July 26, 2023

Filed Electronically

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Doucet:

Re: Broadcasting Notice of Consultation CRTC 2023-138 - Call for comments – The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content (the "Contribution Consultation")

1. Motion Picture Association-Canada ("**MPA-Canada**") is pleased to submit these reply comments on behalf of the Companies and their Services[1] in response to the submissions filed with respect to the Contribution Consultation, initiated by Broadcasting Notice of Consultation CRTC 2023-138 ("**BNC 2023-138**"). In addition, certain of the Companies may file individual final reply comments.

INTRODUCTION AND SUMMARY

2. As we indicated in our initial submission, MPA-Canada strongly agrees with the Commission's proposal to adopt a flexible, outcomes-based approach that permits broadcasting undertakings to design their contributions in a way that best reflects their business models and provides them with increased flexibility over where and how they contribute to the Canadian broadcasting system.[2]

3. A broad spectrum of intervenors support that proposal as being appropriate for a modernized contribution framework and a way to ensure that the many broadcasting policy objectives of the revised *Broadcasting Act* (the "**Act**") are met, by allowing various participants to focus on their areas of core competence.

[1] The Services (and their Canadian operating Companies) are currently comprised of: Crunchyroll (Ellation, LLC); Discovery+ (Discovery Digital Ventures, LLC); Disney+ (Buena Vista International, Inc.); Hayu (Universal Pictures Subscription Television Limited); Netflix (Netflix Services Canada ULC); Paramount+ (Paramount Streaming Canada, a division of Paramount Entertainment Canada ULC, a British Columbia unlimited liability company); Pluto TV (Pluto Inc.); and SonyLIV (Sony Pictures Networks India Private Limited).

[2] As proposed by the Commission in BNC 2023-138, at para. 62.

Regulatory gamesmanship is counterproductive

4. However, certain parties have taken the position that while a flexible, outcomes-based approach is highly desirable, it should be applied inequitably. They argue that *only* traditional Canadian broadcasters and Canadian online undertakings should benefit from this approach, while foreign online undertakings should be *forced* to pay all or the lion's share of their contributions into a fund(s) they cannot access.

5. Traditional broadcasters, in particular, argue that their existing contribution framework is stifling their creativity and they are being forced to compete with "one hand tied behind their backs".[3] At the same time, they argue that the Commission should impose a contribution framework on online undertakings that would eliminate all prospects of creativity and tie both hands behind their backs. They argue that "highly prescriptive regulatory interventions are problematic in an open marketplace",[4] "it will be impossible to apply prescriptive regulatory tools …in an open, Internet-based environment"[5] and "[o]utdated regulatory tools that ignore market realities and rely on prescriptive, anachronistic requirements and fees must be eliminated".[6] At the same time, they advocate for an entirely prescriptive contribution regime to be imposed on foreign online undertakings.

6. This kind of regulatory gamesmanship is counterproductive and should be ignored by the Commission.

The only workable path forward is to adopt a flexible, outcomes-based approach for all

7. As Corus notes, "[g]iven the 60 broadcasting policy objectives in the Act, providing broadcasting undertakings with greater discretion to decide how they will achieve some, but not necessarily all, of these priorities is *the only workable path forward*".[7] This is true of Canadian *and* non-Canadian broadcasting undertakings.

8. We agree with Rogers that the regulatory framework should "enable and empower *all players* to contribute to the achievement of the broadcasting policy objectives in a manner that aligns with their business models and priorities".[8] By allowing each element of the Canadian broadcasting system to contribute in a manner that builds on its strengths and is consistent with its business model and its nature of service, the Commission will be able to build a modernized broadcasting system for the future.

[3] BCE submission to BNC 2023-138, at para. 23.

[4] BCE submission to BNC 2023-138, at A34.

[5] Corus submission to BNC 2023-138, at para. 32.

[6] Rogers submission to BNC 2023-138, at para. 9(d) [emphasis added].

[7] Corus submission to BNC 2023-138, at para. 53 [emphasis added].

[8] Rogers submission to BNC 2023-138, at para. 9(d) [emphasis added].

Prescriptive models will not work in a competitive, open environment

9. We also agree with the Commission that this is an opportune time to innovate and explore new transformative models. A regulatory model that was designed for traditional broadcasting undertakings operating in a closed and protectionist regulatory environment is inconsistent with online undertakings operating in a competitive, open digital environment.

