

Comments by the Coalition for the Diversity of Cultural Expressions

in the context of the

**Consultation on the
Proposed Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications
Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation**

submitted to the

Director General, Telecommunications and Internet Policy Branch,
Innovation, Science and Economic Development Canada

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List of acronyms

BDU: Broadcasting distribution undertaking
BTLR: Broadcasting and Telecommunication Legislative Review
CDCE: Coalition for the Diversity of Cultural Expressions
CRTC: Canadian Radio-television and Telecommunications Commission
GIC: Governor in Council
IFCCD: International Federation of Coalitions for Cultural Diversity
MTM: Media Technology Monitor
OCCQ: Observatoire de la culture et des communications du Québec
SAGIT: Cultural Industries Sectoral Advisory Group on International Trade
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 30 organizations that collectively represent the interests of more than 200,000 professionals and 2,000 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 February 26, 2019, the Coalition for the Diversity of Cultural Expressions (CDCE) became aware of a proposed order issuing a direction to the Canadian Radio-television and Telecommunications Commission (CRTC) on implementing the Canadian telecommunications policy objectives to promote competition, affordability, consumer interests and innovation.

The CDCE welcomes the publication of a new order to replace the directions of the previous order, which essentially relied on “market forces as a means of achieving the telecommunications policy objectives.”¹

Thus, with this project, the government hopes that the CRTC, when using regulation, will take into account four priorities in implementing Canadian telecommunications policy objectives: competition, affordability, consumer interests and innovation.

The CDCE agrees with these principles, as much as it does with the other principles of the telecommunications policy. It would be more supportive of an approach that would more precisely identify the changes that the government wants to see adopted without prioritizing certain telecommunications policy objectives. But since the government wished to highlight some priorities, the CDCE considers it important to add another one, Canada’s cultural sovereignty.

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 Ms. 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 consume it.

However, many organizations have proposed changes to the legislative framework, including some short-term measures. These measures are based in particular on the Canadian telecommunications policy, and more specifically on the essential nature of telecommunications for Canadian identity and sovereignty, which constitute the ever relevant cornerstone of Canadian telecommunications policy.

First, we will focus on the responsibility and societal role of telecommunications carriers. Second, we will propose that cultural sovereignty be given priority. Third, we will reiterate the findings and recommendations that we sent on January 11, 2019 to the Broadcasting and Telecommunications Legislative Review Panel (BTLR). Fourth, we will close our comment with a recommendation regarding the 2006 Direction.

The reader will find all the recommendations of the CDCE in Annex 1.

¹ SOR/2006-355

3. Recognizing the corporate responsibility of telecommunications carriers

3.1. Technical architecture as a source of normativity

On March 14, during a conference of the L.R. Wilson Chair, Pierre Trudel brilliantly demonstrated how technical architecture can constitute a source of normativity, which can be in contradiction with the law. Thus, technologies are not necessarily neutral and lead us to rethink regulatory techniques to achieve the objectives of the law.

Let us take the example of terminals – think of smart speakers – that provide access to particular applications or services through the Internet. By not providing access to all existing applications or services, they bypass the principle of Internet neutrality in a way that was not originally intended. However, should we abandon the neutrality of the Internet, or introduce new regulations targeting these objects?

Pierre Trudel explained that in the digital age, telecommunications are called upon to intervene in a multitude of fields that are regulated by specific laws. 5G will allow objects and machines to connect with each other to generate data, adjust their behaviours, etc. Which laws, and even which jurisdictions, will connected objects in medicine, transportation, occupational health² and safety come under? In addition, the development of these new applications should highlight the importance of the safety and quality of telecommunications services. In the proposed order, however, these objectives set out in the telecommunications policy are only secondary (in terms of quality) or non-existent (in the case of security).

The societal significance of telecommunications is expanding considerably with the development of digital technology and is expected to reach every corner of people's lives. As a result, the requirements placed on telecommunications carriers in terms of corporate responsibility are increased.

Canadian telecommunications carriers are already planning the development of the 5G network, which promises new innovations, but also new disruptions in several sectors. The cultural sector is likely to be further affected by this development from the early 2020s³. On the one hand, the development of the 5G network, where available, should accelerate the transition to mobile services for access to cultural content, as well as the availability of these services in new environments, such as cars. Advertising revenues will follow the growth of mobile media. On the other hand, it will gradually allow the development of a mass market for augmented reality, virtual reality and immersive and interactive experiences.

