



Canadian Radio-television and  
Telecommunications Commission

Conseil de la radiodiffusion et des  
télécommunications canadiennes

Canada

# CRTC WRITTEN PUBLIC SUBMISSION TO THE LEGISLATIVE REVIEW PANEL

CRTC.GC.CA

ISSN: 978-0-660-29143-7

Cat. No.: BC92-102/2019E-PDF

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## CRTC public submission

The Canadian Radio-television and Telecommunications CRTC (CRTC) is an independent administrative tribunal charged with the supervision and regulation of many of the activities of the broadcasting and telecommunications sectors under their respective legislation. More specifically, the CRTC's role is to ensure and facilitate access to the best possible communications services and content by and for Canadians.

As noted in *Responding to the New Environment: A Call for Comments*, the CRTC has recently published a report, [Harnessing Change: The Future of Programming Distribution in Canada](#), at the direction of the Governor in Council, which sets out many of the CRTC's views and should be read in conjunction with these comments. Although that report was focused on matters related to broadcasting, given the close relationship between broadcasting and telecommunications in Canada, several areas of the report pertain to both.

In particular, the report emphasized that as the communications environment changes, so too must legislation and regulation. Having vibrant domestic communications markets in the future will require developing systems and approaches that provide an environment in which services that benefit Canadians can thrive and innovate, while opportunities for creativity and the knowledge-based economy are optimized.

Today, some of our legislative powers and regulatory approaches lag behind even current technological and social realities. The tools developed for the future must be flexible enough to *continuously* adapt to the unforeseen changes that will be the norm. The CRTC's overall view is that future communications legislation must:

1. provide clear direction as to the specific outcomes to be achieved;
2. establish the necessary tools to achieve those outcomes; and
3. allow the regulator(s) the discretion and flexibility to adapt its approaches to best suit the environment.

### ***Clear direction***

The CRTC implements the policies of the Federal Government as set out in the legislation established by Parliament. The key elements of these policies are set out in the objectives that appear at the beginning of both the *Telecommunications Act* and *Broadcasting Act*. This review presents an opportunity to re-examine and refine these objectives to specify the outcomes that legislation will be expected to achieve in the new and changing communications environment. The CRTC takes no position as to whether there should be separate or combined legislation for telecommunications, broadcasting or radiocommunications. However, whatever form new legislation takes, certain principles should be applied to ensure that it gives clear direction.

Generally speaking, any new legislation's objectives should articulate clearly defined outcomes, should not unduly overlap with each other and should not be prescriptive. For example, it should not specify or make assumptions with regard to the type of service or technology by which outcomes should be achieved. A useful approach could be the introduction of a clear and simple purpose clause that frames the context of whatever communications legislation is advanced. Any set of objectives or outcomes would then be read and interpreted in light of this clause, without placing undue limitations on how those outcomes are implemented.

In relation to telecommunications, much of the current legislative framework continues to demonstrate its effectiveness in the new communications environment; however, certain adjustments would be valuable to enhance that effectiveness for the future. For instance, current legislation is focused on the introduction of competition to what was a communications environment characterized largely by regulated regional monopolies. With varying degrees of competition having been introduced into most telecommunications markets, new legislation should focus instead on outcomes that will benefit Canadians in an era of hyper-connectivity by optimizing competition, enabling affordable and innovative services and extending these services and the facilities necessary to access them across the country.

As for broadcasting, the changes necessary for the future are more fundamental. The CRTC has already set out in its report three principles that could be incorporated into new legislation as part of a purpose clause or as specific outcomes. The report proposed that a future legislative and regulatory approach to content and its distribution should:

1. focus on the production and promotion of reflective, informative and/or entertaining high-quality content by Canadians that is discoverable by Canadians and the rest of the world;
2. recognize that there are social and cultural responsibilities associated with operating in Canada and ensure that all players and Canadians participate in appropriate and equitable—though not necessarily identical—ways to benefit Canadians and Canada; and
3. be nimble, innovative and continuously adapting to change.

### ***Necessary tools***

Desired outcomes cannot be achieved without the necessary tools. Many current tools, particularly with respect to broadcasting, are founded on the ability to control market entry, i.e., to allow or not allow a service to operate. In the Internet-based communications environment, control over market entry has been greatly reduced. Future legislation should place greater reliance on other more sophisticated systems of incentives and obligations intended to achieve specific outcomes in more precise ways and place less reliance on controlling market entry. Similarly, more precise enforcement tools with respect to the broadcasting sector must also be available, such as administrative monetary penalties, which are available for the telecommunications sector.

In addition to enforcement tools, other effective existing tools should also be harmonized across communications legislation. Simply put, Canadians should expect to be able to receive comparable content and services that meet their needs, regardless of their circumstances. And where content or services do not meet those needs, Canadians should have simple means of complaint and recourse, as well as opportunities to participate in efforts to improve them. Similarly, harmonization should allow all industry players equitable access to mediation and/or dispute resolution mechanisms where appropriate, regardless of the type of service they offer.

Harmonized tools, however, must still be adaptable to differing circumstances. In particular, there will continue to be a need to develop unique approaches that are best suited to Canada's French- and English-language markets. Indigenous Peoples, Canadians with disabilities, official language minority communities and Canada's other diverse multicultural communities will continue to also require specific consideration.

### ***Adaptable approaches***

Finally, the changing communications environment necessitates that regulators adapt their approaches to best suit that environment at all times. Current legislation has retained some relevance because it was drafted in a manner that is largely "technologically neutral." However, its drafters could not have foreseen the manner in which the technologies employed would change or how Internet-based services would blur the lines between, for example, what is a telecommunications service, a programming service or a distribution service.

