CCSA

Regulatory

January 11, 2019

VIA Email: ic.btlr-elmrt.ic@canada.ca

The Broadcasting and Telecommunications Legislative Review Panel
c/o Innovation, Science and Economic Development Canada
235 Queen Street, 1st Floor
Ottawa, Ontario K1A 0H5

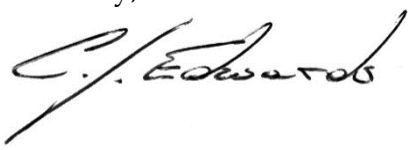
Subject: **Broadcasting and Telecommunications Legislative Review - Responding to the New Environment: A Call for Comments**

1. The Canadian Communication Systems Alliance ("CCSA") speaks for independent communications distributors – smaller broadcasting distribution companies, telephone companies and Internet Service Providers – across Canada. CCSA represents more than 110 companies operating from sea to sea to sea, including across the North.

2. CCSA thanks the panel for the opportunity to appear before it in Halifax on October 3, 2018 and for the opportunity to provide these further written comments.

3. CCSA will be pleased to provide any further information the panel might require regarding the views of the independent communications distributors it represents.

Sincerely,



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Broadcasting and Telecommunications Legislative Review

Responding to the New Environment: A Call for Comments

Comments of the Canadian Communication Systems Alliance, Inc.

January 11th, 2019

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Introduction

1. The Canadian Communication Systems Alliance ("CCSA") speaks for independent communications distributors – smaller broadcasting distribution companies, telephone companies and Internet Service Providers – across Canada. CCSA represents more than 110 companies operating from sea to sea to sea, including across the North.

2. CCSA members include co-operatives, family businesses and companies run by Indigenous Peoples which compete with large, vertically integrated companies on choice, technology, service and price. They invest in their communities, provide local jobs and sponsor local events. This is because their relationship to their community is not just business; they live there.

3. Today, CCSA's members bring broadcasting and telecommunications alternatives to Canadians in more than 1,200 communities throughout the country. Often, they provide services in the lowest-density and most challenging geographic regions of Canada.

4. In many cases, CCSA's members exist, at least in part, because those challenges discourage investment in terrestrial networks by the large, vertically-integrated incumbent communications companies.

5. CCSA believes very strongly that these independent distributors will remain a vital component of Canada's content delivery infrastructure for many years to come. For that reason, legislation that responds to "a new environment" must account for the vital role these companies will continue to play in the delivery of critical communications services to Canadians and must support their discharge of that role.

6. CCSA's submission is divided into four parts, as follow:

    - present challenges and related recommendations
    - future vision and related recommendations
    - responses to questions posed in the Panel's Terms of Reference; and
    - responses to questions from the panel at CCSA's October 3, 2018 appearance.

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Present Challenges and Related Recommendations

7. The *Broadcasting Act* is, in essence, cultural legislation designed to promote a robust Canadian broadcasting industry and to provide a framework for a system that works for the good of Canadians as consumers and citizens of a multi-ethnic, multi-lingual and socially tolerant society.

8. Unlike the *Telecommunications Act*, the *Broadcasting Act* has never had, as its primary aim, the economic regulation of the communications system.

9. For that reason, the *Broadcasting Act* lacks many of the tools an economic regulator is called upon to apply in supervision of a competitive marketplace. Those tools, in large part, are certain powers of a superior court, such as are contained in the *Telecommunications Act*.

10. Evolution of the broadcasting sector has made it increasingly similar, from an economic and competitive point of view, to the telecommunications sector.

11. That is, as is the case with "big box" stores, everybody is now into everybody else's business and both the broadcasting and telecommunications sectors are populated by the same companies competing for the same customers to their video, voice and data services.

12. In that environment, the most important shortcoming of the *Broadcasting Act* is its inability to provide the regulator with the tools required to supervise effectively the growing and pressing economic and competitive issues in the broadcasting sector.

13. For that reason, CCSA's top priority in responding to the Panel's call for comments is to highlight its concerns with the potential for anti-competitive behavior in the broadcasting sector and the regulator's lack of tools to deal quickly and effectively with such behaviour.

Authorize the CRTC to Address Competitive Challenges

Ensure the CRTC Can Make Regulations to Constrain Anti-Competitive Behaviours

14. Beginning with BCE Inc.'s acquisition of CTV Inc. in 2000, there has been a substantial consolidation of the broadcasting industry based on a fundamental policy shift whereby the CRTC permitted broadcasting distribution undertakings ("BDUs") to own and operate

programming undertakings, including television stations and discretionary programming services.

15. At the public hearing to consider that transaction, many parties raised concerns with the potential for anti-competitive conduct by the vertically-integrated company ("VI company") that would emerge from the transaction.

16. In its decision to approve the transaction, the CRTC stated:

> In addition, BCE made a commitment at the hearing to develop and implement a code of conduct. This code would be applicable to the purchaser's various BDUs and would govern such matters as the distribution, packaging, and pricing of specialty services. Accordingly, as one further safeguard against undue preference, the Commission requires BCE to adhere to this commitment. The code must be submitted to the Commission for its approval by no later than 1 June 2001.[1]

17. At that time, the CRTC's primary concern was with the new vertically-integrated company's potential to act unfairly as a "gatekeeper" with respect to broadcasting undertakings that it did not own and to give undue preference to its own broadcasting undertakings.

18. Since that time, further consolidations have resulted in four VI companies, Bell, Rogers, Shaw and Quebecor, owning and operating the vast majority of Canadian television stations and discretionary programming services.

19. Since that time, it has become evident that the VI companies have the incentive and the ability to act anti-competitively not only against other broadcasting undertakings but, also, against BDUs with which they compete.

20. In its 2011 Vertical Integration decision, the CRTC acknowledged that:

> . . . in an increasingly consolidated and vertically integrated broadcasting system, there is a possibility that VI entities might prioritize the distribution of related services and of services related to other VI entities over the distribution of independent programming services, thus limiting the programming to which Canadians have access.[2]

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[1] Decision CRTC 2000-747, "1406236 Ontario Inc. on behalf of CTV Inc. Across Canada – 200015497", Ottawa, December 7, 2000 at para. 21.
[2] Broadcasting Regulatory Policy CRTC 2011-601, "Regulatory framework relating to vertical integration", Ottawa, 21 September 2011 at para. 43.

21. With respect to the impact of vertical integration on competing broadcasting distributors, the CRTC noted that:

> . . . the record of this proceeding demonstrates that VI entities have both the opportunity and incentive to give undue preference by providing themselves with exclusive access, on various distribution platforms, to content that they control. As a result, a consumer would have to subscribe to the distribution platform owned by the VI entity to have access to the exclusive content. The potential increase in the market share of the distribution services that form part of the VI entity would provide an incentive for a VI entity to deny competing distribution systems access to popular programming.[3]

and that:

> . . . because of their dominant position in the broadcasting system, VI entities and consolidated entities licensed to operate numerous programming services could potentially use their most popular programming services to leverage favourable carriage terms for programming services of lesser value.[4]

22. As a result, the CRTC implemented certain regulatory amendments, including introduction of a "standstill rule" and a new *Code of Conduct for Commercial Arrangements and Interactions* (the "*Code*").

23. The *Code* was intended to govern the commercial relationships between the VI companies, on the one hand, and independent programmers and BDUs, on the other.

24. The *Code* prohibited certain anti-competitive practices such as, for example, tied selling of programming services and, in addition, set out *indicia* for assessing the reasonableness of commercial rates and terms in affiliation agreements.

25. The *Code* was made "applicable to all licensed undertakings by means of an order issued pursuant to section 9(1)(h) of the Broadcasting Act" [5], effective January 22, 2016.

26. Bell Canada appealed the CRTC's decision to implement the *Code* in the Federal Court of Appeal. Specifically, Bell Canada challenged the CRTC's authority to implement the *Code* by means of an order under s. 9(1)(h) of the *Broadcasting Act*.

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[3] *Ibid*. at para. 19.
[4] *Ibid*. at para. 61.
[5] Broadcasting Regulatory Policy CRTC 2015-438, "The Wholesale Code", Ottawa, 24 September 2015 at headnote. For the *Code*'s implementation, *see* Broadcasting Order CRTC 2015-439, "Distribution of the programming of licensed programming undertakings by broadcasting distribution undertakings", Ottawa, 24 September 2015.

