it already has under the provisions of the *Telecommunications Act*, to impose administrative penalties and to order the payment of fees to programming undertakings.

## 7. Other changes to the *Broadcasting Act*

In addition to the changes requested in the previous sections, the CDCE would like to make three other recommendations to improve the *Broadcasting Act*.

### 7.1. Canadian Broadcasting Policy

The CDCE considers it essential that Canada make full use of its right to implement a broadcasting policy that maintains and enhances national identity, cultural sovereignty and other public policy objectives.

As mentioned earlier, this policy seems to us to be just as important as it was more than 20 years ago, or even more so because of the increase in the number of content offers. However, it may be desirable to revise it more thoroughly, or even to prioritize some of the current objectives cited in section 3 of the *Broadcasting Act*, which constitute the Canadian Broadcasting Policy. However, it seems useful to us to proceed gradually and to give ourselves the time to complete this exercise. If the interim report of the Broadcasting and Telecommunications Legislative Framework Review Group already outlines the changes that will be recommended, this would allow us to contribute more adequately to the revision of the objectives of the Canadian Broadcasting Policy.

Notwithstanding, we are now suggesting the addition of a new objective to the policy, which could read as follows:

*The Canadian broadcasting system must contribute to the protection and promotion of the diversity of cultural expressions, in accordance with Canada's obligations under the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.*

This addition is amply justified by the central role that Canada played in the development and adoption of this instrument, including being the first signatory to the 2005 Convention, and that it continues to play today to ensure its implementation<sup>67</sup>.

## Recommendation 10

**The CDCE recommends adding a new objective on the protection and promotion of the diversity of cultural expressions to the Canadian Broadcasting Policy. In addition, it recommends that a more thorough review of the objectives be undertaken after the publication of the interim report on the review of broadcasting and telecommunications legislation.**

---

<sup>67</sup> See in particular the Operational Guidelines on the implementation of the Convention in the digital environment, online: [https://unesdoc.unesco.org/ark:/48223/pf0000260710\\_eng.page=100](https://unesdoc.unesco.org/ark:/48223/pf0000260710_eng.page=100)

## 7.2. Destination of Canadian content support funds

We believe that the production funds to which Canadian radio, BDUs and the Government of Canada currently contribute, and to which TSPs and online service programming undertakings will now contribute, must continue to be available exclusively to Canadians. It would be useful to include this in the Act.

### Recommendation 11

**The CDCE proposes to add a new section to the *Broadcasting Act* to specify that only Canadians can access Canadian content support funds.**

## 7.3. The Canadian Broadcasting Corporation

The public broadcaster plays a major role in the creation, distribution and promotion of Canadian content, diverse and of high quality. In doing so, it contributes significantly to Canadian culture, creates a sense of belonging and provides spaces where the many communities can discuss the issues that affect them.

A new law could govern the CBC's activities, which would define its objectives, its obligations in terms of programming, production expenditures and other aspects currently found in the *Broadcasting Act*. Without changing anything about the characteristics, mission, obligations, etc. of the CBC, this would prevent these elements from being subject to legislative reviews that deal with the broadcasting system.

The *Broadcasting Act* could simply mention that the broadcasting system includes a public broadcaster, the CBC, and that certain priorities are given to the public broadcaster (Article 3 (1) (n)). In fact, this article was mainly used to obtain frequencies, which will no longer be sought for television, while the CBC's radio frequencies are sustainable.

The CBC's overall mandate and its independence from political power must be maintained.

### Recommendation 12

**The CDCE recommends that a new law should frame the activities, objectives, obligations and other characteristics of the CBC so that these elements are no longer included in the *Broadcasting Act*.**

## 8. Spectrum auctions

Auction sales of 700 MHz spectrum licences generated revenues of \$5.27 billion in 2014.<sup>68</sup> These funds were paid into the Consolidated Revenue Fund. We propose that the revenues from the upcoming auctions be used as financial compensation due to technological changes and allocated to the financing of Canadian content.