As Pierre Trudel explained, we are currently trying to regulate a networked world with a set of laws that operate in silos. The changes we are proposing to the *Broadcasting Act*, which we will recall in Section 5, are intended to provide guidance for the social responsibility of telecommunications carriers with respect to the dissemination of cultural content. However, until such time as this law is amended, the objectives of the *Telecommunications Act* will have to be relied upon to anchor this societal responsibility, particularly with regard to the challenges facing the diversity of cultural expressions.

²Telus' health division is already developing an application that will enable to chat with doctors and provide recommendations based on an artificial intelligence system. See the article published on The Wire: <https://thewirereport.ca/2019/03/05/telus-health-app-to-offer-video-doctor-appointments-ai-advice/>

³ See the study from Ovum (2018), [How 5G Will Transform the Business of Media and Entertainment](https://newsroom.intel.com/wp-content/uploads/sites/11/2018/10/ovum%E2%80%93intel%E2%80%935g%E2%80%93book.pdf): <https://newsroom.intel.com/wp-content/uploads/sites/11/2018/10/ovum%E2%80%93intel%E2%80%935g%E2%80%93book.pdf>

3.2. The impact of telecommunications on the diversity of cultural expressions

High speed Internet and 4G technology have had many applications in the cultural field. For example, without these technologies, continuous viewing and listening would not have been possible. These applications have a huge impact on cultural ecosystems at various levels. We refer the reader to the CDCE brief submitted on January 11, 2019 to the Broadcasting and Telecommunications Legislative Review Panel⁴ for a full explanation. We will nevertheless recall the main features.

First, they have brought in new players who have not yet been able to integrate into the Canadian system and who are not subject to requirements for discoverability and funding of local and national content, generating a two-tier system. In addition, because these players do not provide access to usage data, we have no information regarding access or exposure to a variety of content. While it is true that Canadian cultural content can attract a global audience, it is also drowned in a sea of foreign content. Algorithmic recommendation systems are guided by the economic objectives of their owners. While they are intended to capture the attention of listeners, particularly to collect valuable data, the origin and diversity of content are not yet part of the criteria taken into account by recommendation algorithms.

Regulations to ensure the implementation of Canada's cultural sovereignty still do not apply to online programming services. While these issues are at the heart of the debates regarding the broadcasting sector, these services would not have been possible without the technological innovations that have taken place in the telecommunications sector. For the cultural sector, the consequences are essentially twofold: discoverability and financing. While we should not ask the telecommunications sector to deliver solutions for the former, it can certainly contribute to the latter in the same way that the broadcasting distribution undertakings (BDUs) do. As we will explain, these contributions are decreasing despite an increase in TSP revenues (we will come back to this in section 5.1.).

Second, 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 [...] some segments are in decline,” the CRTC explains. However, a declining traditional system “may be unable to support production, promotion or discoverability.”⁵ This decline leads to a reduction in the revenues of BDUs and broadcasters. Since these undertakings are the only ones in the Canadian communications services ecosystem that must contribute directly and continuously to Canadian content support funds⁶, 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.

Third, these decreases in funding for Canadian content, combined with steady decreases in conventional media advertising revenues,⁷ have negative effects on the diversity of cultural expressions, both quantitatively and qualitatively. For example, in the audiovisual sector, spending on Canadian programs is declining and some specific content – programs of national interest, local news, content aimed at Aboriginal or linguistic minorities, works of fiction, documentaries, works for children – is likely to be particularly affected. In the case of drama, especially in French,⁸ companies must cut as much as possible to

⁴ Online, on the CDCE Website: <https://cdce-cdce.org/en/brief-by-the-cdce-in-the-context-of-the-broadcasting-and-telecommunications-legislative-review/>

⁵ <https://crtc.gc.ca/eng/publications/s15/pol1.htm>

⁶ Broadcasting Distribution Regulation, SOR /97-555, Art. 34 and 35, *Radio Regulations*, 1986, SOR/86-982, Art. 15.