10. Existing requirements on Canadian broadcasters are overly prescriptive and should not simply be transferred to foreign online undertakings. Doing so will not correct the long-standing, systemic issues that have plagued the Canadian broadcasting system and predate the entry of foreign online undertakings into Canada. Foreign streaming services should not be "penalized" for operating in accordance with the regulatory framework established by the Commission.

Existing contributions should be recognized and incentivized

11. Far from "free riding" (as alleged by BCE), foreign online undertakings have, for years, made contributions that are significant and far-reaching. They benefit various participants within the Canadian broadcasting system, including vertically integrated ("**VI**") companies and other Internet service providers ("**ISPs**") and telecommunications service providers ("**TSPs**"), whose Internet and telecommunications revenues have risen due to the demand for online content delivered to viewers using their networks.

12. A modernized contribution framework should incentivize global producers and foreign online undertakings to continue to bring large-scale productions to Canada. It has always been the Government's intention that a portion of the existing production investments that foreign online undertakings are already making in Canada would be shifted to expenditures on "Canadian programs", as redefined by the Commission.

Procedural fairness requires that foundational issues be determined first

13. It is premature to consider the intricacies of the contribution framework when core foundational issues, such as the revised definition of a "Canadian program", the funds eligible for contribution and their access rules, and the contribution framework to be applied to traditional broadcasters are unknown. These are fundamental issues that can materially prejudice any position taken by online undertakings in this proceeding. In addition, the current process gives rise to significant issues of procedural and substantive fairness:

    (a) The issues in Steps 1 and 2 of this proceeding are interrelated and should be determined jointly rather than sequentially.

    (b) Frustration over the ongoing perpetuation of an outdated contribution regime, the false narratives of foreign streaming services as free riders, and the misperception that foreign online undertakings have unlimited resources to devote to Canada have resulted in traditional broadcasting undertakings arguing that Step 1 contributions should be borne entirely by foreign and unaffiliated online undertakings and for the benefit of traditional broadcasters.

(c) It has also resulted in numerous parties making self-serving proposals that are entirely inconsistent with the Commission's objective that "a new and modernized framework should *recognize the new perspectives and opportunities that online undertakings bring* to the broadcasting system, and *ensure flexibility and adaptability* in the future".[9]

(d) In particular, we strongly object to the proposal that all of Steps 2 and 3 of this process should be bypassed for foreign online undertakings, their entire contributions should be established in Step 1 and 100% should be directed to funds they cannot access. It completely violates the principle of procedural fairness and we ask that the Commission reject it in its entirety.

Proportionality, fairness and flexibility are essential

14. The Commission should reject proposals that are inconsistent with its objective for a flexible, outcomes-based approach that is applied in an equitable manner and in accordance with the principles of proportionality, fairness and flexibility – as required by the Act, the Draft Policy Direction[10] and the cornerstone principle of procedural fairness.

15. In keeping with the Commission's objectives to "*encourage innovation*" and to provide undertakings with "*greater control over how they will meet their regulatory obligations*", [11] all broadcasting undertakings (including foreign online undertakings) should be permitted to choose between paying into a fund(s), making Canadian programming expenditures ("**CPEs**") and making intangible contributions.

Contribution to funds should be an option, not a requirement

16. We reiterate our strong objection to the proposal of an initial base contribution to a fund(s), for the numerous reasons set out in our initial submission.[12] Payment into a fund should be an option, not a requirement. It has always been the Government's intention that the contributions of streaming services that are in the business of producing and commissioning content would take the form of an expenditure requirement or an investment obligation, which would allow them to harness their expertise in making commissioning decisions.

17. If the Commission adopts a requirement to contribute to funds (via an initial base contribution or otherwise): (a) it should apply equitably to all Canadian and foreign online undertakings (excluding those exempted from contribution obligations); (b) there should be equitable access to funds by foreign online undertakings; and (c) the list of eligible funds should not be limited to existing funds but should be expanded to include support for equity-seeking groups.

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[9] BNC 2023-138, at para. 15 [emphasis added].

[10] *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, dated June 2, 2023 (the "**Draft Policy Direction**").

[11] BNC 2023-138, at para. 58 [emphasis added].