Future legislation should not only be technologically neutral but should also carefully avoid any assumptions as to the communications environment of the future. It should only draw bright lines—i.e., make specific distinctions between or references to technologies, platforms or any types or categories of service—where it is critical to do so. Legislation must necessarily distinguish between those services, platforms or technologies that are to be captured by it and those that are not. However, prescribing or limiting the use of legislative powers or regulatory approaches to certain services captured by legislation will inevitably introduce future problems. Instead, regulators require a wide range of flexible tools that can be adapted to fit the environment as it changes. A rigid framework that requires further legislative change to adapt to new conditions would be undesirable.

Under suitably flexible legislation, regulatory approaches can be adapted to remain abreast of these changes while continuing to implement the outcomes set out in that legislation. Ideally, new legislation should establish those outcomes and allow regulators the discretion to determine how to best make use of the tools provided by legislation to pursue those outcomes. Under such legislation, the CRTC would continue its approach of allowing services and markets to operate without direct intervention unless there is evidence of market failure or that a legislated objective cannot be realised without regulatory intervention.

The following sections set out more detailed comments on each of the themes identified in the *Call for Comments*. Not every question raised in that document has been addressed. Instead,

these comments focus on the areas in which the CRTC considers that it can provide the most effective input at this stage in the review process.

## **A. Reducing barriers to access by all Canadians to advanced telecommunications networks**

Historically, telecommunications services in Canada were provided by incumbent regional telecommunications companies who had monopolies in their respective service areas. During the 1990s, the CRTC started to open various regulated telecommunications markets to competition.

Since then, technological advances and changes to regulatory policies to facilitate competition have drastically transformed the Canadian telecommunications market. Today, a variety of service providers compete in residential and business telecommunications markets in the vast majority of communities across Canada.

The way Canadians are accessing telecommunications services has also significantly changed since the introduction of the *Telecommunications Act* in 1993. While mobile telephone services were originally used as a complement to wireline services, today 88 percent of Canadian households are subscribed to mobile phone services, compared to only 67 percent for landline telephone services. As for Internet access, while low-speed dial-up connection was the standard way to connect to the Internet in the 1990s, 98 percent of Canadian households in 2017 had access to fixed broadband Internet. In addition, 84% percent of Canadians had access to the CRTC's target speeds of 50 megabits per second (Mbps) download and 10 Mbps upload with services offering unlimited data.

Telecommunications in most of Canada is now in a highly competitive and technologically advanced phase (with the exception of many rural and/or remote regions) that is marked by increased options for customers in terms of who provides telecom services, as well as the ways in which such services are being delivered and accessed. The emergence of new technologies and innovations will continue, such as increased fibre access directly to homes and businesses, improved Internet connections in rural and remote communities using low earth orbit satellites, and the deployment of 5G technology in wireless networks. New concerns and challenges will also emerge, such as the unprecedented speeds and amounts of bandwidth that will be required to respond to the needs of Canadians who shift their viewing from broadcasting to online, stream in higher resolution formats (e.g., 4K and beyond), explore Augmented Realities, connect more devices to the Internet of Things<sup>1</sup> and obtain vital services online such as E-learning, Telemedicine and government services.

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<sup>1</sup> The Internet of Things refers to the interconnection, via the Internet, of computing devices embedded in everyday objects, enabling them to send and receive data. Such devices include cars, household appliances, alarm systems and vending machines.

It is therefore vital that new legislative tools allow the CRTC to effectively respond to the ever-changing market and the impact these changes will have on the Canadian telecommunications sector and Canadians, without the need for further legislative amendments.

### ***Access to passive infrastructure***

Under the current *Telecommunications Act*, the CRTC has limited direct jurisdiction over support structures, public property and privately owned buildings. The CRTC has, in the past, successfully granted service providers access to multi-unit buildings by using its condition of service powers under section 24 of the *Telecommunications Act*, as well as access to municipal land as a result of a Federal Court ruling.<sup>2</sup> However, it does not currently have the explicit powers to resolve disputes, order access or establish guidelines regarding all support structures on public property or all privately owned buildings (residential or commercial) to facilitate telecommunications.

Instead, responsibilities over access to passive infrastructure are currently shared across multiple bodies and levels of government, which presents challenges for efficient and effective network deployment. Inefficient access to passive infrastructure such as poles, ducts and rights-of-way for deploying telecommunications infrastructure can dramatically increase the cost of deployment or prevent it altogether.

The current absence of a single regulatory body with explicit powers over all support structures, public property and privately owned buildings will likely become more problematic with the emergence of new technologies. For example, many Internet of Things applications require that a wide variety of devices and machines stay connected at all times. This ubiquitous connectivity will require equipment to be installed at even more locations, such as cell towers, traffic lights, provincially regulated hydro poles and even utility pipes in the case of water, sewers and gas. Such equipment requirements will need to consider the impact on, and the concerns of, the public and private property owners of these infrastructures all across Canada.

Given the shared responsibilities for passive infrastructure, there is a real likelihood that one of the bodies or levels of government involved could render decisions inconsistent with those of another body or that impede or even prevent networks and new technologies from being deployed. This scenario has already come to fruition in other countries.<sup>3</sup> Granting one body greater authority in resolving disputes or requiring owners of all types of infrastructure to share access to these infrastructure is also likely to lower the costs of deploying networks and avoid duplicative investments.

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<sup>2</sup> *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106.

<sup>3</sup> For example, on 6 September 2018, the City of Mill Valley, California, enacted an urgency ordinance to regulate small cell towers amid concerns that cellphone companies want to grow their 5G networks and install new equipment. The ordinance has standards to limit and prohibit the installations of equipment in residential neighbourhoods.

Reducing infrastructure duplication would further help address the growing resistance from communities who, while in favour of the deployment of new networks and technologies, are opposed to the growing amount of infrastructure being installed in plain sight in residential neighbourhoods, public parks and agricultural lands or near schools.

The issue of access to passive infrastructure has been a concern in the telecommunications industry for over a decade. In 2006, the Telecommunications Policy Review Panel had recommended in its final report that changes be made to the *Telecommunications Act* to ensure that the CRTC has the power to resolve disputes and order access to public property of all descriptions. As described above, this issue is even more important today with the emergence of new technologies.