The CRTC's report on the future of programming distribution in Canada mentioned this possibility: "A restructured funding strategy should be based on a revised contribution structure that is broad-based, equitable and sustainable in the longer term. It could integrate or at minimum align the existing contributions of the federal government directed to audio and video content. It could also incorporate a

---

<sup>68</sup> <https://www.ic.gc.ca/eic/site/ic-gc.nsf/eng/07398.html>

portion of the revenues derived from spectrum licensing and auctions, since the demand for spectrum is driven to a large extent by the demand for audio and video content.”<sup>69</sup>

The next auctions will be for 600 MHz spectrum licences and are expected to take place shortly. They are expected to generate approximately \$1 billion in revenue.

### **Recommendation 13**

**The CDCE proposes that the revenues from the upcoming auctions of spectrum licences be constituted as financial compensation due to technological changes and allocated to the financing of Canadian content.**

## **9. Conclusion**

The many issues raised by this consultation are complex. Despite the time allocated for reflection, and even though many other consultations have led representatives of the cultural community to examine the issues we are raising again today, some reflections will remain incomplete, and others will not be addressed.

In closing, we would like to emphasize the importance of adapting to technological changes as well as new business strategies. The CRTC will have to be extremely vigilant in this regard.

The CDCE has recently begun a reflection on the challenges of artificial intelligence (AI) from the point of view of the diversity of cultural expressions<sup>70</sup> and the ethical principles that should guide its development. We make the following observation, with reference to the online programming service:

“The current model, which is more subscription-oriented, leads to captivity of audiences. Users who try to limit the multiplication of monthly fees and develop a reluctance to pay to buy or rent content will tend to limit themselves to the platforms to which they subscribe. Content that is not available on major platforms is at risk of being ignored or pirated.”<sup>71</sup>

It is unlikely that no actor will attempt to organize the programming offer to counter this situation. The evolution of programming services clearly demonstrates the tendency to reproduce characteristics of the traditional system: the introduction of advertising, of course, but also with playlists and numerous recommendation mechanisms<sup>72</sup>. Combined with situations of near-monopoly, these recommendations bring us strangely close to the linearity of traditional media.

This is perhaps more a question of whether the organization of the offer would come from TSPs or programming undertakings (probably foreign). This would of course have an impact on the ability to maintain a Canadian broadcasting system.

If this were to happen, it would be essential that the CRTC remain vigilant and ensure that the I is enforced so that the system remains the property of Canadians. Similarly, it will have to ensure that the changes we

---

<sup>69</sup> <https://crtc.gc.ca/eng/publications/s15/pol1.htm#pr2>

<sup>70</sup> CDCE, Ethical Principles for the Development of Artificial Intelligence Based on the Diversity of Cultural Expressions, November 2018, online: <https://cdec-cdce.org/en/ethical-principles-for-the-development-of-artificial-intelligence-based-on-the-diversity-of-cultural-expressions/>.

<sup>71</sup> CDCE, Op. Cit., p. 5.

<sup>72</sup> See this article describing Netflix's strategy and how it tries to direct its subscribers to its productions: <https://www.wired.com/story/netflix-the-defenders-audience-data/>

are proposing today have the effect of regulating all current and future players in this system, including social media.

Finally, the CDCE proposes that the interim report of the panel be sent to the Canadian government by the end of April 2019 instead of waiting until June. This could allow for immediate measures to be implemented before the next election.

The current revision is fundamental. Many Canadian artists, creators and cultural workers look forward to the Canadian government taking the right actions to enable them to generate cultural expressions for the benefit of the entire population. As we have said, cultural content plays a fundamental role in society: identity building, social cohesion, dialogue between individuals, integration of newcomers, etc. The monetary value of this contribution can be measured, and it is enormous. Its symbolic value is invaluable and must be preserved at all costs.

That is why we insist that the Broadcasting and Telecommunications Legislative Framework Review Group take on board our many recommendations<sup>73</sup> that will make it possible in the very short term, without having to wait until the end of the law review process, to restore the balance in cultural ecosystems.

---

<sup>73</sup> Recommendations 2, 4, 5, 6, 7, 8, 13 and 14.

## Appendix 1: Reminder of Short- and Long-Term Recommendations

The CDCE makes 14 recommendations as part of this consultation. It insists on the fact that several of these recommendations (2, 4, 5, 6, 7, 8, 13 and 14) could be implemented in the very short term.