27. In recognition of the court challenge to its authority to make the mandatory order, the CRTC, in its 2017 renewal of licences for the major broadcasting groups, imposed "suspensive" Conditions of Licence that substantially mirror the provisions of the *Code*.[6] For so long as the *Code* remained in effect, those Conditions of licence remained suspended.

28. In 2018, the Federal Court of Appeal granted Bell Canada's appeal[7] with the result that the *Code*, as implemented by the CRTC's mandatory order under s. 9(1)(h) of the *Broadcasting Act*, was no longer in effect.

29. As a result, the VI companies are now subject to the above-mentioned Conditions of Licence which, by virtue of the FCA decision, are no longer in a state of suspension. Those Conditions of Licence will remain binding until August 31, 2022, at which time the existing licences for the major broadcasting groups will expire.

30. The points of the above discussion are that:

- the CRTC has found, as fact, that the VI companies have the incentive and the ability to act anti-competitively against independent players in the industry; and that
- the protections that the CRTC has put in place to respond to that finding of fact are subject to challenge and are at risk of disappearing.

31. CCSA's members are dependent on the VI companies for most of their upstream inputs; namely Canadian programming, satellite delivery of television programming signals and, to a growing extent, terrestrial network interconnections for delivery of such content to their systems.

32. At the same time, CCSA's members compete directly with the VI companies' satellite and terrestrial distribution undertakings for retail customers.

33. As such, CCSA's members, most of whom are smaller, independent broadcasting distributors, are especially vulnerable to the anti-competitive tactics of the VI companies.

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[6] Broadcasting Decision CRTC 2017-148, "Renewal of licences for the television services of large English-language ownership groups – Introductory decision", Ottawa, 15 May 2017 and Broadcasting Decision CRTC 2017-143, "Renewal of licences for the television services of large French-language ownership groups – Introductory decision", Ottawa, 15 May 2017.

[7] *Bell Canada* v. *7265921 Canada Ltd.*, 2018 FCA 174 (CanLII).

34. For those reasons, CCSA submits that broadcasting legislation must give the regulator a clear and flexible authority to respond to anti-competitive behaviours in the marketplace.

35. One possibility would be to ensure that the *Act* gives the CRTC clear authority to make regulations that govern commercial relationships and agreements among actors in the marketplace.

36. That can be accomplished by the addition of an express power to make such regulations in s. 10 of the *Broadcasting Act*.

Recommendation: **Amend s. 10 of the *Broadcasting Act* to give the regulator clear authority to make regulations, as required to respond to potential anti-competitive behaviours, which govern commercial relationships and agreements among actors in the marketplace.**

Support Timely Dispute Resolution and Enforcement

37. Under the *Broadcasting Act*, the regulator's ability to respond quickly and effectively to regulatory breaches and anti-competitive behaviours is very limited. The main remedies available to the CRTC are revocation or suspension of a licence pursuant to its licensing power or issuance of a mandatory order under s. 12(2) of the *Act*.

38. Licence suspension or revocation is a blunt instrument that the CRTC will rarely use, especially as against a major, integrated media company like Bell or Rogers. Realistically, use of such a tool is truly a last resort.

39. The power to make mandatory orders, on the other hand, can and should be a flexible and effective tool.

40. However, as currently written, the *Broadcasting Ac*t requires the CRTC to conduct a full public process, including gazetting of a public notice and conduct of a full public hearing, prior to issuing a mandatory order.

41. That process can take months. It is not capable of responding to circumstances in which a party's improper, non-compliant behavior wreaks havoc on other industry players on a day-to-day basis.

42. As an example, consider the case in which a programmer, in violation of the regulated "standstill rule" withdraws access to its programming service by a BDU. For this example, assume that the service is premium sports programming with a robust schedule of live major league sports events.

43. In this example, a BDU who is denied access to the service will lose customers every single day that the service is withheld. That BDU cannot wait months for the issuance of a mandatory order that requires the programmer to restore the service. Rather, within days or weeks, the BDU will suffer catastrophic damage.

44. The problem lies with inclusion, at s. 18(1)(d) of the existing *Act*, of the issuance of mandatory orders as one of the CRTC's powers that is conditioned upon prior conduct of a public hearing.

45. The language of the mandatory order provision at s. 51of the *Telecommunications Act* is very similar to that in s. 12(2) of the *Broadcasting Act*. However, the *Telecommunications Ac*t lacks a provision which corresponds to s.18(1)(d), with the result that the *Telecommunications Act* empowers the CRTC to issue immediate orders without a full public process.

46. Notably, s. 12(3) of the *Broadcasting Act* entitles a person affected by a mandatory order to apply to the CRTC for re-consideration and empowers the CRTC to rescind or vary its order. However, that relief applies only in the case where the mandatory order is issued as the result of an inquiry conducted pursuant to s. 12(1).

47. CCSA submits that the legislation should authorize the CRTC to make mandatory orders immediately and should ensure that persons affected by such orders are entitled, in every case, to apply for re-consideration of such orders.

48. Those objectives can be accomplished by repealing s. 18(1)(d) of the *Broadcasting Act* and by re-wording s. 12(3) of the *Act* to extend its remedy to any person affected by an order made under s. 12(2).

Recommendation:

a. **Repeal s. 18(1)(d) of the *Broadcasting Act*; and**

b. **re-word s. 12(3) of the *Broadcasting Act* , as set out below, to ensure that it applies to any person affected by a mandatory order issued under s. 12(2):**

Where the Commission issues an order pursuant to subsection (2) of this section, any person who is affected by the order may, within thirty days after the making thereof, apply to the Commission to reconsider any decision or finding made by the panel, and the Commission may rescind or vary any

order or decision made by the panel or may re-hear any matter before deciding it.

Authorize the CRTC to Impose Administrative Monetary Penalties

49. Section 72.001 of the *Telecommunications Act* authorizes the CRTC to impose Administrative Monetary Penalties ("AMPs") where it finds that a person has contravened a "regulation or decision made by the Commission" under the *Act*.

50. Section 72.002 sets out *indicia* for determining the amount of the AMP to be applied in a given case.

51. Section 72.003 provides that, where the Commission has found that a person has contravened a regulation or decision, the Commission "may impose a penalty in a decision in the course of a proceeding before it under the *Act*."

52. The CRTC has no corresponding authority to impose AMPs under the *Broadcasting Act*.

53. Rather, other than the ss. 32 and 33 offence-creating provisions, the enforcement tools available to the CRTC under the *Broadcasting Act* are, essentially, suspension or revocation of a licence or, as discussed above, issuance of a mandatory order under s. 12.

54. The CRTC stated the following position in its Vertical Integration regulatory framework:

> The Commission agrees with the position advanced by Bell Canada that, in order to impose AMPs on specific entities, legislative authority is required. However, where non-compliant behaviour causes specific harm, the Commission can make orders of restitution or compensation. Similarly, in instances where non-compliant behaviour causes general harm to the overall broadcasting system, it can make orders to repair the harm caused. This can include orders requiring contribution to a specific fund for the benefit of the system as a whole or for the benefit of a large group that cannot be reasonably defined or identified.[8]

55. To date, that position has not been tested.

56. More recently, the CRTC, itself, has declared its need for the power to impose AMPs. In remarks to the IIC convention in November, 2018, the CRTC Chair said:

[8] Broadcasting Regulatory Policy CRTC 2011-601, "Regulatory framework relating to vertical integration", Ottawa, 21 September 2011at para. 148.

> The Broadcasting Act, as it's currently written, does not allow the CRTC to impose administrative monetary penalties when broadcasters do not respect their obligations. We can revoke a broadcaster's licence for non-compliance, or require them to appear before us. However, these processes take time and cost taxpayers money.
>
> Administrative monetary penalties would be an easy-to-implement tool that could address non-compliance more quickly and efficiently. Given our experience in enforcing the telemarketing rules over the past decade, we can confidently state that such penalties are a real deterrent to non-compliance when used with other enforcement methods.[9]

57. The power to suspend or revoke a licence is a blunt tool which, for that reason, is seldom used and is highly unlikely to be used as against the large, integrated media companies such as Bell and Rogers.