While historically access to passive infrastructure has primarily been an issue under the *Telecommunications Act*, there may be future issues with respect to facilities-based services operating under broadcasting legislation, e.g., those referred to as broadcasting distribution undertakings under the current *Broadcasting Act*. Regulators should not be hindered in their ability to address telecommunications issues related to access to passive infrastructure even should such undertakings be subject to distinct broadcasting legislation, where doing so furthers the objectives of telecommunications legislation.

**New legislation should provide a single regulatory body, such as the CRTC, with direct authority to resolve disputes, order access and establish guidelines (as appropriate) with respect to all passive infrastructure owned by utilities such as power, gas, water and local authorities. This additional authority should also be applicable to non-traditional structures for which access will be key for the efficient deployment of many future technologies. This would include light poles, bridges, water towers, street furniture and privately owned buildings such as high-rises and office towers.**

### ***Extend certain powers to apply directly to resellers***

In the increasingly competitive telecommunications market, there are many different kinds of providers offering services to Canadians. However, the CRTC's jurisdiction under the *Telecommunications Act* is largely confined to regulating "Canadian carriers" (or telecommunications common carriers)<sup>4</sup> and the definition of that term excludes those that do not own or operate their own transmission facilities. One such type of provider resells services obtained from other telecommunications carriers.

Resellers of telecommunications services are excluded from the definition of common carriers and are instead considered "telecommunications service providers" (which also includes common carriers). Many sections of the *Telecommunications Act* do not directly apply to

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<sup>4</sup> A Canadian carrier is a telecommunications common carrier that is subject to the legislative authority of Parliament. A telecommunications common carrier means a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation.



resellers since specific reference is made to “Canadian carriers,” not “telecommunications service providers.”

Currently, in situations where the *Telecommunications Act* does not give it direct statutory authority over resellers, the CRTC directs underlying carriers that provide services to resellers to include specific regulatory obligations in their tariffs and contractual arrangements with those resellers. This indirect approach is not the most efficient or effective as it relies heavily on a third party (i.e., the underlying carrier), instead of the CRTC to enforce the resellers’ obligations.

Resellers are a growing part of the Canadian telecommunications market, and their customers expect to receive the same levels of service and protection (e.g., public safety, net neutrality) as customers of Canadian carriers. However, the CRTC’s indirect regulatory approach has led to many situations where resellers were found to not be in compliance with important regulatory obligations (e.g. 9-1-1 service).

In 2014, section 24.1 of the *Telecommunications Act* was amended to allow the CRTC to directly impose conditions of service on “any person other than Canadian carriers” (which includes resellers). However, that section remains an exception as several key provisions of the *Telecommunications Act* still do not apply directly to resellers.

Many more, if not all, sections of the *Telecommunications Act* should apply directly to resellers of telecommunication services. For example, there are two sections of the Act that relate to the concept of net neutrality, but only directly apply to Canadian carriers, namely section 27(2) (Unjust discrimination)<sup>5</sup> and section 36 (Content of message).<sup>6</sup>

The *Telecommunications Act* should to the greatest extent possible apply equally and directly to the various types of telecommunications service providers. The achievement of certain important social and technical objectives of regulation—including net neutrality—requires the application of a consistent regulatory approach over the activities of service providers that do not fall within the definition of telecommunications common carriers.

**New legislation should ensure that key sections of new telecommunications legislation apply directly and equally to common carriers and resellers of telecommunications services.**

### ***Net neutrality***

The CRTC defines net neutrality as the concept that all traffic on the Internet should be given equal treatment by Internet providers with minimal to no manipulation, discrimination or preference given. This important principle is enshrined in the current *Telecommunications Act* through sections 27(2) and 36, as described above.

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<sup>5</sup> “No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.”

<sup>6</sup> “Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.”

The CRTC was one of the first regulators in the world to implement an approach to uphold net neutrality and has issued three decisions that combine to form the current regulatory framework for net neutrality in Canada. These three decisions consist of a framework against which Internet traffic management practices may be evaluated for compliance with the *Telecommunications Act*,<sup>7</sup> a decision directing certain wireless service providers to stop offering mobile wireless services that exempted their own mobile television services from their customers' standard monthly data allowance<sup>8</sup> and a framework for differential pricing practices to determine whether an ISP's specific approach is or is not consistent with section 27(2) of the *Telecommunications Act*.<sup>9</sup>

In the near future, as the Internet of Things continues to evolve, millions of devices will be interconnected and communicating with each other at all times. This will enable the provision of new advanced services, such as e-health applications (e.g., remote heart rate monitoring), home automation (e.g., remote control of heating, lighting and home appliances), autonomous vehicles and smart electric meters. The current legislative framework enables the CRTC to uphold the principle of net neutrality by prohibiting unjust discrimination or undue preference and will be sufficient to continue to protect and enforce net neutrality in the evolving Internet of Things environment.

As recommended in the “*Extend certain powers to apply directly to resellers*” section above, new legislation should ensure that key sections apply equally and directly to common carriers and resellers of telecommunications services. This change would be required to ensure that the current framework for net neutrality applies directly to all Internet service providers, including resellers.

**The current legislation, modified to extend certain powers to apply directly to resellers, would provide the CRTC with the required authority to continue to uphold the principle of net neutrality for all telecommunication services.**

## **B. Supporting creation, production and discoverability of Canadian content**

The *Broadcasting Act's* foundations and the regulatory framework within which the CRTC now operates are firmly rooted in a linear broadcasting environment, one that is cultivated and maintained in a set of local, regional and national walled gardens, supported by a national funding framework and domestic infrastructure, and distributed to Canadians on technology

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<sup>7</sup>*Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657, 21 October 2009

<sup>8</sup>*Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv*, Broadcasting and Telecom Decision CRTC 2015-26, 29 January 2015

<sup>9</sup>*Framework for assessing the differential pricing practices of Internet service providers*, Telecom Regulatory Policy CRTC 2017-104, 20 April 2017

with limited reach and finite capacity. Within this environment, Canadians have benefited from the growth of strong national players operating in both official languages, a wide range of smaller independent broadcasters, a plethora of media services and content that reflects Indigenous Peoples, multicultural and official language minority communities, as well as well-financed and diverse Canadian production and music sectors.