[12] See MPA-Canada initial submission to BNC 2023-138, at paras. 22 to 34.

The Act cannot be rewritten -- Canadians are required to contribute more that non-Canadians

18. The Commission should reject proposals that foreign online undertakings should be required to make the same or larger contributions than domestic broadcasters. It would be a perverse, inequitable, disproportionate and unfair result if international online undertakings were required to contribute more to the Canadian broadcasting system than Canadian broadcasters who operate almost entirely within the Canadian market. It would also be entirely inconsistent with subsections 3(1)(f) and (f.1) of the Act, which *require* Canadian broadcasting undertakings to make *higher* contributions than foreign online undertakings.

19. Contrary to arguments made by the Directors Guild of Canada ("**DGC**") and the Writers Guild of Canada ("**WGC**"), it would be a complete violation of the principles of administrative law if the Commission, as an "independent public authority",[13] were to determine the level of contributions it extracts from online undertakings on the basis of meeting a funding number speculated by elected officials, with no evidentiary backing. We trust that the Commission will approach these proceedings with "*a blank sheet of paper before it*" as it has indicated,[14] and not one imprinted with a predetermined total.

Over-regulation has unintended consequences

20. The Commission should reject calls to adopt similar contribution levels to those employed in France, given: (a) the differences between the EU and Canadian markets; (b) the fact that France is an outlier in the EU; (c) new evidence that countries like France and Italy that have adopted high investment requirements for foreign VOD services are currently experiencing negative, unintended, inflationary impacts on their local production sectors; and (d) the fact that just this month, Italy's regulator has recommended reducing its high investment quotas, given that Spain's flexible 5% investment obligation has achieved excellent comparative results. The EU experience demonstrates that any contribution requirements should be properly impact-assessed with a clearly defined aim and be in line with the principles of proportionality, fairness and flexibility.

Online undertakings are not BDUs or programming undertakings

21. In addition, we ask that the Commission reject proposals by the Canada Media Fund ("**CMF**") and TELUS that online undertakings offered on a direct-to-consumer ("**DTC**") basis should be subject to the contribution obligations of both programming undertakings *and* broadcasting distribution undertakings ("**BDUs**"), as well as the CAB's proposal that online undertakings should contribute only to funds because like BDUs, they enter into direct relationships with consumers. Such proposals are inconsistent with the Act, which expressly carves out online undertakings from the definitions of "distribution undertaking" and "programming undertaking", and applies an entirely different and lower contribution

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[13] As set out in s. 3(2) of the Act.

[14] Speech by Vicky Eatrides, CRTC Chairperson and Chief Executive Officer, to the Banff World Media Festival: "Going Fast and Far Together: Our Journey to Create the Broadcasting System of the Future", June 12, 2023 ("**Banff World Media Festival Speech**") [emphasis added].

objective to foreign online undertakings in subsection 3(1)(f.1) than Canadian broadcasting undertakings in subsection 3(1)(f).

Terms of trade would hinder the success of Canadian programs

22. The Commission should also reject the Canadian Media Producer Association's ("**CMPA**") terms of trade proposal. All of the reasons why the Commission previously disbanded terms of trade apply equally to the online environment. The EU regimes cited by the CMPA are not comparable and broadcasters and online services enjoy contractual freedom in the vast majority of EU countries. Contrary to the CMPA's allegation about "grabs of IP rights", global studios and streaming services play a crucial role in financing the development and production -- and facilitating the distribution, promotion and exhibition -- of Canadian-owned content. Creating and distributing audiovisual works is high risk and flexibility -- to choose from different types of deal models and terms based on the nature and scale of the project -- is necessary to ensure the vitality of the audiovisual sector and the success of Canadian programs.

