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REGULATORY

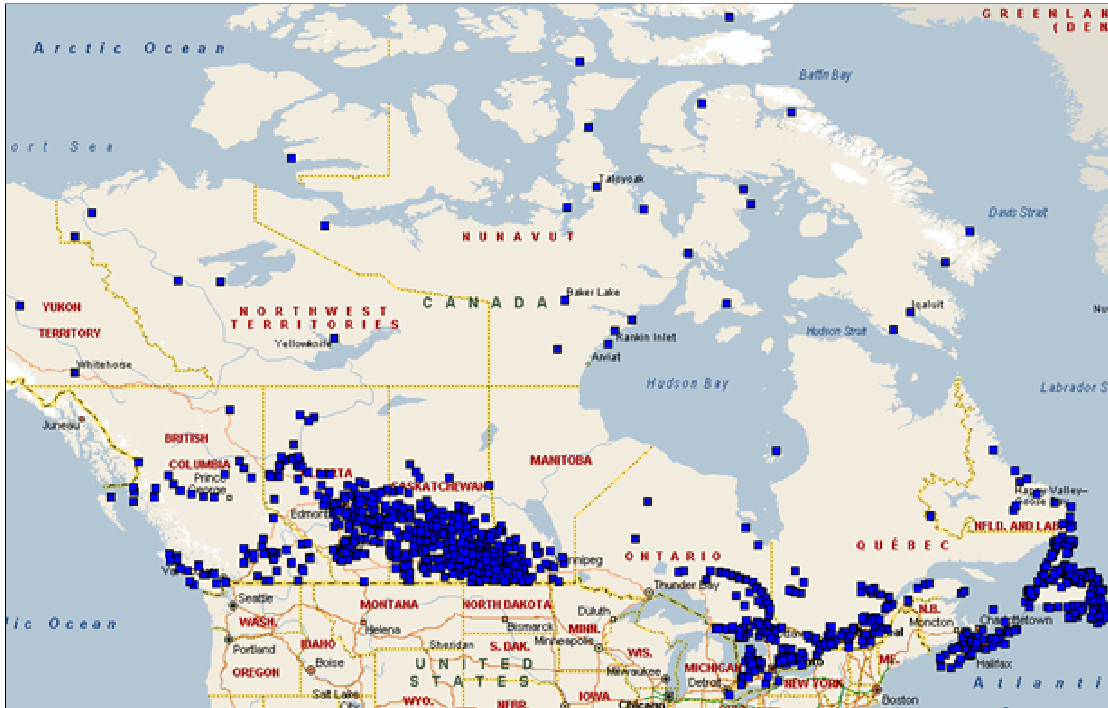
CANADIAN COMMUNICATION SYSTEMS ALLIANCE INC.

Submission for Consideration

in the

Standing Committee on Canadian Heritage's

Study on the Subject Matter of Bill C-10: An Act Respecting Broadcasting and to Amend Certain Acts in Relation Thereto and in Relation to Radiocommunication



CCSA Member Company Systems

January 28, 2021

1. As the representative of over 100 smaller, independent companies providing cable TV/IPTV services to mostly rural parts of Canada, the Canadian Communication Systems Alliance (CCSA) is pleased to provide these comments and recommendations regarding Bill C-10: *An Act respecting broadcasting and to amend certain Acts in relation thereto and in relation to radiocommunication* ("Bill C-10").

2. In its focus on modernizing the *Broadcasting Act* to address the growth in size and influence of foreign "digital giants" over the last thirty years, Bill C-10 fails to address the growth in size and influence of similar *domestic* giants over the same period, and the threat they now pose to the diversity and affordability of broadcasting services available to Canadians.

3. To counter this threat, the Bill needs to clearly affirm the CRTC's power to regulate those domestic giants in the public interest.

<u>The Need to Protect Canadian TV Consumers from the Threat Canada's Communications Giants Pose to Broadcasting Diversity and Affordability</u>

4. Discussions regarding Bill C-10 make much of the fact that the Internet was only in its infancy when the *Broadcasting Act* was last amended (in the early '90s) and that none of today's huge and hugely-influential foreign digital companies – e.g., Netflix, Google, Facebook, Amazon, Spotify – existed or were contemplated at the time.