This was the broadcasting environment of the 1991 *Broadcasting Act*, before the development of the large international online entities against which the Canadian broadcasting industry must now compete and before there was even competition between Canadian broadcasting distributors, such as satellite and cable undertakings. Parliament could not have taken into account the broad and rapid roll-out of the Internet and mobile communications technologies or how vital this communications infrastructure has become in the lives of Canadians.

Traditional models for the distribution of content are impacted by technological change. New and emerging business models are growing to take a place of prominence among Canadians' entertainment and information choices while mature sectors of Canada's broadcasting system, though still viable at present, are forced to adapt due to changes in the ways content is used and distributed, which have led to revenue stagnation or even declines in their business models. Although the impact has varied by linguistic and regional market, this cycle of disruption and adaptation has beneficially impacted Canadians' choices and the diversity of content to which they are exposed, and now forces legislators and regulators to rethink how to ensure that public policy objectives are achieved going forward.

### ***A hobbled regulatory framework***

Working within the legislative framework designed and provided by Parliament, the CRTC has regulated for the better part of the last three decades in a way that has facilitated the expansion of a diverse broadcasting system. Canadians have benefited from the growth of strong national players operating in both official languages, a well-financed and diverse Canadian production and music sector and the availability of content on a variety of platforms. There have been substantial challenges, but our broadcasting system has been successful in providing news and information, drama, comedy, lifestyle and sports content for Canadians of all ages, for Indigenous Peoples and for our diverse multicultural communities.

Increasingly, Canadian content faces competition from an abundance of compelling and well-supported non-Canadian content. Canadians' priorities for the content they consume and the ways they choose to obtain it have fundamentally shifted. Canadians are spending more time with non-Canadian sources for content than ever before. As their priorities have shifted, so too has their spending.

The CRTC's licensing powers are predicated on regulation of scarce resources operating on spectrum and networks with limited capacities. These powers assume players will be Canadian operators working entirely within the Canadian legal, funding and cultural system, and that the

regulator can ensure compliance by controlling access to the market, i.e., by granting or taking away licences.

As the CRTC found in its [Harnessing Change: The Future of Programming Distribution report](#), this framework, which has served Canadians well in the creation and distribution of content for many years, has reached the limits of its adaptability. Non-Canadian online services are less susceptible to regulatory pressure under the current legislation as they do not rely on these scarce resources or on the Canadian market for their viability. It is therefore increasingly difficult to meaningfully support Parliament's broadcasting policy objectives in an environment that no longer resembles Parliament's understanding and vision as articulated in 1991.

The very notion of licensing and exemption based on a system in which the CRTC is the ultimate gatekeeper as to who can access the Canadian market is outdated. A regulatory system that relies on impermeable national borders to achieve its goals and outcomes cannot effectively do so when content is received and exchanged through globally interconnected networks.

Perpetuating a regulatory system that places a disproportionate emphasis on national players and their domestic activities will place increasing burdens on those players and will not enable either the regulator or the Canadian broadcasting system to achieve Parliament's public policy outcomes, since it ignores the full impacts—both positive and negative—of non-traditional service providers.

The CRTC needs an updated regulatory toolkit to enable it to approach new players operating in Canada, regardless of their national affiliation, to maintain a strong and diverse Canadian broadcasting system that best serves all Canadians, as citizens, consumers and creators. Such an approach must be inclusive of all entities that operate in and derive revenue from audio and video content in the Canadian market, regardless of platform or national affiliation.

The CRTC's report, [Harnessing Change: The Future of Programming Distribution](#), identified public policy options the government could consider. Among the options discussed, new legislation could replace the existing prescriptive and rigid licensing framework with a more nimble, comprehensive and binding [approach](#) that applies to all players within the broadcasting system and includes appropriate incentives to better ensure that each contributes effectively and equitably to the system.

Such an approach should place a new emphasis on the promotion and discoverability of Canadian content throughout every element of the system. Whether it be music, podcasts, short-form video, a one-hour drama series, feature-length film or any other type of content, regardless of what platform it is offered on, all stakeholders should be obligated and incented to promote and make content by Canadians discoverable, including government funding supports. Government should contribute to this effort as well through funding and tax-based supports of promotion and discoverability.

New approaches should also continue to be adapted to reflect the characteristics and needs of Canada's linguistic and regional communities. For instance, as indicated in the *Harnessing Change* report, ensuring that all players contribute effectively and equitably to the system includes ensuring that those that operate in French-language markets contribute specifically in those markets.

New legislation should grant the CRTC explicit statutory authority as well as flexible tools to regulate services, both domestic and international, including online service providers, who offer audio or video services in Canada and benefit from the creative, economic and social advantages of operating in this market. Such an approach would aid in ensuring that all players contribute in an equitable and effective manner to achieving the public policy outcomes established for new legislation, including the promotion and discoverability of Canadian content.

## *Data*

The current *Broadcasting Act* gives the CRTC the powers of a superior court of record and the explicit ability to make regulations to compel licensees to submit information regarding their programs and financial affairs where necessary to further the Act's objectives. The CRTC also has the power to audit and examine the records and books of accounts of licensees. The CRTC extends its abilities in this regard to other entities, such as exempt services, that fall within its jurisdiction.

However, the CRTC's authority over certain exempt services operating in Canada is not always recognized by those services. Although the *Broadcasting Act* gives the CRTC broad-reaching authority to examine the business practices and verify regulatory compliance of the entities that fall within its jurisdiction, in practice, these powers rely on a limited enforcement regime.