### Recommendation 1

The CDCE recommends that the necessary adjustments be made to the *Broadcasting Act* and the *Telecommunications Act* to clearly distinguish the regulation of modes of transmission and telecommunications activities from that of cultural content, which can be transmitted by various technical means.

### Recommendation 2

The CDCE recommends that the GIC issue instructions under the *Telecommunications Act* to the CRTC to adopt and implement measures to ensure a contribution by telecommunications carriers to the financing of Canadian content, thereby “serv[ing] to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions,” and reaffirming their “essential role in the maintenance of Canada’s identity and sovereignty”.

### Recommendation 3

The CDCE recommends that amendments be made to the *Broadcasting Act* to ensure and regulate the contribution of TSPs to the financing of Canadian content.

### Recommendation 4

The CDCE recommends that the CRTC implement an appropriate methodology to determine the contribution of TSPs to the financing of Canadian content.

### Recommendation 5

The CDCE recommends that the GIC issue instructions to the CRTC to amend the new media exemption order, the relevant regulations and adopt any other regulations if necessary, in order to require all programming undertakings to make contributions to the financing of Canadian content, the promotion of Canadian content, the collection of information and the obligation to register with the CRTC. The GIC must also request the CRTC to harmonize its requests for information for all programming undertakings.

### Recommendation 6

The CDCE recommends that the CRTC determine the best ways to ensure the presence and promotion of Canadian content on online programming services through targeted and binding measures, including issues of access to content by terminals.

### Recommendation 7

The CDCE recommends that the CRTC implement an appropriate methodology to determine the contribution of online programming undertakings to the financing of Canadian content.

### Recommendation 8

The CDCE believes that the regulation of online programming undertakings must be accompanied by an obligation to provide data on the cultural content accessed by Canadians. This data should be collected by the CRTC, under the *Statistics Act*, in collaboration with Statistics Canada, which has the power to impose sanctions if companies operating in Canada do not provide it.

**Recommendation 9**

The CDCE is seeking a legislative review to ensure that the CRTC has the same powers as it already has under the provisions of the *Telecommunications Act*, to impose administrative penalties and to order the payment of fees to programming undertakings.

**Recommendation 10**

The CDCE recommends adding a new objective on the protection and promotion of the diversity of cultural expressions to the Canadian Broadcasting Policy. In addition, it recommends that a more thorough review of the objectives be undertaken after the publication of the interim report on the review of broadcasting and telecommunications legislation.

**Recommendation 11**

The CDCE proposes to add a new section to the *Broadcasting Act* to specify that only Canadians can access Canadian content support funds.

**Recommendation 12**

The CDCE recommends that a new law should frame the activities, objectives, obligations and other characteristics of the CBC so that these elements are no longer included in the *Broadcasting Act*.

**Recommendation 13**

The CDCE proposes that the revenues from the upcoming auctions of spectrum licences be used as financial compensation due to technological changes and allocated to the financing of Canadian content.

**Recommendation 14**

The CDEC proposes that the interim report of the panel of experts be forwarded to the Canadian government by the end of April 2019 to allow for immediate action to be taken before the next election.



## **Appendix 2: Consistency with the questions set out in the terms of reference**

The reader will find below a list of the questions raised in the legislative framework review to which CDCE is responding in this submission. A short text accompanies each of these questions to provide a brief answer and, above all, a reference to the corresponding sections of the brief.

### **Telecommunications Act and Radiocommunication Act**

#### **6. Effective Spectrum Regulation**

*6.1 Are the right legislative tools in place to balance the need for flexibility to rapidly introduce new wireless technologies with the need to ensure devices can be used safely, securely, and free of interference?*

Auctions of 700 MHz spectrum licences generated revenues of \$5.27 billion in 2014. These funds were paid into the Consolidated Revenue Fund. The CDCE proposes that the revenues from the upcoming auctions of spectrum licences be constituted as financial compensation due to technological changes and allocated to the financing of Canadian content (section 8).

#### **7. Governance and Effective Administration**

*7.2 Does the legislation strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?*

The CDCE is considering a new case of application of this balance between Cabinet and the CRTC. The CDCE proposes a short-term measure to use the powers of the Governor in Council to require telecommunications service providers (TSPs) to participate in the financing of Canadian content. Under its powers under the *Telecommunications Act*, the Governor in Council could issue instructions to the CRTC to adopt regulations ensuring that TSPs contribute to the financing of Canadian content (section 5.2).