⁷ Traditional media have experienced losses in advertising revenue over the past 10 years, while web-based placements now account for nearly 50% of revenues. See Think TV's report (accessed March 19, 2019) : <https://thinktv.ca/research/advertising-revenue-by-media/>

⁸ The AQPM estimates that “the gap between the budgets for English-language and French-language productions has quadrupled in the case of drama and almost tripled in the case of youth productions”. See the brief submitted to the Broadcasting and Telecommunications Legislative Framework Review Panel:

deliver quality local productions that must compete with foreign productions with huge budgets.⁹

In the music sector, the data indicates that revenues for the entire music industry worldwide fell significantly from the late 1990s to 2014, and that they have been slowly increasing since 2014¹⁰. This of course has many impacts for companies in the sector, particularly for independent producers who invest significant amounts of money in the development of musical content. These revenue losses also result in a decrease in the number of projects that can be supported or the resources available to promote them. In short, digitization has an impact on the entire value chain, and it also affects the diversity of expressions that emanate from it.

Fourth, the opportunities for discoverability and financing are not the same for the English and French markets in Canada. Francophone products export less well and have a smaller funding base. The dematerialization of content and the growing role of multinationals in the cultural sector, made possible by the Internet, are increasing the challenges for French-language content.

Fifth, the models put in place in the digital age are impoverishing many artists, creators and cultural professionals. For example, in the music sector, although it is quite difficult to know in what proportion artists' revenues have been affected, it takes one million streams for a song to generate \$4,000 of income, based on a rate of about \$0.004 per listening¹¹. These revenues are then distributed throughout the whole production chain. In Canada, a minority of artists are favoured by continuous listening due to a very high concentration of listening (0.7% of titles account for 87% of listening on online music services in Canada).¹²

Sixthly, the global costs of access to cultural content are increasing and this leads to two negative phenomena for the diversity of cultural expressions. The dematerialization of cultural content, and its increasing consumption through the Internet, is certainly at the root of increased household spending on various telecommunications services. 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, for a combined total of 72%.¹³ As we mentioned in another contribution,¹⁴

“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.”¹⁵

There is indeed a concern that the increase in the cost of access to cultural content will significantly reduce the diversity to which Canadians will be able to access, to the potential detriment of local and national content.

https://www.aqpm.ca/medias/documents/AQPM_EXAMEN_DE_LA_LEGISLATION_CANADIENNE_11_janvier_2019.pdf

⁹ For example, each episode of the series *The Crown* (Netflix) is estimated to have cost \$14 million. Emmie Martin, CNBC, *Here's how much it costs HBO to produce one episode of 'Game of Thrones', august 2017*, <https://www.cnbc.com/2017/08/04/it-costs-millions-to-produce-one-episode-of-hbos-game-of-thrones.html>

¹⁰ As reported by ADISQ: https://adisq.com/medias/pdf/fr/Examen_du_cadre_legislatif_canadien_intervention_ADISQ.pdf, with particular reference to data from IFPI, State of the industry, 2018: <https://gmr.ifpi.org/state-of-the-industry>

¹¹ Spotify rate in 2018: <https://www.digitalmusicnews.com/2018/01/16/streaming-music-services-pay-2018/>.

¹² According to figures provided by a Nielsen Music representative by email.

¹³ <https://crtc.gc.ca/eng/publications/s15/mar1.htm#f10>

¹⁴ 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/>.

¹⁵ CDCE, Op. Cit., p. 5.

4. Prioritizing cultural sovereignty

Thus, we affirm that the telecommunications sector has a role to play in protecting and promoting the diversity of cultural expressions. As we have just seen, technological developments in this sector have an impact on the ability of legal instruments to achieve their objectives, as is the case with the *Broadcasting Act*.

Fortunately, this recognition of the role of telecommunications is already enshrined in the Act. In this section, we will propose to add a new criterion to the priorities identified by the government as well as a direction on the contribution to the financing of Canadian content.

4.1. A concept of cultural sovereignty rooted in the diversity of cultural expressions

The concept of cultural sovereignty can be defined as the “right to protect and promote the diversity of cultural expressions,”¹⁶ or as the “the right of a state to legislate in the cultural sector”.¹⁷ It is incorporated in section 3 (1)(b) of the *Broadcasting Act*, which states that

“the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;”

A more complete definition can be found in a Canadian Parliament publication,

“A country can be said to be culturally sovereign if it has the freedom to make the necessary decisions on its cultural future; that is, if it enjoys the necessary freedom to promote the creation, distribution, preservation and accessibility of its cultural production across its territory. Cultural sovereignty includes the ability to adopt statutes and policies and to create institutions and programs that will support these activities.”¹⁸

The societal importance of culture has been affirmed on many occasions by the government, civil society and in particular companies in the telecommunications and broadcasting sector. Beyond the assertions, this commitment was materialized by all the steps taken by the governments of Canada, Quebec and civil society that finally led to the adoption in 2005 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, of which Canada was the first signatory.