The CRTC collects multiple types of information to further its objectives as outlined under the current Act and render informed decisions. Without that information, the CRTC is severely limited in its ability to meet those objectives and must rely on third-party information that may not be easily verifiable.

To be an effective regulator, the CRTC must have the explicit authority to collect information from all services that operate in Canada's broadcasting system. It must also be able to publish certain data to allow the public and stakeholders to meaningfully participate in the decision-making process. In much the same way as the CRTC can under section 37 of the current *Telecommunications Act*, the CRTC should have the explicit statutory authority to collect information from any relevant source, including regulated entities, to administer new broadcasting legislation. As the expert tribunal in this domain, an appropriate level of knowledge and understanding of the entities that fall within its jurisdiction is necessary to, for example, better understand how they make, acquire or distribute content or address the needs of more vulnerable populations.

For the CRTC to effectively work with a variety of players within the broadcasting system, it should have the explicit statutory authority to obtain information from Canadian and non-Canadian players, necessary to meet the broadcasting policy outcomes set out in the *Broadcasting Act*.

At the same time, there may be instances where the CRTC must collect commercially sensitive information to further its mandate. In the same manner in which Parliament considered it important to consider the confidentiality of such information under the current *Telecommunications Act*, any broadcasting legislation must ensure that parties have the ability to designate certain information as confidential within a defined context. In short, parties should be subject to consistent treatment when they are before the same regulator.

While it should continue to be based on the fundamental principles of openness and transparency, new broadcasting legislation should grant explicit statutory authority to designate some types of information as confidential, whether collected as a part of a proceeding or as part of its ongoing activities, where significant commercial, personal or national security harm could be expected were it to be released.

### ***Ensuring there are accurate and independent news and information sources***

The fundamental freedoms and democratic rights that underpin the interactions between Canada's citizens and its institutions are best maintained when these institutions are verifiably held to account in an open and transparent way. Canada's broadcasting system, including news and information programming in particular, plays a significant part in this system of accountability. When elements of this system are left unchecked and offer false or misleading information to Canadians, without strong, accurate, independent and trustworthy sources of rebuttal, the ability of Canadians to fully exercise their democratic rights suffers.

In the current *Broadcasting Act*, Parliament saw fit to ensure that the programming provided by the Canadian broadcasting system, which includes news and other informative programming, should inform and enlighten while providing information and analysis concerning Canada and other countries from a Canadian point of view. While the CRTC has taken steps to see that these objectives are met, it has consistently recognized that direct oversight of news, information, analysis and opinion by a government body is inappropriate.

The CRTC has worked in a co-regulatory fashion with broadcasters and journalists in the implementation of various codes of conduct. Codes such as the *Equitable Portrayal Code* and the *Journalistic Independence Code*, which were developed in partnership with the Canadian Association of Broadcasters and ultimately approved by the CRTC, are administered in large part by the Canadian Broadcast Standards Council, which itself is an industry self-regulatory body that is separate from the CRTC. Working in partnership with the private, public and community elements of the Canadian broadcasting system has helped to ensure that baseline standards for journalistic ethics and balanced portrayal of Canada's diverse populations in newscasts exist and are maintained.

Canadians already make use of various sources for audio and video news and information content, including both traditional broadcasters and a wide range of online content services. In the future, Canadians are likely to continue to rely on both traditional and online news and information sources, many of the latter of which may be unknown at this time. In such an environment, Canadians will need the means to determine which sources provide trustworthy, verifiably accurate news and information and are independent of political or other influence. Educational efforts related to digital literacy will be key to giving Canadians the tools they need to make these determinations themselves. However, ensuring that Canadians have access to accurate, independent and trustworthy news and information sources should also be an explicit outcome for Canada's broadcasting system.

Regulators will continue to play an important role in ensuring access to such news and information sources. Not by acting as a gatekeeper, but by encouraging and helping Canadians identify those sources that adhere to appropriate journalistic standards. Journalistic standards such as those described above have been applied to traditional broadcast media since their inception and should continue to play a role in ensuring Canadians have access to accurate, independent and trustworthy news and information sources in the future on whatever platform they choose to obtain this content. New legislation should continue to enable the CRTC to develop co-regulatory approaches to encourage content providers, including certain online services, to adopt journalistic codes and practices.

**An outcome of new legislation should be to ensure Canadians have access to verifiably accurate, independent and trustworthy news and information sources in Canada's broadcasting system, regardless of the platform on which they choose to consume it.**

### **C. Improving the rights of the digital consumer**

The Internet and digital technology have transformed social, economic, cultural and civic participation by Canadians, making way for a new type of citizen—one who is engaged as a creator, consumer and a full participant in the digital society and economy. However, there will continue to be barriers or more systemic issues that can limit or prevent meaningful participation in the digital economy, which warrant specific consideration. Those affected could include certain Canadians with disabilities, Indigenous Peoples and members of official language minority communities, each of which are discussed below.

#### ***Accessibility***

In November 2018, Bill C-81, the *Accessible Canada Act* (the ACA) was unanimously passed by the House of Commons and has since passed a first reading by the Senate. Passage of the ACA would significantly affect how federally regulated communication companies address the accessibility of Canada's communications system and how the CRTC regulates in this area. While

the CRTC has an accessibility mandate and legal framework, the ACA would enhance its existing powers and increase its public accountability to Canadians and the Government for realizing and sustaining the accessibility of Canada's communications system.

The ACA proposes the CRTC as the regulator of the statutory obligations to be imposed on companies regulated under the *Telecommunications Act* and the *Broadcasting Act*. In doing so, it proposes consequential amendments to these Acts as well as to the *CRTC Act*. In addition, as part of this Review, CRTC powers to promote broader aspects of accessibility should be considered, such as to ensure the accessibility of online content.