The Copyright Act cannot be ignored

23. Lastly, the Commission should reject proposals that it should force foreign online undertakings to provide their services and/or copyrighted works to Canadian BDUs or broadcasters. There is no justifiable public policy reason for such self-serving proposals, since the content of DTC streaming services is available over the public Internet to all Canadians. Furthermore, such proposals are in violation of the *Copyright Act*, since as the Supreme Court of Canada has previously held, the Commission must have express statutory power in order to constrain or diminish a copyright owner's "statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner's consent".[15]

TRANSFORMATION, NOT TRANSFERENCE

24. We were gratified to hear Chairperson Eatrides say that "we can't take regulatory frameworks that have been in place for years and simply apply them to our new reality". Instead, *we have to start with "a blank sheet of paper before us"* and "add depth and breadth to foundational conversations", in order "to innovate and to explore new models" and explore "transformative new ideas".[16]

25. Nevertheless, certain intervenors are determined to simply transfer the existing obligations of traditional linear broadcasters onto foreign online undertakings. They are looking for opportunities for transference, rather than transformation. However, a regulatory model that was designed for traditional broadcasting undertakings operating in a closed and protectionist regulatory environment is inconsistent with online undertakings operating in a competitive,

[15] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 (CanLII), [2012] 3 SCR 489, at paras. 36 and 39.

[16] Chairperson Eatrides, Banff World Media Festival Speech [emphasis added].

open digital environment. As Chairperson Eatrides succinctly observed, "square pegs don't fit in round holes".[17]

26. For instance, BCE claims that the Canadian broadcasting system is "in crisis"[18] due to the "tangled web of regulation"[19] it has had to withstand, while foreign online undertakings have been "free riding"[20] and have "contributed precious little to the Canadian system".[21] Based on this specious logic, it argues that until the existing obligations for traditional broadcasters are reformed, "only online undertakings not affiliated with a broadcast licensee" (i.e., essentially foreign online undertakings) should be required to make contributions, which would be used to (among other things) subsidize Canadian programming shown by traditional broadcasters.[22]

27. The entire premise of an argument such as this is false. While the challenges faced by traditional broadcasters are currently being blamed on the entry of foreign online undertakings into Canada, many of these issues are systemic and predate the digital universe. Canadian programming has always been uneconomical to produce and has always been subsidized by American programming. For decades, Canadian broadcasters have forecasted that this model is unsustainable in the long-term. Indeed, the potential "North Americanization" of program rights was a key topic of discussion during the Commission's 1998 Canadian Television Policy Review proceeding, more than ten years before Netflix was launched in Canada. As a member of the Canadian Association of Broadcasters (the "**CAB**") panel noted at that time, it was incumbent on Canadian broadcasters to stop relying on foreign programming to make money and "to make Canadian programming pay for itself", rather than regarding it as "a cost of doing business":

> To put it bluntly -- and I don't think any of my colleagues on the broadcasting side could say this -- *the facts of the situation are that from a financial standpoint, Canadian programming has been a cost of doing business* and I think that it's in everyone's best interest to turn it into a business, into a business that makes money, not just a costing business, just keep throwing money at it and then you can *make your money on foreign stuff* and everyone is happy. *That doesn't work any more and coming into the new reality, which is a very, very competitive environment with tons of signals from all over the world coming into Canada, if we are ever going to make it work, we have to make Canadian programming pay for itself.*[23] [emphasis added]

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[17] *Ibid.*

[18] BCE submission to BNC 2023-138, at para. 17.

[19] *Ibid.*, at para. 21.

[20] *Ibid.*, at para. 20.

[21] *Ibid.*, at para. 21.

[22] *Ibid.*, at para. 14.

[23] CRTC Transcript of Proceedings, Canadian Television Policy Review, 23 September 1998, at para. 837.

28. The fact that Canadian broadcasters failed to take heed of their own predictions and recommended actions from 25 years ago cannot be blamed on foreign online undertakings. Nor can the fact that the "ecosystem for the production and presentation of Canadian programming …has never been especially robust in Canada, having been subject in the past to missed opportunities, unrealized policy objectives, and simply bad timing", as described by the WGC.[24]

29. As we noted in our initial submission, existing requirements on Canadian broadcasters are overly prescriptive and should not be transposed onto foreign online undertakings. Doing so will not correct the long-standing, systemic issues that traditional broadcasters have been grappling with since the inception of the Canadian broadcasting system. Instead, as recognized by the Commission, this is an opportune time to innovate and to explore new models, which can be adapted to suit the various business models and programming strategies of different players. MPA-Canada supports an objective for a flexible, outcomes-based model that provides operational and financial flexibility for *all* participants in the Canadian broadcasting system – both linear and online.