5. While this is certainly true, it is also true that there were many more, diverse domestic players in the Canadian broadcasting system back then, and that today's huge, hugely-influential and vertically-integrated Canadian broadcasting giants – Bell, Rogers, Quebecor – neither existed as such nor were contemplated at the time.

6. Beginning with BCE Inc.'s acquisition of CTV Inc. in 2000, there has been a substantial consolidation of the Canadian 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.

7. At the public hearing to consider that transaction, many parties raised concerns with the potential for anti-competitive conduct by the vertically integrated broadcasting giant that would emerge from the transaction.

8. 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]

9. At that time, the CRTC's primary concern was with the new broadcasting giant'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.

10. Since that time, further consolidations have resulted in three domestic giants – Bell, Rogers and Quebecor – owning and operating the vast majority of Canadian television stations and discretionary programming services.[2]

11. Since that time, it has become evident that Canada's broadcasting giants have the incentive and the ability to act anti-competitively not only against other broadcasting undertakings but, also, against BDUs with which they compete, to the detriment of Canadian TV consumers.

12. In its 2011 Vertical Integration ("VI") 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.3

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[1] Decision CRTC 2000-747, "1406236 Ontario Inc. on behalf of CTV Inc. Across Canada – 200015497", Ottawa, December 7, 2000, https://crtc.gc.ca/eng/archive/2000/db2000-747.htm, at para. 21.
[2] Arguably, Shaw could also be included in this list given its ownership of Corus.
[3] Broadcasting Regulatory Policy CRTC 2011-601, "Regulatory framework relating to vertical integration", Ottawa, 21 September 2011, https://crtc.gc.ca/eng/archive/2011/2011-601.htm, at para. 43.

13. 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.[4]

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.[5]

14. As a result, the CRTC established certain safeguards to protect TV consumers and independent broadcasters from potential anti-competitive by the broadcasting giants.

15. One of those safeguards is a *Code of Conduct for Commercial Arrangements and Interactions* (the "*Wholesale Code*"), which governs the commercial relationships between the broadcasting giants, on the one hand, and independent programmers and BDUs, on the other.

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

17. The *Wholesale Code* was made "applicable to all licensed undertakings by means of an order issued pursuant to section 9(1)(h) of the *Broadcasting Act*" [6], effective January 22, 2016.

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[4] *Ibid*. at para. 19.
[5] *Ibid*. at para. 61.
[6] Broadcasting Regulatory Policy CRTC 2015-438, "The Wholesale Code", Ottawa, 24 September 2015, https://crtc.gc.ca/eng/archive/2015/2015-438.htm, 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, https://crtc.gc.ca/eng/archive/2015/2015-439.htm.

18. Bell Canada appealed the CRTC's decision to implement the *Wholesale Code* in the Federal Court of Appeal. Specifically, Bell Canada challenged the CRTC's authority to implement the *Wholesale Code* by means of an order under s. 9(1)(h) of the *Broadcasting Act*.[7]

19. In recognition of the court challenge to its authority to make the mandatory order, the CRTC, in its 2017 renewal of licences for the broadcasting giants, imposed "suspensive" Conditions of Licence that substantially mirror the provisions of the *Wholesale Code*.[8] For so long as the *Wholesale Code* remains in effect, those Conditions of Licence remain suspended.

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

21. As a result, the broadcasting giants 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 broadcasting giants will be up for renewal.

22. Meanwhile, the broadcasting giants continue to challenge the CRTC's authority to implement safeguards intended to protect consumers and independent broadcasters from the giants' anti-competitive behaviour.

23. Another of those consumer safeguards is known as "the Standstill Rule". That Rule precludes a programmer from holding Canadian TV viewers hostage by withholding its signal from a cable/IPTV distributor during a carriage contract dispute to pressure the distributor to pay higher rates for the signal. Withholding signals in that way and for that purpose is a common and much-criticized tactic used by programmers in the US, for example on the eve of a hugely popular TV event such as the Super Bowl.