While the CRTC has been acknowledged as a leader in accessibility and is recognized internationally for its innovative approach in establishing a video relay service, a specific policy objective to proactively create barrier-free access to Canadian communications services for persons with disabilities would improve the CRTC's ability to address these issues.

**New legislation should adopt an approach for accessibility of Canada's communications system that aligns with human rights legislation, aspires to full and equal participation of Canadians with disabilities in society and that includes amendments to current legislation adopted in relation to the ACA. In addition, any new telecommunications and broadcasting legislation should include a specific policy objective or outcome of proactively creating barrier-free access to Canada's communications system by people with disabilities.**

### ***Participation by Indigenous Peoples in the communications system***

Indigenous Peoples in Canada represent a diverse political, cultural and linguistic demographic stretching across the country in all of its regions. The importance of Indigenous Peoples' participation in, and their access to, Canada's communications system should not be understated. Whether it is through the preservation of Indigenous languages, the broadcast of news and information from an Indigenous perspective, the creation of programming and the employment opportunities related to those creative endeavours, the creation of other business development opportunities or the connection of these communities to the world through the Internet, Indigenous communities and their activities within the communications system serve to enrich and strengthen the country's social and economic fabric.

Access to the communications system, as a whole, is important to respond to the cultural needs and interests of these communities, as well as to their economic and social requirements. Such access helps to create jobs and training opportunities while helping to maintain the distinct languages and cultures that are foundational pieces of our shared national identity.

While the current *Broadcasting Act* recognizes that programming that reflects Indigenous cultures should be provided within the Canadian broadcasting system, this objective is limited by the caveat "as resources become available." It is important that future legislation reflect a more respectful acknowledgement of the needs of Indigenous Peoples, and seek to ensure that they



are in control of their own communications and are unequivocally and more broadly supported in accessing and participating in the larger communications system. As part of this objective, appropriate obligations and incentives should be created to promote and make content by and for Indigenous Peoples discoverable. Government should contribute to this effort as well through funding and tax-based supports of promotion and discoverability.

**An outcome of any new legislation should be to provide broad and unequivocal access to Indigenous Peoples and reflect their needs in Canada’s communications system.**

### ***Official language minority communities***

The current *Broadcasting Act* also recognizes Canada’s linguistic duality and the importance, particularly in the programming provided by the CBC, of the needs and circumstances of Canada’s French- and English-language minority communities. These communities, though united through their respective languages, represent a set of diverse cultural heritages and identities.

While sharing a common language with linguistic majority communities elsewhere in the country, these official language minority communities often face challenges in accessing programming that reflects their specific circumstances, while also finding certain difficulties in accessing platforms on which their voices can be heard and their realities reflected. Whether through the national public broadcaster or through other participants in the Canadian broadcasting system, it is essential to remain mindful of the importance of these communities, and that their contributions to Canada’s national identity continue to be reflected in that system.

**Any new broadcasting legislation should continue to recognize the distinct needs and interests of Canada’s official language minority communities and the importance of programming reflecting those needs and interests.**

## **D. Renewing the institutional framework for the communications sector**

### ***Administrative monetary penalty and condition of service powers***

The *Telecommunications Act* provides the CRTC with several enforcement powers, including the power to impose administrative monetary penalties<sup>10</sup> (AMPs) and the power to impose conditions on the offering and provisioning of telecommunications service by Canadian carriers<sup>11</sup> or other persons (such as resellers).<sup>12</sup> In addition, a CRTC decision may be filed in Federal Court and enforced in the same manner as a court order.<sup>13</sup>

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<sup>10</sup> *Telecommunications Act*, S.C. 1993, c.38, ss.72.001, 72.01

<sup>11</sup> *Telecommunications Act*, S.C. 1993, c.38, s.24

<sup>12</sup> *Telecommunications Act*, S.C. 1993, c.38, s.24.1

<sup>13</sup> *Telecommunications Act*, S.C. 1993, c.38, s.63

The *Broadcasting Act* provides the CRTC with a more limited range of enforcement powers. These include the ability to make mandatory orders with respect to specific regulatory obligations<sup>14</sup> that can be made orders of the Federal Court or a superior provincial court.<sup>15</sup> Fines may also be sought with respect to persons who broadcast without a licence or contrary to a licence, or who contravene an order, regulation or condition of licence.<sup>16</sup>

The *Broadcasting Act* requires that conditions of licence relate to the circumstances of the licensee, and the CRTC cannot amend a condition of licence on its own initiative in the first five years of a licence term.<sup>17</sup> As a result, there is uncertainty concerning the ability of the CRTC to impose uniform regulatory requirements through broadcasting regulations or conditions of licence. Specifically, it is not clear how a CRTC regulation applies to pre-existing conditions of licence. The condition of licence power is therefore of limited use in imposing uniform regulatory requirements.

The current enforcement powers under the Acts are inconsistent and procedurally complex. For example, there are two AMPs regimes in the *Telecommunications Act*: the General Administrative Monetary Penalties Regime and the Administrative Monetary Penalties Scheme for Unsolicited Telecommunications (applicable to violations of section 41 relating to the Do Not Call List and violations of the Voter Contact Registry under the *Canada Elections Act*). Even though each AMPs regime was created to promote compliance, each regime was implemented at a different time with different procedures, requirements, powers and criteria for determining a penalty amount. While each of the regimes positively contributes to the outcomes for which it was designed, the inconsistencies between the two AMPs regimes do not have a practical rationale and create challenges for those navigating the regimes. The situation is compounded by the fact that the CRTC also enforces Canada's Anti-Spam Legislation, which contains a third distinct AMPs regime.<sup>18</sup>

The *Broadcasting Act* does not include any AMPs regime at all. As a result, the CRTC has limited flexibility to encourage compliance or address non-compliance under that Act. Imposing conditions of licence, short-term licence renewals and mandatory orders are not suited to addressing minor instances of non-compliance in a timely manner. More extreme measures such as the suspension or revocation of licences are only of limited use and may in many cases be counter to the Act's objectives of ensuring Canadians have access to a wide variety of content. An AMPs regime under the *Broadcasting Act*, consistent with a harmonized regime in the

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<sup>14</sup> *Broadcasting Act*, S.C. 1991, c.11, s.12

<sup>15</sup> *Broadcasting Act*, S.C. 1991, c.11, s.13

<sup>16</sup> *Broadcasting Act*, S.C. 1991, c.11, ss.32, 33

<sup>17</sup> *Broadcasting Act*, S.C. 1991, c.11, ss.9(1)(b) and (c)

<sup>18</sup> *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications CRTC Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c.23, s.20

*Telecommunications Act*, and designed to help the regulator meet the outcomes of any future legislation, would improve the CRTC's ability to effectively fulfill its mandate.