58. Similarly, as discussed above, the process required to issue a mandatory order "takes time and costs taxpayers money".

59. Most importantly, there is no authority for the CRTC to impose such measures as interim remedies during the course of a proceeding before it.

60. As we have noted, the nature of commercial disputes in the context of affiliation agreements for the distribution of programming services is such that very severe damage can accrue to a party to a dispute in a very short time and during the course of a proceeding – for example, a CRTC-supervised dispute resolution proceeding.

61. The CRTC needs the ability to respond quickly enough to forestall or at least minimize such damage so as to protect both the parties to a commercial dispute and Canadian viewers from harm.

Recommendation:

The legislation should authorize the CRTC to award Administrative Monetary Penalties by including in the *Broadcasting Act* provisions which mirror ss. 72.001 to 72.003 of the *Telecommunications Act*, as follows:

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[9] Ian Scott, Chairperson and Chief Executive Officer Canadian Radio-television and Telecommunications Commission, "Ian Scott to the annual conference of the Canadian Chapter of the International Institute of Communications", November 1, 2018, accessed at https://www.canada.ca/en/radio-television-telecommunications/news/2018/11/ian-scott-to-the-annual-conference-of-the-canadian-chapter-of-the-international-institute-of-communications.html on December 12, 2018.

s. n.1 Every contravention of a provision of this Act, and every contravention of a regulation or decision made by the Commission under this Act, constitutes a violation and the person who commits the violation is liable

(i) in the case of an individual, to an administrative monetary penalty not exceeding $25,000 and, for a subsequent contravention, a penalty not exceeding $50,000; or

(ii) in any other case, to an administrative monetary penalty not exceeding $10,000,000 and, for a subsequent contravention, a penalty not exceeding $15,000,000.

s. n.2 The amount of the penalty is to be determined by taking into account the following factors:

(i) the nature and scope of the violation;

(ii) the history of compliance with this Act, the regulations or the decisions made by the Commission under this Act, by the person who committed the violation;

(iii) any benefit that the person obtained from the commission of the violation;

(iv) the person's ability to pay the penalty;

(v) any factors established by any regulations; and

(vi) any other relevant factor.

s. n.3 The purpose of the penalty is to promote compliance with this Act, the regulations or the decisions made by the Commission under this Act, and not to punish.

s. n.4 The Commission may impose a penalty in a decision in the course of a proceeding before it under this Act in which it finds that there has been a contravention of a provision, a regulation or a decision referred to in section n.1.

Empower the CRTC to Make Interim Decisions

62. As presently written, the *Broadcasting Act* does not expressly confer on the CRTC any authority to make interim decisions or to award interim relief such as an injunction.

63. CCSA considers that, as the CRTC is called upon, more and more frequently, to adjudicate commercial disputes in the broadcasting sphere, it is required to act increasingly in the manner of a superior court. In that context, the CRTC lacks certain powers that a court normally would have available to it in support of such adjudication.

64. AMPs, mandatory orders and exercise of the CRTC's powers of licence revocation or suspension are all predicated on a finding that a person has violated a provision of the *Broadcasting Act*, a regulation or a decision or order of the Commission.

65. In the context of commercial disputes, there may be a need for the Commission to address behaviours or circumstances that do not amount to express violations of any of those categories of rules.

66. For example, the current regulations provide that a BDU has retroactive liability to pay at new rates to be established in a contract renewal from the time of expiry of the prior contract.

67. However, the Commission might find as fact, that, in the circumstances of a case in which the BDU has been unable to secure a renewal offer from a programmer and, therefore, has no way to estimate or accrue for the retroactive liability, that it is just and reasonable to relieve the BDU from the retroactive payment liability for the period in which no renewal offer was forthcoming.

68. In such a case, it should be open to the CRTC to make an interim decision based on that finding of fact and to relieve the BDU from the retroactive payment liability for the period in question.

69. Again, ss. 60 to 62 of the *Telecommunications Act* provide a useful model for such interim decisions and relief.

Recommendation:

The legislation should empower the CRTC to make interim decisions and award interim relief by including in the *Broadcasting Act* provisions which mirror ss. 60 to 62 of the *Telecommunications Act*, as follows:

s.n	**The Commission may grant the whole or any portion of the relief applied for in any case, and may grant any other relief in addition to or in substitution for the relief applied for as if the application had been for that other relief.**
s. n.2	**(1) The Commission may, in any decision, provide that the whole or any portion of the decision shall come into force on, or remain in force until, a specified day, the occurrence of a specified event, the fulfilment of a specified condition, or the performance to the satisfaction of the Commission, or of a person named by it, of a requirement imposed on any interested person.** **(2) The Commission may make an interim decision and may make its final decision effective from the day on which the interim decision came into effect.** **(3) The Commission may make an *ex parte* decision where it considers that the circumstances of the case justify it.**
s. n.3	**The Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision.**

Do Not Require ISPs to Contribute to Canadian Content Creation

70. CCSA acknowledges that an issue exists with respect to foreign Over-The-Top services benefiting from selling their services in the Canadian market without any corresponding obligation, such as licensed Canadian programming services bear, to contribute to the creation and exhibition of Canadian content.

71. CCSA respectfully submits that any resolution of that issue should be addressed to the specific problem and the harm; that is, the legislation should ensure that foreign content providers who benefit from selling in the Canadian market should contribute in a manner that is fair and equitable to the existing licensed Canadian content providers.

72. CCSA submits that such an approach is capable of injecting sufficient new funding into the broadcasting system to ensure robust support to the creation and exhibition of Canadian content.

73. It is neither necessary nor appropriate to impose new contribution obligations on Canadian ISPs. For the reasons discussed below, that is especially true as regards smaller, independent ISPs such as CCSA represents.

74. First, ISPs are regulated as carriers under the *Telecommunications Act* and, as the Courts have decided,[10] do not perform a broadcasting function to the extent that they simply provide bandwidth and access to video content on the networks. They do not perform "broadcasting" as that term is defined in the *Broadcasting Act* and, for that reason, should not be called upon to fund the creation of broadcasting content.

75. Second, most of CCSA's members operate both as ISPs and BDUs. It is increasingly true that the broadcasting distribution activities of BDUs related to ISPs are no longer a profit centre.

76. Rather, given the substantial increases to wholesale prices for programming in recent years, the broadcasting distribution function has already become a customer-retention product and is well along the way to becoming a "loss leader" for many distributors.

77. That point is especially true for smaller, independent distributors in low-density markets who face a more challenging economic case than distributors in densely-populated urban centres and who, in addition to the premium most pay to obtain delivery of programming to their networks via satellite, typically pay substantially higher wholesale rates for programming than the large BDUs.

78. For many independent distributors, income from their ISP business is becoming an important source of subsidy to their ongoing BDU operations. Imposition of a new levy on their ISP business would necessarily impair their ability to cross-subsidize in that manner.

79. Indeed, imposition on such companies of any new levy will almost certainly require those smaller distributors to "rob Peter to pay Paul": funding of some aspect of their operations will have to be scaled back to cope with such a levy.

80. Third, in their roles as BDUs, many operate community channels, a very important source of local Canadian content and reflection for the communities they serve.

81. Almost all of CCSA's members are exempted from regulation with respect to their BDU operations and the large majority serves fewer than 2,000 customers each. While exempt

[10] *Reference Re: Broadcasting Act*, 2012 SCC 4; [2012] 1 S.C.R. 142, as cited in Peter S. Grant, ed. "Communications Law and the Courts in Canada 2014, Second Edition (Toronto, 2014) at §55-545.

BDUs that serve fewer than 2,000 customers are not required to contribute to Canadian content, many such BDUs do fund and operate some form of community channel.

82. Even so, BDUs that serve fewer than 2,000 customers have no Canadian content funding obligation today and are not required to contribute to the CMF. Imposition of a new levy on their ISP operations would therefore represent a new expense to them which would almost certainly be passed on, at least in part, as increased costs to their customers.

83. Exempt BDUs that serve more than 2,000 customers retain an obligation to direct 5% of their gross revenues to Canadian content. Most CCSA members in that class meet that obligation, as permitted, by direct funding of the community channels they operate.