CONTRIBUTIONS MADE BY FOREIGN ONLINE UNDERTAKINGS

30. In proposing that online undertakings be required to make an initial base contribution, the Commission noted that it was considering this option due to the impact that online undertakings are having on the Canadian broadcasting system, and in recognition of the fact that traditional broadcasters currently make contributions to that system.[25] This suggests that online undertakings are responsible for the issues facing the broadcasting system. However, as described above, many of these issues have plagued the Canadian broadcasting system since its inception. It also suggests that online undertakings do not currently make any contributions to the Canadian broadcasting system. However, that is an erroneous assumption. In addition to providing a wide diversity of programming choices for Canadian viewers, as described below, foreign online undertakings have made significant contributions to the Canadian broadcasting system and the larger creative ecosystem over the years.

31. We agree with Amazon that "[u]nderstanding the extent of the contributions to Canada's creative industries already made by online undertakings, as well as developing concepts and categories for such contributions, are both foundational precursors to achieving a flexible, adaptable, and equitable approach that will ensure the continued success of online undertakings in the Canadian broadcasting system".[26]

32. In addition to the falsehood that online undertakings contribute nothing to the system, certain intervenors have adopted a narrative that insinuates that foreign online undertakings have done something underhanded by providing their services to Canadians. Foreign online undertakings have operated within the Canadian broadcasting system pursuant to the Digital Media Exemption Order (the "**DMEO**"), which the Commission in its wisdom first

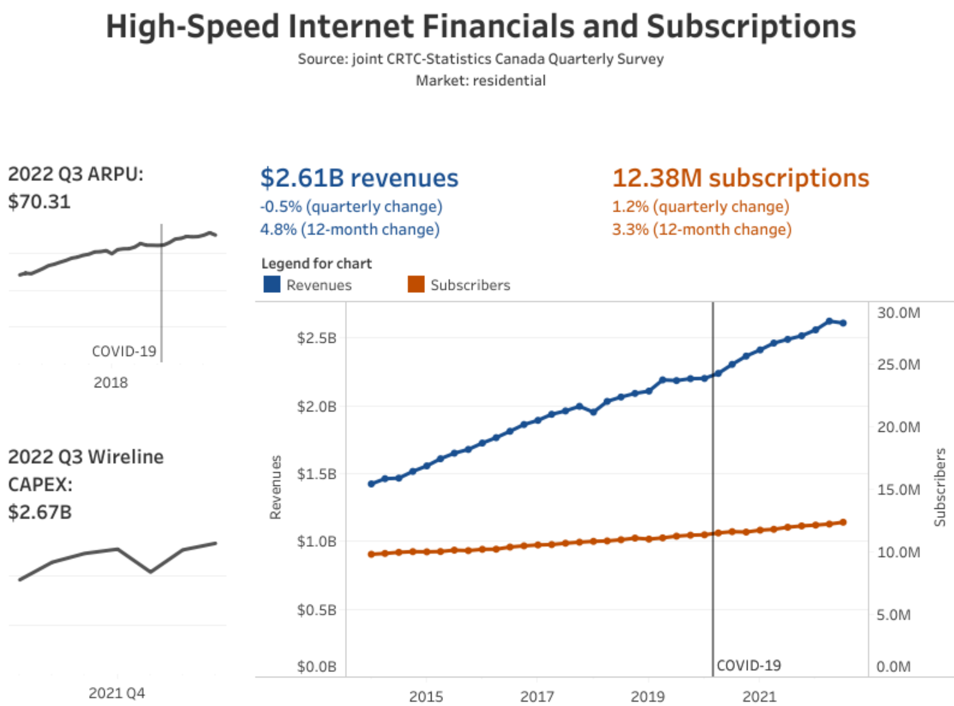
[24] WGC submission to BNC 2023-138, at para. 2.

[25] BNC 2023-138, at para. 26.

[26] Amazon submission to BNC 2023-138, at para. 15.

established in 1999 and reviewed and reinstated over the years.[27] Foreign streaming services should not be now "penalized" for operating in accordance with the regulatory framework laid out by the Commission. Their entry into the Canadian broadcasting system and the diversity of content they provide have benefitted Canadian viewers, creators and underserved communities. It has also benefitted Canadian VI companies and other ISPs and TSPs, whose Internet and telecommunications revenues have risen due to the demand for online content delivered to viewers using their networks.