The absence of the power under the *Broadcasting Act* to impose regulatory requirements in a timely and uniform manner creates a further challenge to effective broadcasting regulation. For example, the CRTC was able to impose the Wireless Code across all wireless service providers at a single point in time using its powers under sections 24 and 24.1 of the *Telecommunications Act*. In contrast, when regulating under the *Broadcasting Act*, the CRTC must rely largely on adding or amending conditions of licence over a period of years. The authority to impose general conditions of service at any point on entities regulated under the *Broadcasting Act* would allow for regulatory requirements to be implemented in a more uniform and equitable manner across the broadcasting industry.

The CRTC is of the view that the enforcement powers under the Acts could be improved by amendments implementing the following changes:

**a) Harmonize AMPs regimes under the *Telecommunications Act***

- Harmonize the General AMPs regime and the AMPs Scheme for Unsolicited Telecommunications into a single regime.
- Streamline the procedural requirements of a harmonized AMPs regime to increase ease of use while ensuring fair treatment of parties who face the imposition of an AMP.

**b) Create an AMPs regime for the *Broadcasting Act***

Implement a general AMPs regime under the *Broadcasting Act*, applicable to all compliance matters and harmonized with a single, streamlined regime under the *Telecommunications Act*.

**c) General Condition of Service Power for the *Broadcasting Act***

Create a new regulatory power allowing the CRTC to impose general conditions of service relating to subject matter and parties within its mandate, similar to sections 24 and 24.1 of the *Telecommunications Act*.

### ***Supporting public participation in CRTC proceedings***

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

To ensure the record of a proceeding contains a balance of evidence and diverse perspectives, the CRTC has established the following mechanisms to award costs to facilitate the participation of these groups in its proceedings:

- cost awards for telecommunications proceedings; and
- the Broadcasting Participation Fund (BPF).

Section 56 of the *Telecommunications Act* grants the CRTC the authority to award interim or final costs in telecommunications proceedings. The CRTC has established a process for groups to apply for their costs associated with participating in a proceeding. In most cases, the telecommunications service providers that participated in the proceeding are required to pay those costs. Entitlement to costs is based on whether the applicant participated in the proceeding in a responsible way and contributed to a better understanding of the matters considered by the CRTC. Costs awards encourage broader public participation in proceedings, enriching the quality of the record upon which decisions are based.

The *Broadcasting Act* lacks a legislated mechanism to help support consumer and public interest organizations' participation in broadcasting proceedings. Instead, in 2011, as part of an ownership transaction involving BCE Inc. and CTVglobemedia, the CRTC required, as one of the conditions of approval, the establishment of an independent broadcasting participation fund (BPF) to offset the costs of public interest groups that participate in CRTC broadcasting proceedings.<sup>19</sup> The initial funding was \$3 million, and as a result of two other merger and ownership transactions, an additional \$3 million has been added.<sup>20</sup> The BPF is administered independently from the CRTC.

The forms, procedures and costs scales of the BPF are similar to the costs process under the *Telecommunications Act*. However, there are three important differences:

1. Costs determinations are made by the BPF (a private, not-for-profit corporation), not the CRTC, and are not bound by administrative law principles and are not subject to appeal.
2. The BPF's processes are less transparent than those of the CRTC.
3. Funding for the BPF is currently dependent on the CRTC directing a portion of broadcasting tangible benefits to the BPF.

The current costs awards processes (both under the *Telecommunications Act* and the BPF) are proceeding based and limit the ability of public interest organizations to develop expertise based on stable funding. The issues with the current costs award process in telecommunications and broadcasting include:

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<sup>19</sup> *Change in effective control of CTVglobemedia Inc.'s licensed broadcasting subsidiaries*, Broadcasting Decision CRTC 2011-163, 7 March 2011

<sup>20</sup> An additional \$2 million from the BCE-Astral acquisition in 2014 (*Astral broadcasting undertakings – Change of effective control*, Broadcasting Decision CRTC 2013-310, 27 June 2013) and \$1 million from the Sirius XM Canada Inc. change in ownership structure in 2018 (*Tangible benefits proposal by Sirius XM Canada Inc.*, Broadcasting Decision CRTC 2018-91, 16 March 2018).

- **Uncertainty:** Costs claimants do not know in advance how much of their claim will be approved or when it will be paid. Costs are linked to proceedings that may be launched with little advance notice. Public interest participants may not have the funds to participate effectively or retain appropriate experts. The absence of stable funding limits the ability of public interest participants to develop a depth of expertise and experience.
- **Fairness:** Responsibility for paying costs is generally allocated to telecommunications service providers and industry organizations that participate in a given proceeding. It may not be fair in broad policy proceedings to put the burden of costs solely on participating companies.
- **Consistent process:** There is no compelling rationale for different costs processes with varying procedures and safeguards in broadcasting and telecom proceedings.