84. In recent years, a number of CCSA members – both those that bear a contribution obligation and smaller BDUs that do not – have launched new community channels and community programming initiatives. Such channels are both an important service to their communities and a valuable competitive differentiator for the BDUs.

85. However, in response to a new levy on their ISP businesses, one of the first places such companies will look for compensating cost reductions will be their community channels.

86. CCSA wishes to emphasize that, in the context of the struggles that the national networks continue to face in funding the creation of local news and other local content, the local community channels are becoming an increasingly vital source of local expression and reflection, particularly to Canadians in the rural and remote areas that most of CCSA's members serve.

87. CCSA submits that imposition of a new levy on smaller, independent ISPs would impair their ability to fund their existing community channels and undermine any incentive such distributors might have to launch new ones. That is a result to be avoided.

88. Fourth and of no less importance, Government is placing great emphasis on extending broadband services to Canadians in rural and remote areas and is providing funding for that purpose through both ISED and the CRTC.

89. It is widely acknowledged that, even with such funding, the challenges of extending service to Canadians in many such areas are daunting. Capital funding programs do not address the absence of a viable economic case for ongoing operation of broadband networks in many such areas.

90. Imposition of a new levy on the ISPs that already serve customers and wish to extend their networks in such areas will act as one more disincentive, among many, to network investment.[11]

91. As such, a new levy on ISPs would run directly counter to the objectives of existing and planned broadband funding programs.

92. As has been pointed out above, the impacts of a new levy would have a disproportionate negative impact on smaller, independent ISPs who already face the most challenging economic cases for operation of their networks.

93. On the other hand, in the overall scheme of a possible new levy, contributions by the independent ISPs would represent a negligible portion of the overall contribution by the sector.

94. For those reasons, should Government choose to apply a new levy to Canadian ISPs, it should exempt independent ISPs from the obligation to contribute. Such an exemption would have little impact on the overall contribution size and would avoid the harms, described above, to independent ISPs and the Canadian consumers they serve.

95. Rather than use an arbitrary telecommunications revenue amount as an exemption threshold, such an exemption should apply based on the top five Internet companies identified in the Commission's most recent Communications Monitoring Report as generating almost three-quarters of revenue in the residential Internet service market. [12]

Recommendation:

Government should not impose a levy on ISPs whereby Canadian ISPs would be required to contribute to the creation of Canadian content.

No legislative changes are required to implement this recommendation. Rather, the CRTC lacks authority, under the existing *Broadcasting Act*, to impose such a levy on ISPs who are regulated as telecommunications common carriers under the *Telecommunications Act* and who act solely in that capacity as set out at s. 4 of the *Broadcasting Act*. Government should not introduce changes to that provision so as to impose a new Canadian content levy on ISPs.

[11] *See* discussion of support structure access costs at paras. 118 to 148, *supra*.
[12] CRTC, *Communications Monitoring Report 2018*, Infographic 5.4.

In the event Government does decide to impose a levy on Canadian ISPs, the CRTC should use its exemption power under s. 9 of the *Telecommunications Act* to exempt independent ISPs who are not "the top five Internet companies identified in the Commission's most recent Communications Monitoring Report as generating almost three-quarters of revenue in the residential Internet service market".

Support Competitive Entry in the Mobile Wireless Market

96. Among the top-level objectives of the *Telecommunications Act* are that telecommunications policy should have, as its objectives:

- to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; [13] and
- to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications.[14]

97. As CCSA has noted in its submissions in response to the CRTC's review of the wireless wholesale policy framework in 2014, effective competition has yet to be established in the mobile wireless services market.

98. Rather, Canada's wireless telecommunications services market continues to be dominated by the three largest carriers who, in aggregate, served 90% of subscribers and reaped 92% of the total revenues in 2017.[15]

99. Over the decade from 2007 to 2017, those numbers have not changed greatly. In 2007, the three largest carriers held 92% of the subscribers and 94% of the revenues in the sector.[16]

100. Those numbers show that competitors have achieved some limited success in penetrating the market over the past decade but those gains have been very small. However, from the perspective of Canada's aspirations to deliver broadband connectivity to all Canadians, the subscriber and revenue share numbers, alone, do not tell the full story.

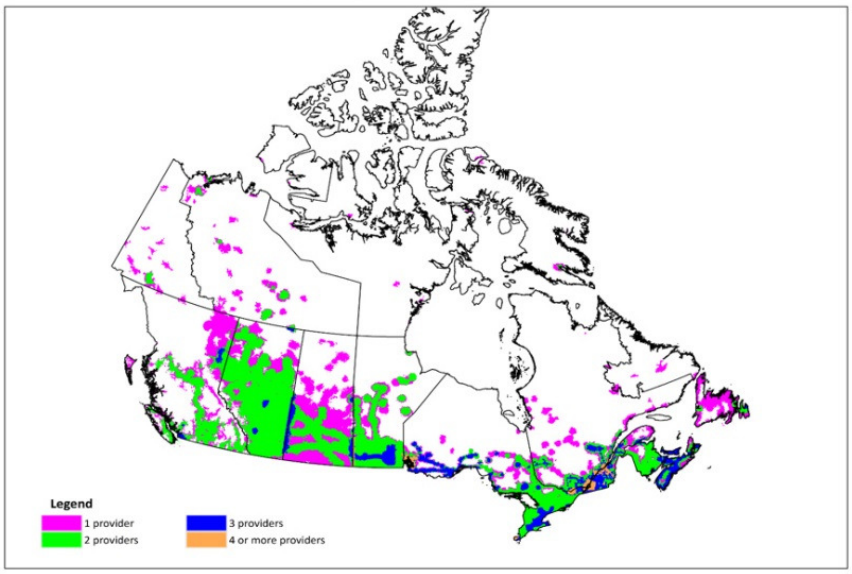
[13] *Telecommunications Act* (S.C. 1993, c. 38), s. 7(b).
[14] *Telecommunications Act* (S.C. 1993, c. 38), s. 7(c).
[15] CRTC, *Communications Monitoring Report 2018* at Infographics 6.6.2 and 6.6.6, respectively.
[16] CRTC, *Communications Monitoring Report 2008* at Figures 5.5.7 and 5.5.8.

101. As wireless technology evolves, it becomes an increasingly important element of delivery of broadband service to Canadians and has the potential to become an especially effective means for delivering such service to Canada's low-density rural and remote areas.

102. In that context, the geographic reach of competition for delivery of wireless service is a critical consideration.

103. The map below, taken from the CRTC's 2017 Communications Monitoring Report,[17] shows that areas of the country which have more than one wireless provider, at any level of technology, are very limited and areas with more than two competitors are extremely concentrated in highly populated regions.

Wireless service coverage by number of facilities-based WSPs, 2016

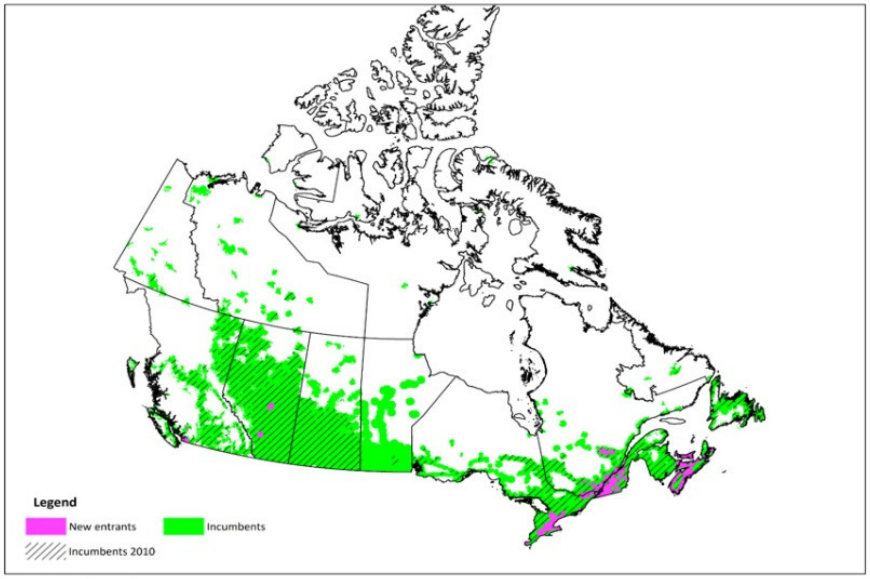


104. When the competitive environment for what the CRTC refers to as "HSPA+" networks is considered, it appears from the map below[18] that, while the incumbents have significantly extended their network coverage, competition from new entrants, once again, is highly limited in terms of the geographic areas served.