Without reviewing, in the context of these comments, all the representations associated with culture, let us recall the one that guided the work of the Sectoral Consultation Group on Foreign Trade (SAGIT) - Cultural Industries in 1999, a group of which many representatives of the telecommunications sector were members:

¹⁶ Coutu, Emmanuelle and France Aubin (2016), “Régulation ou gouvernance de la culture. Le cas de la Convention sur la protection et la promotion de la diversité des expressions culturelles de l’UNESCO” in *Médias et société. La perspective de la communication sociale*, under the direction of Jason Luckerhoff, Presses de l’Université du Québec.

¹⁷ Standing Committee on Canadian Heritage (2003), *Our Cultural Sovereignty. The Second Century of Canadian Broadcasting*. <http://www.ourcommons.ca/Content/Committee/372/HERI/Reports/RP1032284/herirp02/herirp02-e.pdf>.

¹⁸ Jackson, Joseph and René Lemieux (1999), *The Arts and Canada’s Cultural Policy*, Current issue review 93-3E, Ottawa, Library of Parliament. <http://publications.gc.ca/collections/Collection-R/LoPBdP/CIR/933-e.htm#B.%20Cultural-t>.

“Our culture -- our ideas, songs and stories -- gives meaning to who we are as Canadians. Through cultural products, such as sound recordings, books and films, we express ideas and perspectives, and we share stories and images that are uniquely Canadian -- among ourselves and with the rest of the world. Cultural products are "brain and soul foods" that help us communicate with others and share differing views. They entertain, and they inform. They help shape our sense of identity. They add richness to our lives.

In Canadian books, magazines, songs, films and radio and television programs, we are able to see and understand ourselves. We develop a more cohesive society and a sense of pride in who we are as a people and a nation.”¹⁹

Twenty years later, it must be said that this way of seeing things is shared by the Canadian population. 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.”²⁰

We believe that this very important attachment to Canadian content must be considered at least in the same way as other consumer (or user) interests and that it is possible to reconcile cultural sovereignty with consumer rights, differentiated service offerings or high quality services.

4.2. The foundation of cultural sovereignty in telecommunications policy objectives

Canada’s telecommunications policy is described in section 7 of the *Telecommunications Act*. At the outset, Article 7 states that “[i]t is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada’s identity and sovereignty.”

Subsequently, nine specific objectives are identified as being covered by the Canadian telecommunications policy. Of these objectives, two seem essential to us to support this fundamental mission and serve as a basis for the priority of cultural sovereignty:

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

“h) to respond to the economic and social requirements of users of telecommunications services;”

4.3. Proposed amendments to reflect the principle of cultural sovereignty

Thus, the CDCE wants cultural sovereignty to be taken into account by the CRTC when it must use regulation. We recommend that the Minister add a priority, that of cultural sovereignty, as well as a specific instruction regarding the contribution to the financing of Canadian content.

¹⁹ Cultural Industries Sectoral Advisory Group on International Trade (SAGIT) (1999), *Canadian Culture in a Global World*.
<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/ip-pi/canculture.aspx?lang=eng>.

²⁰ <https://crtc.gc.ca/eng/publications/s15/pol1.htm#pr1>

Recommendation 1

The CDCE proposes the following changes (in bold) to the “Direction” section of the proposed order:

1. In exercising its powers and performing its duties under the *Telecommunications Act*, the Commission must implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:

- a) The Commission, when relying on regulation, should consider how measures used can promote **cultural sovereignty**, competition, affordability, consumer interests and innovation, namely to the extent to which they
 - 1. **ensure that the value generated by the delivery of cultural content is shared,**
 - 2. encourage all forms of competition,
 - 3. foster affordability and lower prices, particularly when there is potential for telecommunications service providers to exercise market power,
 - 4. ensure that affordable access to high quality telecommunication services is available,
 - 5. enhance and protect the rights of consumers in their relationships with telecommunications service provider,
 - 6. reduce barriers to entry and barriers to competition for new and smaller telecommunications service providers,
 - 7. enable innovation in telecommunications services, including new technologies and differentiated service offerings, and
 - 8. stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services; and
- b) the Commission, when relying on regulation, should demonstrate its compliance with this Order and should specify how the measures used can, as applicable, promote **cultural sovereignty**, competition, affordability, consumer interests and innovation.