24. Taking a lesson from its US counterparts, Quebecor used that prohibited tactic in April 2019, pulling its TVA Sports signal on the eve of the NHL playoffs[10]; as a result and to protect Canadian hockey fans, the CRTC had to issue an emergency ruling requiring Quebecor to

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[7] That subsection provides that "Subject too this Part, the Commission may, in furtherance of its objects,…require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission."

[8] Broadcasting Decision CRTC 2017-148, "Renewal of licences for the television services of large English-language ownership groups – Introductory decision", Ottawa, 15 May 2017, https://crtc.gc.ca/eng/archive/2017/2017-148.htm, 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, https://crtc.gc.ca/eng/archive/2017/2017-143.htm.

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

[10] See https://cartt.ca/quebecor-carries-out-its-threat-and-yanks-tva-sports-from-bell-in-defiance-of-crtc/.

reinstate its signal.[11] In December 2019, Quebecor appealed the CRTC's authority to establish and enforce that consumer safeguard[12] and the case is currently before the Federal Court of Appeal.

25. Notably, while Quebecor had pulled its TVA Sports signal during a dispute with fellow broadcasting giant, Bell, Bell is supporting Quebecor's court challenge.

26. The points of the above discussion are that:

    a. the CRTC has found, as fact, that the broadcasting giants have the incentive and the ability to act anti-competitively against independent players in the industry, to the detriment of Canadian TV consumers; and that

    b. the safeguards that the CRTC has put in place to respond to that finding of fact are subject to challenge and are at risk of disappearing.

27. Should the broadcasting giants prove successful in challenging the CRTC's authority to implement its consumer safeguards, they could become free to force distributors to package and price their TV services in ways which will undermine customer choice and affordability. For example, they could be free to force Canadians both to take their unpopular TV services to get access to their popular one, and to pay much more for all of such services.

28. CCSA's members are dependent on the broadcasting giants 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.

29. At the same time, CCSA's members compete directly with the broadcasting giants' satellite and terrestrial distribution undertakings for retail customers.

30. As such, CCSA's members, most of which are smaller broadcasting distributors serving rural markets, are especially vulnerable to the anti-competitive tactics of Canada's broadcasting giants.

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[11] Broadcasting Decision CRTC 2019-109 and Broadcasting Order CRTC 2019-110, "TVA Group Inc. – Non-compliance", Ottawa, 18 April 2019, https://crtc.gc.ca/eng/archive/2019/2019-109.htm.

[12] See https://cartt.ca/supreme-court-standard-of-review-decision-to-find-way-in-tva-sports-case-say-lawyers/.

31. This makes Canadians living in Canada's rural communities – who are customers of CCSA members – especially vulnerable to the anti-competitive tactics of Canada's broadcasting giants.

32. For these reasons, it critical that Bill C-10 expressly confirm that the CRTC has the power to protect Canadian TV consumers by establishing and enforcing safeguards to preclude anti-competitive behaviour by the broadcasting giants in their commercial dealings with independent broadcasters.

The Need to Maintain Existing Consumer Safeguards in the Online World

33. As the CRTC observed in its 2011 Vertical Integration decision, the broadcasting giants "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."[13]

34. In the context of what Bill C-10 would newly define as "online undertakings", this means that, for example, Rogers if left unchecked could require Canadians to subscribe to Rogers' internet service to get access to the online version of its Sportsnet service, Sportsnet Now. Similarly, Bell could require Canadians to subscribe to Bell's internet service to get access to its online services such as TSN Direct or Crave. In other words, if left unchecked, the broadcasting giants could preclude Canadians who subscribe to other internet providers from accessing the giants' popular online programming services, to the detriment of those consumers and to the competitive disadvantage of other internet providers.

35. Similarly, and to the same negative effect on many Canadians, the foreign digital giants if left unchecked could strike deals with certain Canadian internet providers – e.g., those owned by Canada's broadcasting giants – to make services like Netflix and Amazon Prime available only through those select providers.

36. Fortunately, the CRTC has put in place rules which prohibit both the Canadian broadcasting giants and the foreign digital giants from engaging in this kind of consumer-unfriendly, anti-competitive behaviour. The CRTC has done this in its *Digital Media Exemption Order* (the "*DMEO*")[14] which currently establishes the regulatory rules for online undertakings such as Sportsnet Now, TSN Direct, Crave, Netflix and Amazon Prime.