105. That is, for much of the rural and remote regions that CCSA members serve, there is little or no effective competition in this sector and Canadians in those regions do not, like their urban counterparts, benefit from robust competition.

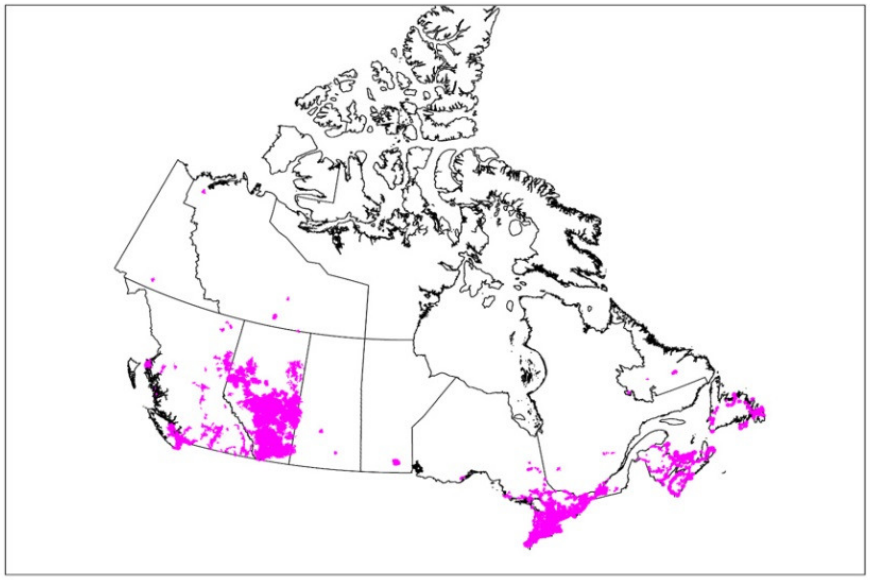
[17] CRTC, *Communications Monitoring Report 2017*, Map 5.5.1.
[18] CRTC, *Communications Monitoring Report 2017*, Map 5.5.2.

HSPA+ network coverage 2010 vs. 2016



106. Finally, as the map below[19] illustrates, when advanced LTE -- the technology level at which broadband service capable of supporting today's capacity-intensive uses and applications becomes available – is considered, the geographic scope of coverage by any provider – incumbent or competitor – is, again, extremely limited.

LTE Advanced Coverage, 2016



[19] CRTC, *Communications Monitoring Report 2017*, Map 5.5.4.

107. This is an area in which reliance on market forces[20] simply is not getting the job done and has not resulted in substantially enhanced competition for the benefit of Canadians.

108. Especially in view of Government's rural broadband strategy, there is a pressing need for efficient and effective regulation to promote access to wholesale wireless services by competitive entrants.

109. CCSA's members provide some 1,200 communities, most of which are in the unserved or underserved areas shown in the maps above, with facilities-based video, telephone and Internet services.

110. However, with a very few exceptions, they are not able to provide wireless services to their customers. That is because they have been unable to secure access to the incumbents' Radio Access Networks on a "white label" or any other basis.

111. Those members are therefore limited to offering a "triple play" service to the communities and regions they serve. As a result, Canadians in the areas those companies serve are foreclosed from benefiting from robust competition and alternatives in their local wireless markets.

112. CCSA's members acknowledge that entry into the mobile wireless market would be a new, different and challenging undertaking for them. Nonetheless, if access to wireless services was established at mandated, affordable wholesale rates, many would be interested in entering the space as new competitive entrants using a Mobile Virtual Network Operator ("MVNO") reseller model.

113. In the face of the daunting challenge of extending broadband service to as many Canadians as possible, regardless of where they live and work, such competitive entry should be supported.

114. CCSA notes that the CRTC plans to review its policies for the wholesale wireless market, including the matter of MVNO access, in 2019.

115. In that respect, CCSA is encouraged by the CRTC's recent statement that:

> . . . the Commission considers that there is more work to be done to further improve competition, reduce barriers to entry, and address any concerns about affordability and

[20] The *Telecommunications Act*, at s. 7(f), requires policy to "to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective."

> service adoption in the broader mobile wireless service market. The Commission intends to assess such issues in its upcoming review of mobile wireless services.[21]

116. CCSA will participate in the CRTC's review and, at this time, will await the Commission's determinations.

117. For the purposes of the present legislative review, CCSA emphasizes the importance of the objectives at ss. 7(b) and (c) of the *Telecommunications Act* and recommends that those provisions be preserved as they exist today.

Recommendation:

Government should support increased competition in the delivery of mobile wireless services, especially in underserved rural and remote regions and should encourage existing facilities-based telecommunications service providers in such areas to provide competitive wireless services. Government should support competitive entry on the basis of an MVNO reseller model.

CCSA does not recommend specific changes to the *Telecommunications Act* in this regard but does recommend that ss. 7(b) and (c) of the *Act* be preserved as they exist today.

Implement Consistent Regulation of Access to Telecommunications Support Structures

118. One effect of the Supreme Court's *Barrie Utilities* decision in 2003[22], in the words of the 2006 Telecommunications Policy Review Panel report, "was to place resolution of disputes over access to support structures owned by electrical utilities outside of the CRTC's jurisdiction and to prevent it from regulating access to such poles pursuant to ss. 43(5) of the [Telecommunications]Act".[23]

119. The TRP Panel cited a number of instances[24] in which telecommunications providers' requests for access to support structures were either refused or delayed by local electrical utilities as a result of the CRTC's diminished authority to regulate in this area.

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[21] Telecom Decision CRTC 2018-475, "Lower-cost data-only plans for mobile wireless services", at Preamble.
[22] *Barrie Public Utilities* v. *Canadian Cable Television Association*, [2003], 1 SCC 28 (16 May, 2003).
[23] Sinclair, G., Intven, H. and Tremblay, A., *Telecommunications Policy Review Panel: Final Report* (Ottawa: March 2006) at 5-6.
[24] *Ibid*. at 5-7.

120. The TPR Panel stated its view that "all these restrictions can lead to unacceptable delays in the expansion of new telecommunications infrastructure to Canadians."[25]

121. Accordingly, the TRP Panel recommended that:

> The wording of subsection 43.(5) of the *Telecommunications Act* should be expanded to ensure that the CRTC has a clear power to resolve disputes and order access to support structures constructed on, over, along or under public or private property of all descriptions. These access rights should be defined to include the right to install, maintain, repair and operate transmission facilities as defined in the Act. Subsection 43.(5) should be amended to ensure that it applies to support structures owned by electricity utilities, municipalities and other parties.[26]

122. The TRP Panel also recommended that the CRTC be authorized to resolve commercial disputes over access and be required to consult with provincial regulators, as appropriate, in resolving such disputes.[27]

123. The TRP Panel rightly forecast that, as electrical utilities were becoming more involved as telecommunications providers, "access-related issues may increase in the future".[28]

124. Since 2006, the number of issues has increased due, largely, to the assertion of provincial regulators' jurisdiction over matters relating to provincially-regulated electrical utilities.

125. Recently, the Ontario Energy Board has made a number of rate-setting decisions that have dramatically increased support structure attachment rates in that province. Other provincial regulators are watching closely.

126. Except for the Ontario's three largest hydros (Hydro One, Toronto Hydro and Hydro Ottawa), Ontario's pole attachment rate has remained unchanged at $22.35 per pole per year since 2005.

127. As a result of recent OEB hearings, the province-wide pole attachment rate increased to $43.63 as of January 1, 2019.

128. However, Hydro One was seeking an even higher rate – starting with $47.67 in 2018, rising to $48.47 in 2019 and $51.41 by 2022. After a challenge by the telecommunications

[25] *Ibid*. at 5-8.
[26] *Ibid*. at Recommendation 5-1.
[27] *Ibid*. at Recommendations 5-2 and 5-3.
[28] *Ibid*. at 5-7.

carriers, Hydro One decided, in November 2018, to abandon its application and simply accept the province-wide rate of $43.63.