2. In order to meet the objectives of the *Telecommunications Act* and to enable telecommunications carriers to assume their social responsibility and participate in the diversity of cultural expressions, the Commission will adopt a regulatory policy to establish a contribution by telecommunications carriers to the financing of Canadian content.

The following section will repeat the arguments that justify this contribution.

5. The contribution of telecommunications to the financing of Canadian content

Currently, it is the broadcasting distribution undertakings (BDUs), broadcasters and the Canadian government that contribute to Canadian content support funds. Despite an increase in government funding in some funds in 2017, 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.

In section 3.2, we have demonstrated how technological change has disrupted cultural ecosystems. As part of our brief to the Broadcasting and Telecommunications Legislative Review Panel, other sources of funding for cultural content were identified. We will only include in this section the one concerning telecommunications carriers.

5.1. The logic of this contribution

The CRTC 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.”²¹

As noted in Section 3.2, the issue of concern to the CDCE is undoubtedly the fragmentation of media companies’ revenues, which leads to a reduction in the revenues of BDUs and broadcasters²² and, consequently, in Canadian content support funds.

Moreover, the income shortfall suffered by these 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.

TSP revenues have been growing since 2012²³ and their profit margins are very high, ranging from 37,7% to 39.1% between 2014 and 2017.²⁴ 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.

The October 2018 OCCQ publication²⁵ 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.

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.”²⁶

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

²¹ <https://crtc.gc.ca/eng/publications/s15/pol1.htm>

²² CRTC, 2018 Communications Monitoring Report, p. 86.

²³ CRTC, 2018 Communications Monitoring Report, p. 86.

²⁴ CRTC, 2018 Communications Monitoring Report, p. 95.

²⁵ <http://www.stat.gouv.qc.ca/statistiques/culture/bulletins/optique-culture-62.pdf>

²⁶ <http://theconversation.com/australia-must-act-now-to-preserve-its-culture-in-the-face-of-global-tech-giants-58724>

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”.²⁷

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:

“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 accorded priority under any such new arrangement, a consequential amendment of the Railway Act is included in this Bill. [our emphasis]”²⁸

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.”²⁹

5.2. A long-term vision to ensure a contribution by TSPs to the financing of Canadian content

One of the CDCE's proposals in the BTLR review is to delimit more clearly the areas of broadcasting and telecommunications laws, in order to better dissociate the content of its transport vehicle. What must be eliminated, in our view, is the association of cultural objectives with a mode of transmission linked to a specific technology.

In 2012, the Supreme Court recognized the dichotomy between broadcasting undertakings and telecommunications carriers under the CRTC's regulatory framework.³⁰ We do not dispute the fact that a telecommunications carrier cannot be assimilated to a broadcasting service. However, this does not mean that telecommunications carriers have no responsibility when transporting cultural content.

As part of the consultation with the Broadcasting and Telecommunications Legislative Review Panel, various organizations proposed changes to the *Broadcasting Act* to ensure that all TSPs involved in the transmission of cultural content contribute to the financing of Canadian content.

Legislative changes will take a long time to be implemented. For this reason, as we will see in the next section, several organizations have proposed using the *Telecommunications Act* as the legal basis for a short-term measure to ensure a contribution by TSPs to the financing of Canadian content.

²⁷ <https://crtc.gc.ca/eng/publications/s15/poli.htm#pr2>

²⁸ 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*.

²⁹ Article 3 (1) (e) of the *Broadcasting Act*.

³⁰ Reference relating to *Broadcasting Act*, 2012 SCC 4.

5.3. A directive to the CRTC to ensure a contribution from TSPs

The CDCE recommended that the GIC 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,”³¹ and reaffirming their “essential role in the maintenance of Canada’s identity and sovereignty.”³² Since Canadian content is at the heart of the social structure and Canadian identity, such action seems to us not only justified, but necessary.

This proposal is based on the same section of the *Telecommunications Act* as the order referred to in these comments, which states that 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.”³³

Thus, given the urgency of the situation for organizations in the cultural sector, it seems appropriate to us that the GIC should integrate this proposal into the framework of the current order.

5.4. Determining 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 revenues³⁴ Above all, it would reduce the risk of invasion of privacy.

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*;

³¹ *Telecommunications Act*, S.C. 1993, c. 38, Art. 7(a).

³² *Telecommunications Act*, S.C. 1993, c. 38, Art. 7.