The Telecommunications Policy Review Panel recognized these issues and, in its 2006 final report, stated:

“... if the government places importance on such funding, it should be made available as a subsidy directly from government, for example, from the Office of Consumer Affairs in Industry Canada, rather than as a charge against telecommunications service providers.”<sup>21</sup>

This is one of a number of different approaches already employed in various forms by regulators in Canada and around the world. In the context of Canadian communications regulation, these approaches could take the form of:

- establishing a single public interest funding or costs process for telecommunications and broadcasting proceedings;
- introducing grants for selected organizations to create stable multi-year funding for public interest participation;
- more equitable funding of costs or grants, either by the CRTC through industry-wide telecom and broadcasting fees or from general revenues through a government department; and/or
- creating a publicly funded consumer advocate with a legislative mandate, either within the CRTC to intervene on its proceedings or within a government department to intervene before a variety of Federal regulators in the public interest.<sup>22</sup>

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<sup>21</sup> Telecommunications Policy Review Panel Final Report - 2006, Section 9-56, page 312 [https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/\\$file/tprp-final-report-2006.pdf](https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/$file/tprp-final-report-2006.pdf) . See also the TPRP recommendation: Recommendation 9-30. The government should review the issue of public interest group participation in telecommunications regulatory proceedings. Funding for such participation should come from a multi-year commitment by government to subsidize such participation, rather than costs awards imposed by the CRTC on individual telecommunications service providers.

<sup>22</sup> For examples of consumer advocates in Canada and the U.S. in energy regulation, see *Consumer Advocacy in Ontario's Energy Sector: A New Model*, Energy Regulation Quarterly, September 2016 – Volume 4, issue 3, 2016 <http://www.energyregulationquarterly.ca/articles/consumer-advocacy-in-ontarios-energy-sector-a-new-model#sthash.WLs8uKNS.OOhYEp7p.dpbs>.

The CRTC recommends adopting a model for supporting public participation with stable, predictable public funding for qualified public interest participants both for participation in proceedings and for building expertise outside the context of a proceeding.<sup>23</sup>

### *Advisory committees*

With respect to both broadcasting and telecommunications, the CRTC has general powers permitting it to hear, inquire and conduct research into issues falling under its jurisdiction. While essential, these powers are largely limited to the examination of issues on a case-by-case basis. To ensure it makes the best possible decisions in the public interest, the CRTC would also benefit from ongoing access to expertise and advice on a broad range of issues.

A simple and practical means of achieving such a goal and one that is already employed in other nations<sup>24</sup> would be through the use of advisory committees. Such committees would be composed of experts and other stakeholders in particular domains of relevance to the work of the CRTC. While members of these committees would be appointed by the CRTC, they would operate independently—supported by CRTC staff—providing additional public forums for ongoing, issue-specific participation in the regulatory process.

In some respects, these committees could be similar to the CISC<sup>25</sup> working groups that address certain implementation issues related to the CRTC’s telecommunications decisions and regulatory policies. However, advisory committees could address broader issues related to telecommunications and broadcasting, be less technical in focus and would allow stakeholders and experts an opportunity to participate in setting the agenda for the CRTC.

Enabling the CRTC to convene an advisory committee on access to passive infrastructure, for example, would allow it to more effectively develop policies supporting efficient next-generation network deployment while also addressing the challenges associated with the current shared

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<sup>23</sup> The Office of Consumer Affairs and the Office of the Privacy Commissioner of Canada provide examples of research funding models that can provide insight and new perspectives on emerging policy issues. See Office of Consumer Affairs Contributions Program for Non-Profit Consumer and Voluntary Organizations [http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/h\\_ca00175.html](http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/h_ca00175.html) and the OPC grants process [https://www.priv.gc.ca/en/opc-actions-and-decisions/research/funding-for-privacy-research-and-knowledge-translation/how-to-apply-for-contributions-program-funding/applying-for-funding-under-the-contributions-program-annual-call-for-proposals/cp\\_guide/](https://www.priv.gc.ca/en/opc-actions-and-decisions/research/funding-for-privacy-research-and-knowledge-translation/how-to-apply-for-contributions-program-funding/applying-for-funding-under-the-contributions-program-annual-call-for-proposals/cp_guide/).

<sup>24</sup> For example, the UK federal regulator, OFCOM, is obligated under the *Communications Act, 2003*, c. 21, to implement “panels” to address consumer and regional issues. It has also elected to use its authority to create at least 10 others. Similarly, the U.S. Federal Communications Commission receives input from 11 advisory committees that provide expertise and advice on matters ranging from broadband deployment, to accessibility and more general consumer issues. Most of these committees have been established under separate legislation, the *Federal Advisory Committee Act*, Pub. L. 92-463, 86 Stat.770.

<sup>25</sup> The CRTC Interconnection Steering Committee (CISC) is composed of several ongoing working groups and numerous task groups in which industry experts, CRTC staff and members of the public assist in developing information, procedures and guidelines as may be required in various aspects of the CRTC’s regulatory activities.

responsibilities for such infrastructure. The advice and recommendations of an accessibility advisory committee would contribute to the effectiveness and agility of policy-making for an array of accessibility matters. Other important areas in which the CRTC would benefit from such committees could include issues of concern to Indigenous Peoples, official language minority communities and third-language multicultural communities.

Granting the CRTC authority to create advisory committees would provide additional forums for ongoing public engagement and expertise in setting the CRTC's agenda, contribute to the effectiveness and agility of policy-making and allow for the implementation and monitoring of decisions.

## E. Conclusion

Canadians should continue to expect the best from their communications system and that any legislation articulating Parliament's objectives for that system will serve their needs and interests. Likewise, the regulator appointed to oversee that system should be fully enabled to act in the public interest.

The opportunity now exists to shift to a legislated regulatory model based more clearly and directly on outcomes, allowing the regulator to be flexible and nimble in its approach to addressing changes in the future. While some of the tools designed by Parliament over a quarter of a century ago are still relevant in today's communications context, it is not clear that this will be true in the future. As the Canadian communications system evolves and changes in unforeseen ways, the regulator should have the necessary tools and the ability to continuously adapt its approaches to best suit the environment now and in the future.