129. Even with that result, pole attachment rates in Ontario have increased by 100% as a result of the OEB's regulatory oversight. The Ontario rates are now more than double the national average rate and more than three times the amount of rates chargeable by federally regulated telecommunications companies.

130. Rural communications distributors are disproportionately affected by such increases. That is because they tend to require attachment to many more support structures, typically poles, than their urban counterparts. This is often expressed as the difference between "customers per pole" in urban settings and "poles per customer" in far less densely populated rural areas.

131. The impacts on these rural telecommunications providers can be very severe. CCSA is aware of one case in which a CCSA member in Northern Ontario recently was forced to sell its company headquarters building to pay the retroactive component of an OEB-approved rate increase for Hydro One.

132. Aside from their immediate impacts on the businesses of smaller, rural operators, such radically increased pole attachment rates act as a powerful disincentive to investment by such companies to upgrade and extend their networks to serve new communities.

133. In that respect, provincial jurisdiction over support structure attachments can run directly counter to the Government's objective of extending high-quality broadband service to all Canadians.

134. A smaller ISP that wishes to extend broadband service to a new community must consider both capital expense of the network building project and the ongoing operational costs required to sustain the network once it is built.

135. Federal Government funding under both the $500 million "Connect to Innovate" program and the CRTC's imminent $750 million rural broadband fund provide funding only for capital project expenses.

136. However, when considering whether to propose projects for funding, the ISP must also consider how to maintain and sustain the network over time. Given recent, dramatic increases to support structure attachment rates, the case for sustaining a new, upgraded or extended network, once built, becomes far more difficult than before.

137. There is no point to building a network – even with subsidized capital dollars available – if the network cannot be maintained. For that reason, smaller telecommunications distributors may well decline to propose rural broadband expansion projects as candidates for subsidy.

138. The issues discussed above are manifestations of the core issue that jurisdiction in this area is split among federal and provincial authorities and that there is no consistency among those authorities as to the objectives of the applicable legislation or as to whether and how support structure attachment rates and terms will be established.

139. The result is an inconsistent and inefficient system that requires telecommunications companies to know the rules and the rates for each jurisdiction in which they operate and for each type of pole owner, be it a federally regulated telecommunications company or a provincially regulated electrical utility.

140. To illustrate the complexity and the inequities involved, the following table sets out corresponding attachment rates in a number of jurisdictions:

Hydros (Ontario)		Hydros (Rest of Canada)		Telecoms	
Toronto Hydro	$42.00	Nova Scotia Power	$14.15	Bell Canada	$12.48
Hydro Ottawa	$53.00	New Brunswick Power	$21.48	Bell Aliant	$18.48
Hydro One	$43.63	Saint John Energy	$26.71	Telus	$17.28
All Other Hydros	$43.63	Newfoundland Power	$26.50	MTS	$16.44
		FortisAlberta	$20 - $21	Telus	$9.60
		Manitoba Hydro	$25 - $26	Telebec	$13.87
		Hydro Quebec	$18.54		

141. Perhaps most importantly, as the TRP Report puts it, the provincial energy regulators "are not regulating access pursuant to the policy objectives embodied in the *Telecommunications Act*, and they do not have a mandate to ensure fulfilment of these policy objectives." [29]

142. In addition, as the TRP Report continues, "even in those jurisdictions in which provincial public utility boards have acted, there is a significant variance in both the methodology used to set rates and in the magnitude of the charges for third-party access to support structures."[30]

143. Based on its experience with the OEB's processes over the past few years, CCSA would go so far as to say that the OEB is neither comfortable with nor has expertise in the matter of

[29] *Ibid*. at 5-6
[30] *Ibid*.

rate-setting for support structure attachments, an area that takes that Board outside its normal mandate and function of setting energy rates.

144. The CRTC, on the other hand, has a clear mandate, under s. 7 of the *Telecommunications Act*, to ensure the orderly development of a Canadian telecommunications system and to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada.

145. The CRTC has a long history of regulating support structure attachment terms and rates as required by its s. 7 mandate. For decades, the CRTC has maintained a consistent rate-setting methodology in this area and has extensive expertise with this subject matter.

146. For those reasons, CCSA recommends that the CRTC be given exclusive jurisdiction to regulate and to resolve disputes relating to support structure attachments for the purpose of delivering telecommunications services.

147. That recommendation is supported by following recent comments of the CRTC Chair at the 2018 IIC Canada Conference, who, in describing key issues to be considered in the present legislative review said:

> The second pertains to jurisdiction over access to passive infrastructure, such as rights-of-way. 5G will transform Canada's telecommunications environment. Robust telecommunications broadband and wireless networks will become a significant competitive advantage for our country.
>
> Deployment in certain areas, however, may be challenging. Rights-of-way issues that cut across provincial and municipal jurisdictions, as well as private interests, will need to be resolved. These are potentially thorny matters that, in extreme cases, wind up before the courts.
>
> The Government of Canada has already acknowledged that shared responsibility over passive infrastructure presents challenges for the efficient deployment of 5G. We agree. For our part, we lack complete jurisdiction to intervene. Our hope is that legislative changes will empower the CRTC to resolve disputes, order access and establish guidelines regarding passive infrastructure.[31]

[31] CRTC, Speech, "Ian Scott to the annual conference of the Canadian Chapter of the International Institute of Communications", Ottawa: November 1, 2018, accessed at https://www.canada.ca/en/radio-television-telecommunications/news/2018/11/ian-scott-to-the-annual-conference-of-the-canadian-chapter-of-the-international-institute-of-communications.html on January 2, 2019.

148. With respect to this matter, CCSA has been active in consultation with a group of telecommunications carriers who, jointly, support the following recommended changes to the *Telecommunications Act*.

Recommendation:

The *Telecommunications Act* should be amended to give the CRTC exclusive jurisdiction to regulate the terms and rates for attachment of telecommunications facilities to support structures. CCSA endorses the recommended amendments to ss. 43 and 44 set out below:

Definition

43 (1) In this section and section 44, *Canadian carrier* includes a *distribution undertaking* as that term is defined in subsection 2(1) of the *Broadcasting Act*.

(1.1) In this section, *electrical utility undertaking* means an undertaking engaged in the distribution or transport of electricity.

(1.2) In this section, a *supporting structure* includes:

(a) poles, strands or ducts owned by Canadian carriers;

(b) poles, strands or ducts owned by electrical utility undertakings, regardless of whether they are otherwise regulated at the provincial level of government; and .

(c) poles, strands or ducts, as well as any public property that is capable of being used as a support for telecommunications facilities, including but not limited to, street light standards, traffic lights, transit shelters or the exterior of buildings, that are owned by a municipality or other public authority.

Entry on public property

(2) Subject to subsections (3) and (4) and section 44, a Canadian carrier may enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its telecommunications facilities and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.

(2.1) Subject to subsections (3) and (4) and section 44, a Canadian carrier may enter on any highway, transit corridor or other public place for the purpose of attaching its

telecommunications facilities to any supporting structure, but shall not unduly interfere with the public use and enjoyment of the highway, transit corridor or other public place.

(2.2) Subject to subsections (3) and (4) and section 44, a Canadian carrier may use any supporting structures owned by a municipality or public authority for the purpose of constructing, maintaining or operating its telecommunications facilities, and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the municipality's or public authority's use of those supporting structures or the safety of the public.

Consent of municipality

(3) No Canadian carrier shall construct a telecommunications facility on, over, under or along a highway or other public place, or attach its telecommunications facilities to any supporting structures owned by a municipality or public authority, without the consent of the municipality or other public authority having jurisdiction over the highway, other public place or supporting structures.

Application by carrier

(4) Where a Canadian carrier cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct, maintain or operate a telecommunications facility or attach its telecommunications facilities to any supporting structure, the Canadian carrier may apply to the Commission for permission to construct it or attach it, as the case may be, and the Commission may, having due regard to the use and enjoyment of the highway, other public place or supporting structure by others, including the municipality or public authority, grant the permission subject to any conditions that the Commission determines, including, but not limited to, the terms of access and the applicable rate, if any, payable.