### **Broadcasting Act**

#### **8. Broadcasting Definitions**

*8.1 How can the concept of broadcasting remain relevant in an open and shifting communications landscape?*

The first proposal of the CDCE is to delimit more clearly the areas of broadcasting and telecommunications laws in order to better dissociate the content of its transport vehicle. At the time the law was passed, the legislator used a term referring to technology to distinguish each of the two areas of application of the laws. The fact is that these two areas have gradually merged into each other over the past two decades (section 4.1).

The distinction between content and its transport vehicle is the best way to ensure that future developments in communication technologies will cause less disruption to the protection of Canadian content (section 4.2, p. 11).

The CDCE suggests maintaining two laws that clearly distinguish the regulation of modes of transmission from that of cultural content that can use these modes of transmission (section 4.2).

*8.2 How can legislation promote access to Canadian voices on the Internet, in both official languages, and on all platforms?*

Appropriate amendments must be made to the *Broadcasting Act* to ensure that all elements that benefit from the dissemination of cultural content contribute to the financing of Canadian content (section 5.3).

The CDCE also recommends that the Governor in Council issue an Order in Council to require the CRTC to adopt regulations to ensure an immediate contribution by TSPs to the financing of Canadian content (section 5.2).

The CDCE also proposes that the GIC issue instructions to the CRTC to amend the new media exemption order, as well as all necessary regulations, to impose contributions to the financing of Canadian content, the promotion of Canadian content, the collection of information and the obligation to register with the CRTC on all programming undertakings, even if they are not licensed (section 6.2).

To ensure compliance with these obligations, the CRTC must have the same powers as it already has under the provisions of the *Telecommunications Act* to impose administrative penalties and order the payment of fees to programming undertakings (section 6.4).

Finally, the CDCE proposes the addition of a new section to the *Broadcasting Act*. We believe that the production funds to which Canadian radio, BDUs and the Government of Canada currently contribute, and to which TSPs and online service programming undertakings will now contribute, must continue to be available exclusively to Canadians. It would be useful to include this in the *Broadcasting Act* (section 7.2).

## **9. Broadcasting Policy Objectives**

*9.1 How can the objectives of the Broadcasting Act be adapted to ensure that they are relevant in today's more open, global, and competitive environment?*

*9.2 Should certain objectives be prioritized? If so, which ones? What should be added?*

The CDCE recommends adding a new objective on the protection and promotion of the diversity of cultural expressions to the Canadian Broadcasting Policy. In addition, it recommends that a more thorough review of the objectives be undertaken after the publication of the interim report on the review of broadcasting and telecommunications legislation (section 7.1).

*9.3 What might a new approach to achieving the Act's policy objectives in a modern legislative context look like?*

A new approach must involve all actors in the system (sections 5 and 6) to contribute to the financing of Canadian content, the promotion of Canadian content and the collection of data that enable society to assess, in particular, the diversity of cultural expressions.

We explore various possibilities in section 6.3.1. Minimum content presence requirements may be required for online programming services. They should include minimum requirements for recommending Canadian content. Targets could also be identified in terms of the proportion of access to Canadian content, allowing services to work in any way they wish to achieve these targets. Alliances with national programming services could also be encouraged to match catalogues, integrate recommendations to other services, and offer joint subscription packages.

To ensure compliance with these obligations, the CRTC must have the same powers as it already has under the provisions of the *Telecommunications Act* to impose administrative penalties and order the payment of fees to programming undertakings (section 6.4).

## 10. Support for Canadian Content and Creative Industries

*10.1 How can we ensure that Canadian and non-Canadian online players play a role in supporting the creation, production, and distribution of Canadian content?*

Canadian and foreign online companies do not have to obtain a licence and comply with obligations, unlike other programming services. The CDCE proposes to regulate these companies through an amendment to the New Media Exemption Order to ensure that they have obligations with respect to the financing and promotion of Canadian content and data transparency (section 6.2).