³³ *Telecommunications Act*, S.C. 1993, c. 38, Art. 8

³⁴ 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.

- 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.

Some members of the CDCE have worked together to propose various scenarios for determining this contribution for the audiovisual sector³⁵. This study shows that the establishment of subscriptions in the telecommunications sector depends on various factors and that a contribution based on the gross revenues of TSPs would not automatically generate increased costs for subscribers. Thus, we note that our proposal is not incompatible with the priority of affordability, as identified in the proposed order.

Recommendation 2

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

6. The 2006 Direction Order

The regulatory impact analysis statement of the proposed order, published in the Canada Gazette, mention that “This policy direction will exist in complementary fashion to the previous policy direction, which among other things, directs the CRTC to use streamlined and efficient practices in order to reduce regulatory burden and costs for the Government, the CRTC and the telecommunications industry”³⁶.

Thus, the intention is to maintain in force the Order Issuing a Direction to the CRTC on the Implementation of the Canadian Telecommunications Policy Objectives³⁷. However, maintaining the two orders seems contradictory and ineffective to us.

Indeed, how can the CRTC reconcile the following two directives without subordinating new priorities to the free market?

2006 : “when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives”³⁸ ;

2019 : “the Commission, when relying on regulation, should consider how the measures used can promote competition, affordability, consumer interests and innovation”³⁹.

Recommendation 3

We recommend that the Minister amend the proposed order to add a section that would repeal Order SOR/2006-355.

³⁵ See the study commissioned by the CMPA and realized by PricewaterhouseCoopers : *Modelling a new broadcasting distribution system financial contribution framework for Canadian audiovisual content*.

³⁶ Canada Gazette, Part 1, Ottawa, March 9, 2019, Vol. 153, No. 10, p. 858.

³⁷ SOR/2006-355

³⁸ SOR/2006-355

³⁹ Canada Gazette, Part 1, Ottawa, March 9, 2019, Vol. 153, No. 10, p.. 860.

7. Conclusion

Changes to the broadcasting and telecommunications legislative framework will take years to implement. We are convinced that short-term measures are essential to restore balance in cultural ecosystems. For this reason, it is important that the proposed order not only does not preclude the imperatives of cultural sovereignty, but also that it includes directions to ensure that TSPs contribute to the financing of Canadian content.

This contribution is fully justified by the TSPs' revenues from access to cultural content on the Web, which, it should be recalled, have been made possible by technological developments. As we have seen, the development of the 5G network in a few years' time will generate new series of impacts for the cultural sector. The implementation of a TSP contribution for the financing of cultural content would make it possible to reconcile innovation and cultural sovereignty. Moreover, it would not have an a priori impact on affordability and would be compatible with the interests of consumers (users), who remain strongly attached to Canadian content.

Indeed, 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 inestimable and must be preserved at all costs.

Annex 1: Reminder of the recommendations

The CDCE makes 3 recommendations as part of this consultation.

Recommendation 1

The CDCE proposes the following changes (in bold) to the “Direction” section of the proposed order:

1. In exercising its powers and performing its duties under the *Telecommunications Act*, the Commission must implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:

- a) The Commission, when relying on regulation, should consider how measures used can promote **cultural sovereignty**, competition, affordability, consumer interests and innovation, namely to the extent to which they
 - 1. **ensure that the value generated by the delivery of cultural content is shared,**
 - 2. encourage all forms of competition,
 - 3. foster affordability and lower prices, particularly when there is potential for telecommunications service providers to exercise market power,
 - 4. ensure that affordable access to high quality telecommunication services is available,
 - 5. enhance and protect the rights of consumers in their relationships with telecommunications service provider,
 - 6. reduce barriers to entry and barriers to competition for new and smaller telecommunications service providers,
 - 7. enable innovation in telecommunications services, including new technologies and differentiated service offerings, and
 - 8. stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services; and
- b) the Commission, when relying on regulation, should demonstrate its compliance with this Order and should specify how the measures used can, as applicable, promote **cultural sovereignty**, competition, affordability, consumer interests and innovation.

2. In order to meet the objectives of the *Telecommunications Act* and to enable telecommunications carriers to assume their social responsibility and participate in the diversity of cultural expressions, the Commission will adopt a regulatory policy to establish a contribution by telecommunications carriers to the financing of Canadian content.

Recommendation 2

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

Recommendation 3

We recommend that the Minister amend the proposed order to add a section that would repeal Order SOR/2006-355.