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[13] See par. 13, above.

[14] See "Appendix to Broadcasting Order CRTC 2012-409 - Exemption order for digital media broadcasting undertakings", Ottawa, 26 July 2012, https://crtc.gc.ca/eng/archive/2012/2012-409.htm.

37. Among other things, the *DMEO* prohibits such online undertakings from giving an undue preference to anyone or subjecting anyone to an undue disadvantage[15], and from offering programming "on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service."[16]

38. Also of importance, the *DMEO* subjects such online undertakings to the CRTC's Dispute Resolution rules and processes, including the Standstill Rule described above.[17]

39. Unfortunately, however, it appears that the introduction in Bill C-10 of a defined "online undertaking" would serve to the supersede the *DMEO* but without preserving or replicating these consumer safeguards or clearly confirming the CRTC's power to maintain or re-establish them in the new contemplated regime.

40. As a result, if left as is, Bill C-10, while seeking to serve Canadian TV consumers and the Canadian broadcasting system by modernizing the *Broadcasting Act*, could in fact serve to harm consumers and the system by freeing up Canada's broadcasting giants and foreign digital giants to embrace currently prohibited anti-competitive, consumer-unfriendly online tactics. This means that, if left as is, Bill C-10 could jeopardize the level of online programming choice and diversity Canadians currently enjoy.

41. For this reason, it is also critical that Bill C-10 expressly confirm that the CRTC has the power to protect Canadian consumers by preserving or replicating the consumer safeguards currently established for online undertakings in the *DMEO*.

Recommendations

42. To address the above-described concerns, CCSA recommends that Bill C-10 be amended as follows.

43. In making these recommendations, we note that we are aligned with other independent sectors of the Canadian broadcasting community in identifying the need to confirm the Commission's power to reign in potential anti-competitive behaviour by the Canadian broadcasting and foreign digital giants.

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[15] *Ibid*. at s. 3.
[16] *Ibid*. at s. 5.
[17] *Ibid*. at ss 9-11.

CRTC Power to Make Orders Respecting Commercial Arrangements Between Broadcasting Undertakings

44. Clause 7 of Bill C-10 would create a new subsection 9.1(1)(f) which would give the CRTC new power to make orders imposing conditions respecting "terms and conditions of service in contracts between distribution undertakings and their subscribers" – i.e., terms and conditions governing the retail relationship between distributors and their customers.

45. To ensure the CRTC has clear authority to establish or maintain consumer safeguards such as the current *Wholesale Code*, Bill C-10 also needs to confirm the CRTC's power to make orders imposing conditions respecting the wholesale relationship between broadcasting undertakings. To accomplish this, Clause 7 of Bill C-10 should include a further subsection under s. 9.1(1) respecting

> "… terms and conditions of service in contracts between broadcasting undertakings. "

Maintaining Existing Consumer Safeguards in the Online World

46. To ensure the CRTC has clear power to preserve or replicate the current Dispute Resolution rules and processes in the *DMEO*, Clause 8 of Bill C-10 should be amended to include new wording for s.10(1)(h) which would grant the CRTC power to make regulations

> "…for resolving, by way of mediation or otherwise, any disputes arising between broadcasting undertakings concerning the carriage of programming originated by the broadcasting undertakings."

47. This language would replace the narrow references to "programming undertakings" and "distribution undertakings" in the current s. 10(1)(h) with the more encompassing "broadcasting undertakings" (i.e., it would now include "online undertakings").

48. CCSA is currently exploring language to ensure the CRTC also has the clear power to preserve or replicate the current rules in the *DMEO* which preclude online undertakings from giving undue preference to their own platform or someone else's through an exclusive arrangement for content which the online undertaking controls. We will advise the Committee of our recommended language once available. Addressing this important issue, however, should not be dependent on CCSA providing such language: we ask that, regardless, the Committee call on the Government to amend Bill C-10 to ensure this important consumer safeguard can and will be maintained.

49. CCSA thanks the Committee for the opportunity to provide this submission.

Sincerely,

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CEO