We detail these obligations in section 6.3. To ensure compliance with these obligations, the CRTC must have the same powers as it already has under the provisions of the *Telecommunications Act* to impose administrative penalties and order the payment of fees to programming undertakings (section 6.4).

*10.2 How can the CRTC be empowered to implement and regulate according to a modernized Broadcasting Act in order to protect, support, and promote our culture in both official languages?*

To support and promote Canadian culture in both official languages, the CDCE advocates a contribution by TSPs to the financing of Canadian content (sections 5.2 and 5.3).

The CDCE also considers that online companies, both Canadian and non-Canadian, should contribute, as programming services, to the support and promotion of Canadian culture in both official languages, and proposes that the Governor in Council (GIC) issue an order-in-council requiring the Commission to amend the New Media Exemption Order so that companies subject to it have obligations in terms of Canadian content financing, Canadian content promotion and data transparency (section 6.2).

To ensure compliance with these obligations, the CRTC must have the same powers as it already has under the provisions of the *Telecommunications Act* to impose administrative penalties and order the payment of fees to programming undertakings (section 6.4).

*10.3 How should legislative tools ensure the availability of Canadian content on the different types of platforms and devices that Canadians use to access content?*

The CDCE considers it essential that terminals be neutral and that Canadians be able to access local content using the devices and platforms of their choice. The CDCE recommends that the CRTC determine the best ways to control the presence and promotion of Canadian content on online programming services through targeted and mandatory measures, including issues of access to content through terminals (section 6.3.1).

## 12. Cultural Diversity

*12.1 How can the principle of cultural diversity be addressed in a modern legislative context?*

Once again, this requires the participation of all elements in the system (sections 5 and 6) to contribute to the financing of Canadian content, the promotion of Canadian content and the collection of data that enable society to assess, in particular, the diversity of cultural expressions.

As noted in question 9.1, the CDCE wishes to include the following objective in the *Broadcasting Act*: The Canadian broadcasting system must contribute to the protection and promotion of the diversity of cultural expressions, in accordance with Canada's obligations under the UNESCO Convention (2005) on the *Protection and Promotion of the Diversity of Cultural Expressions* (section 7.1).

### **13. National Public Broadcaster**

*13.1 How should the mandate of the national public broadcaster be updated in light of the more open, global, and competitive communications environment?*

A new law could govern the CBC's activities, which would define its objectives, its obligations in terms of programming, production expenditures and other aspects currently found in the *Broadcasting Act*. Without changing anything about the characteristics, mission, obligations, etc. of the CBC, this would prevent these elements from being subject to legislative revisions that affect the broadcasting system. The *Broadcasting Act* could simply mention that the broadcasting system includes a public broadcaster, Radio Canada, and that certain priorities are given to the public broadcaster (section 3 (1) (n)) (section 7.3).

*13.2 Through what mechanisms can government enhance the independence and stability of CBC/Radio-Canada?*

For the CDCE, the general mandate of the CBC and its independence from political power must be maintained (section 7.3).

### **14. Governance and Effective Administration**

*14.3 How can a modernized Broadcasting Act improve the functioning and efficiency of the CRTC and the regulatory framework?*

In the short term, a legislative amendment would be required to give new powers to the CRTC to ensure that online programming services are subject to the legal framework. It is necessary for the CRTC to obtain new powers so that it can ensure that programming undertakings that do not require a licence to operate comply with their new obligations (section 6.4).

*14.4 Are there tools that the CRTC does not have in the Broadcasting Act that it should?*

The CDCE recommends that the CRTC should have the same powers as it already has under the provisions of the *Telecommunications Act* to impose administrative penalties and order the payment of fees to programming undertakings (section 6.4).

*14.5 How can accountability and transparency in the availability and discovery of digital cultural content be enabled, notably with access to local content?*

This will of course require the changes described in sections 6.2 and 6.3 to ensure that online programming services make an adequate contribution. To improve transparency regarding the availability and discoverability of digital cultural content, the CDCE requires online programming companies to provide their usage data concerning cultural content accessed by Canadians. The CRTC has the authority, with Statistics Canada, to collect this data, both for Canadian companies and for foreign companies operating in Canada. The CRTC's powers to obtain this information must be exercised in a manner that respects the privacy of citizens (section 6.3).