Access by others

(5) Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to a supporting structure of a Canadian carrier or an electrical utility undertaking constructed on a highway or other public place, or on an easement or real property whether owned by or licensed to the owner of the supporting structure, that person may apply to the Commission for a right of access to the supporting structure for the purpose of attaching its telecommunications facilities in order to provide its services, and the Commission may grant the permission subject to any conditions that the Commission determines including, but not limited to, the terms of access and the applicable rate, if any, payable to the owner of the supporting structure.

Applications by municipalities and other authorities

44 On application by a municipality or other public authority, the Commission may

(a) order a Canadian carrier, subject to any conditions that the Commission determines, to bury or alter the route of any telecommunications facility situated or proposed to be situated within the jurisdiction of the municipality or public authority; or

(b) prohibit the construction, maintenance or operation by a Canadian carrier of any such telecommunications facility except as directed by the Commission.

Future Vision

149. When CCSA considers the role of the legislation in the future, it appears, first, that the *Telecommunications Act*, written as it is to be technologically neutral, is entirely capable of responding to foreseeable technological developments.

150. That is, while networks and their character and capabilities will evolve, the fundamental assumptions, objectives and principles of the legislation should continue to apply.

151. On the other hand, a number of the basic premises which underlie the *Broadcasting Act* can be expected to change in fundamental ways. Again, given the technologically neutral terms of the *Broadcasting Act*, the legislation should be able to cope quite well with changing circumstances without major revisions.

152. Nonetheless, it is important to understand the key anticipated changes and the implications they may have for how the legislation is applied.

The Changing Broadcasting Delivery model

153. The very concept of "broadcasting" is premised on the idea of a one-to-many delivery of programming to consumers. In practice, it has involved a process of content being distributed in the form of programming services, or channels, by programming undertakings, either by direct over-the-air broadcast or via distribution undertakings, to end consumers.

154. However, anyone who has paid attention to recent promotions on CTV's network and discretionary services will have noticed that such promotions steer consumers almost exclusively toward CTV's on-line content hosted on CTV's own websites.

155. For on-demand and, increasingly, for real-time streaming content, the trend is toward a direct relationship between the content provider and the end consumer on the basis of a "pull" request for content from the consumer.

156. That form of content delivery is fundamentally different from "broadcasting" as that term traditionally has been understood.

157. Nonetheless, the term "broadcasting" in the present *Act*, as interpreted by the courts, appears flexible enough to comprehend the newer model of content delivery in response to the individual consumer's demand for access to a channel or to a specific content asset.[32]

158. That is an example of how, while the underlying premises may have changed, the *Act*, as written, is still able provide an effective framework for regulation.

159. However, the change from "broadcasting" to delivery of content through a direct relationship between the content provider and the end customer has profound implications for how the cultural objectives of the *Broadcasting Act* should be applied.

160. First, in a world in which the last mile distributor acts as a conduit through which customers access content but does not actually select, purchase or aggregate content for presentation to the viewer, that last mile distributor no longer acts, in any sense, as a "gatekeeper" within the system.

161. Rather, the content provider, itself, becomes the arbiter of what content will be available to its direct customer and at what price that content will be available.

162. By the same token, the last mile distributor in that environment becomes little more than a "pipe" for transmission of the content to the viewer. As such, the concept of the Broadcasting Distribution Undertaking as the curator and purveyor of a "closed garden" offering of paid video content will gradually become an anachronism.

163. Rather, those last mile distributors eventually will operate only as "carriers", whose role is to provide access, through their physical networks, to a range of applications including voice, data and video transmission.

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[32] *See* discussion of s. 2, "Definitions", "broadcasting" in Peter S. Grant and Grant Buchanan, eds., *Canadian Broadcasting Regulatory Handbook 2017, Fourteenth Edition* (Toronto: McCarthy Tetrault, 2017) at pp. 8 – 10.

164. Notably, such applications will include services that traditionally have not been regarded as "broadcasting" such as access to e-government and e-health services and to user-generated content.

165. As such, those distributors will sell network bandwidth, value-added services such as home WiFi management, network security tools and navigation or recommendation engines to their customers.

166. In that environment, the distributor's incentive will be to make as much content as possible available to its network customers by providing pointers, in its navigation or recommendation engine, to the content providers' online sites where the content is actually hosted and from which it is exhibited directly to the viewer.

167. In short, as last mile distributors move out of the business of aggregating, packaging and re-selling programming services and into the business of facilitating the transmission of programming over their networks as ISPs, one can anticipate the gradual disappearance of "Broadcasting Distribution Undertakings".

Responsibility for Priority, Efficient Delivery and Affordability of Programming

168. Given the evolution just described, it will become necessary to apply the existing legislation in a new and different way. On the one hand, content legislation – that is, the *Broadcasting Act* – with all of its cultural objectives, will still apply to any undertaking that originates or provides content to consumers, be it a linear television channel, an on-demand service that offers content assets on an individual basis or a community channel.

169. On the other hand, telecommunications legislation regulates the activities of all carriers, including ISPs that provide viewers only with access to video or "broadcasting" content over their networks.

170. The current *Broadcasting Act* places a number of obligations on BDUs. Those include, among other things, obligations related to funding and exhibition of Canadian programming and obligations related to the efficient provision of affordable programming to Canadians.

171. In particular, BDUs bear the obligations, at s. 3(1)(t) of the *Act* to:

- give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

- provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost, and

- where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services.

172. However, as BDUs convert their operations to act as ISPs who provide only access over the Internet to the content providers' sites, there will be fewer BDUs to carry those obligations. Eventually, there will be none.

173. In addition, even today, BDUs have less and less control over the affordability of programming, especially as sourced from the large vertically-integrated media companies. Already, services such as Crave TV are being accessed by consumers through "TV Everywhere" portals provided by BDUs under a content curation and pricing model that is controlled entirely by the content provider.

174. For those reasons, to some extent today and to a much greater extent in the future, it will not be sufficient to place obligations relating to affordability, efficient delivery and reasonable packaging terms solely on BDUs.

175. Instead, the legislation will need to impose some of those obligations onto the content providers who, increasingly, will own the direct relationship with the end users of their content.

176. The *Broadcasting Act* should create obligations on "programming undertakings" to:

- give priority to the carriage of Canadian programming services on the platforms which they host and control;

- make access to their content hosting sites available on a non-discriminatory basis to all BDUs and carriers and, therefore, as with the existing Hybrid Video-On-Demand model, to all Canadians regardless of which last mile carrier the consumer chooses; and

- make access to their content available to Canadian viewers at affordable rates.

177. Addition of such provisions to the *Broadcasting Act* will:

- for the present and near-term future, create a shared obligation among programmers and BDUs for efficient delivery of affordable programming which properly acknowledges that content is being hosted on and delivered through platforms controlled by both parties; and

- position the legislation for a longer-term future in which regulated BDUs no longer exist and, therefore, can no longer be used as a nexus for imposition of obligations for efficient delivery of affordable programming to Canadians.

Recommendation:

The *Broadcasting Act* should be amended to place obligations on programming undertakings relating to priority carriage of Canadian services, making programming available to all Canadians and efficient delivery of programming to Canadians at affordable rates.

A new s. 3(1)(t.1) should be added to the *Act*, as follows:

> **programming undertakings, to the extent they host programming for direct delivery to Canadians**
>
> > **(i), should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,**
> >
> > **(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,**
> >
> > **(iii) should make access to their programming available on a non-discriminatory basis to all broadcasting distribution undertakings and carriers; and**

A new s. 3(1)(t.2) should be added to the *Act*, as follows:

> **programming undertakings should, where they provide programming services to broadcasting distribution undertakings or carriers pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services.**

Funding Canadian Content

178. Subsection 3(1)(e) of the *Broadcasting Act* obligates BDUs, as an "element" of the broadcasting system, to "contribute in an appropriate manner to the creation and presentation of Canadian programming".

179. For so long as BDUs continue to operate as BDUs by purchasing, aggregating, packaging and re-selling programming, that obligation remains relevant and appropriate.

180. However, it is not appropriate to impose Canadian content funding obligations on ISPs who act only as carriers of broadcasting and, as such, are excluded from application of the *Broadcasting Act* by s. 4(4) which provides that "this Act does not apply to a telecommunications common carrier, as defined in the *Telecommunications Act*, when acting solely in that capacity".

181. In the future vision set out above, BDUs will gradually convert to operation as ISPs through whom Canadians can access broadcasting. Included in the network access service provided by the ISP will be a navigation or recommendation engine.

182. CCSA considers that inclusion of such navigation and recommendation tools in the network access service should not, of itself, amount to "broadcasting" such that the ISP becomes subject to regulation under the *Broadcasting Act* and, thereby, subject to a Canadian content funding obligation.

183. The Supreme Court of Canada, in *Reference re Broadcasting Act* , 2012 SCC 4, [2012], found that:

> [T]he terms "broadcasting" and "broadcasting undertaking", interpreted in the context of the language and purposes of the *Broadcasting Act*, are not meant to capture entities which merely provide the mode of transmission. The *Broadcasting Act* makes it clear that "broadcasting undertakings" are assumed to have some measure of control over programming. The policy objectives listed under s. 3(1) of the *Act* focus on content. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content. The term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the *Act's* policy objectives. Accordingly, ISPs do not carry on "broadcasting undertakings" under the *Broadcasting Act* when they provide access through the Internet to "broadcasting" requested by end-users.[33]

[33] *Reference re Broadcasting Act* , 2012 SCC 4, [2012], [2012] 1 S.C.R. 142 at headnote.

184. Where an ISP provides only the transmission path and a generic navigation or recommendation engine, it does not by those functions, alone, take part in the in the "selection, origination or packaging of content". As such, the ISP has "no role to play in contributing to the Act's policy objectives".

185. Rather, the navigation or recommendation engine is a passive tool which, properly, is part of the network technology required to "provide access through the Internet to 'broadcasting' requested by end-users".

186. That proposition can be seen to be true in that a recommendation engine responds to the end user's viewing habits without intervention by the ISP.

187. Provision of such a navigation or recommendation engine is analogous to a telephone service provider's provision of a telephone directory to its local exchange customers. It merely assists the end user's search for the location of content that can be accessed through the ISP's network.

188. An ISP that provides only a transmission path over its network, including a navigation or recommendation engine which enables the end user to view broadcasting over the ISP's network, does not exercise "some measure of control over programming" and cannot meaningfully contribute to achievement of the *Act*'s objectives.

189. Such an ISP should fall within the exclusion at s. 4(4) of the *Broadcasting Act*.

190. The legislation should clearly state that exclusion through the addition of a new s. 4(5) of the *Broadcasting Act* which explicitly states that provision of a navigation or recommendation engine is included among the activities of "a telecommunications common carrier . . . when acting solely in that capacity."

Recommendation:

The *Broadcasting Act* should be amended by adding a new s. 4(5) as follows:

4(5) For the purpose of s. 4(4), a telecommunications carrier that provides access to broadcasting through its network, including through a navigational tool or recommendation engine acts solely in the capacity of a telecommunications common carrier.

Managing the Transition

191. To summarize the vision set out above, CCSA anticipates a process in which BDUs eventually cease operations as such and convert to operation as ISPs who provide Canadians with access, over their networks, to content hosted on the platforms of content providers.

192. If the analysis set out above is accepted, the challenge becomes one of managing the transition, as ISPs which are not involved in "broadcasting" gradually replace BDUs as the vehicle through which Canadians access video content.

193. The *Broadcasting* and *Telecommunications Acts*, amended per CCSA's recommendations, are capable of responding to that transition.

194. To the extent a last mile distributor of broadcasting plays a role in the selection, origination or packaging of content and, therefore, has a role to play in contributing to the *Broadcasting Act*'s policy objectives, the last mile distributor would remain subject to regulation under that *Act* as a broadcasting distribution undertaking.

195. For so long as the distributor continues to act as a BDU, it would remain subject to all of the obligations on BDUs that currently apply by virtue of the *Broadcasting Act*.

196. At the time and to the extent the last mile distributor provides only the transmission path, including the navigation or recommendation engine, that enables the end-user to access to broadcasting through the Internet, the *Broadcasting Act* would cease to apply to the distributor's operations. At that point, the distributor would become subject only to regulation as a carrier under the *Telecommunications Act*.

197. CCSA envisions the case in which a single communications company that operates multiple BDUs would convert its BDUs to ISPs on an individual basis over time. Such a company would then have some of its systems operating as BDUs and others operating only as ISPs which provide access to broadcasting.

198. CCSA suggests that there could be a simple process for notifying the CRTC that a given system no longer operates as a BDU and qualifies for regulation only as a carrier under the *Telecommunications Act*. The CRTC could implement such a mechanism by regulation: no statutory amendment would be required.

199. The other significant implication of that process will be a gradual diminution of the base of regulated BDUs who, as such, contribute to the creation of Canadian programming.

200. Without some compensating initiative, that could lead to a reduction of the total available funding for Canadian content creation.

201. CCSA notes that it remains open to Government to apply the Canadian content funding and exhibition obligations to all content providers – Canadian and non-Canadian – who sell their content to Canadian consumers and who benefit from their activity in the Canadian content marketplace.

202. Having said that, CCSA has no further comment on what specific measures, if any, Government should take to ensure adequate continuing support to Canadian programming. CCSA has no recommendations for statutory amendment in that regard.

Conclusion

203. For CCSA, the top and most pressing priority for legislative change is that of giving the CRTC the authority and tools it needs to address anti-competitive behaviours in the broadcasting sector in a timely and effective manner.

204. In particular, the CRTC should have access to interim remedies which it can apply very quickly in the context of commercial disputes that come before it.

205. CCSA recommends strongly against imposition of any levy on ISPs for the purpose of funding Canadian content creation. Such a levy is inappropriate and would impair the ability of many smaller ISPs to invest in upgrades and extensions of their broadband networks.

206. With respect to mobile wireless services, the market remains heavily dominated by the large incumbents. Especially striking is the degree to which the little competition that does exist is concentrated in and around the major urban centres.

207. While the CRTC's coverage maps indicate substantial extension of the incumbents' networks outside the most densely populated markets, there is very little indication that competition is taking hold in those less densely populated areas.

208. As wireless technology evolves and capacity improves, that technology becomes an important element of Canada's strategy to connect all Canadians to broadband service.

209. To help achieve that objective, Government should support increased competition in the delivery of mobile wireless services, especially in underserved rural and remote regions

and should encourage existing facilities-based telecommunications service providers in such areas to provide competitive wireless services. Government should encourage competitive entry on the basis of an MVNO reseller model.

210. Also relevant to achievement of Canada's broadband strategy is the matter of radically increasing costs to attach telecommunications network equipment to support structures. Investment in broadband infrastructure, especially in rural and remote areas, is being chilled by recent increases to attachment rates which, in Ontario, have recently doubled.

211. Network development is also frustrated by an inconsistent patchwork of regulations and rates both as between federally and provincially regulated support structure owners and among various provincial jurisdictions.

212. Canada's rural broadband strategy is aggressive. There simply are not enough dollars available to do the whole job quickly. That means every network dollar must be used effectively. Such effectiveness requires jurisdiction over telecommunications support structure attachments in a single, national, expert regulator.

213. Government should amend the *Telecommunications Act* to grant the CRTC exclusive jurisdiction in this area.

214. Finally, the legislation should account for a future in which content providers own the direct customer relationship with respect to the content they offer. In that future environment, content providers will control the selection, packaging and pricing of their content.

215. It follows that the content providers should bear obligations to make their content widely available to Canadians at affordable prices on a basis that does not tie consumers to specific ISPs. Content providers should also bear the obligation to fund Canadian content creation.

216. In the future environment, the concept of the regulated BDU will become an anachronism as Canadians will connect to ISPs for content and the ISPs, in turn, will enable the end users to connect to the content providers' own hosting platforms.

217. ISPs, in that role, are regulated as carriers under the *Telecommunications Act* and should remain regulated that way. ISPs that provide only network access – and navigation or recommendation engines as part of that access – should not be subject to regulation under the *Broadcasting Act* and should not be required, under that *Act*, to contribute to Canadian content creation.

218. CCSA thanks the Panel for the opportunity to provide these comments and will be pleased to assist the Panel with any further information the Panel may require.

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