33. According to the Commission, revenue growth for high-speed Internet increased by 4.8% over 12 months to $2.61 billion in Q3 2022, "*as many Canadians rely on it more for* work and *entertainment at home* and have increased the speed of their service packages". In addition, high-speed Internet subscriptions have increased by 3.3% over 12 months to 12.38 million subscriptions and the "demand for wireline internet remains steady as exhibited by a *steady increase in subscribers since 2014*".[28]

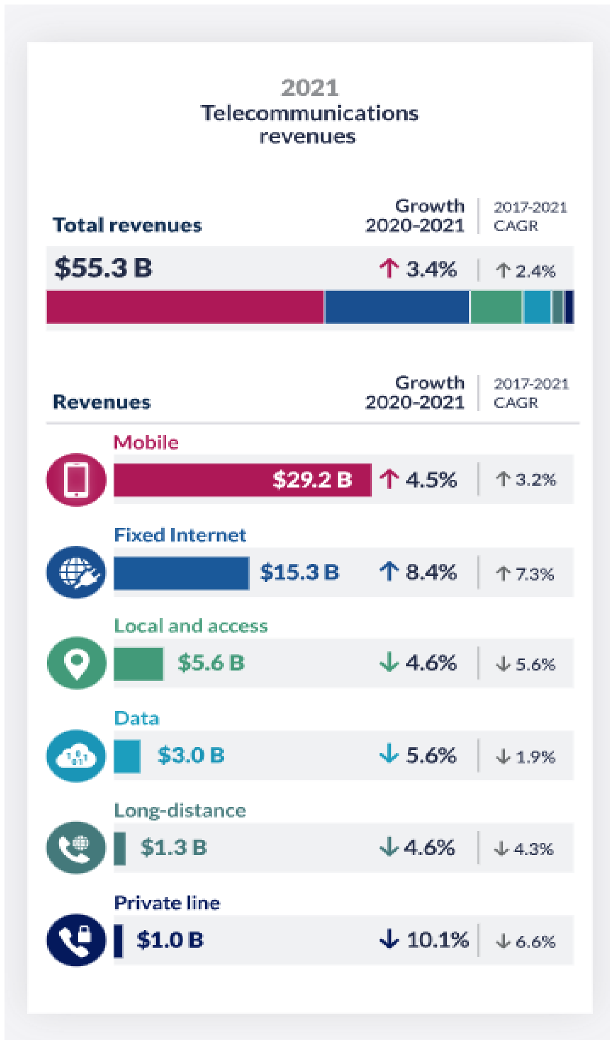


Source: CRTC, Current trends - High-speed broadband

[27] See Public Notice CRTC 1999-197, Broadcasting Order CRTC 2009-660 and Broadcasting Order CRTC 2012-409.

[28] CRTC, Current trends - High-speed broadband [emphasis added].

34. Likewise, the Commission reports that "Canadian telecommunications revenues totalled $55.3 billion in 2021 [up 3.4% from 2020, with a CAGR of +2.4% from 2017-2021], as *Canadians used ever-increasing amounts of data* through both fixed Internet and mobile services".[29]



Source: CRTC, Annual highlights of the telecommunications sector 2021

35. Therefore, claims of hardship by VI companies (and other ISPs and TSPs) due to the presence of foreign online undertakings must be taken with a grain of salt – as, clearly, their Internet and telecommunications divisions are benefitting from the increased demand for such services, which has been partially fuelled by online undertakings.

[29] CRTC, Annual highlights of the telecommunications sector 2021 [emphasis added].

36. Far from "free riding" or making "precious little" contributions (as alleged by BCE), foreign online undertakings have made immense contributions to Canada's film and television ecosystem. As detailed in paragraphs 50 to 62 of our initial submission and briefly summarized below, these contributions are significant and far-reaching, benefitting various players within the Canadian broadcasting system:

    (a) Global producers have been the driving force behind the transformation of Canada's world-class production industry over the last decade, accounting for 85% of total growth in film, television and streaming production.

    (b) The popularity of online services has led to foreign investment in production in Canada of over $7.5 billion annually.

    (c) Global studios and streaming services account for more than half ($6.71 billion) of total production volume in Canada, with the industry supporting more than 240,000 Canadian creative workers.

    (d) Through various financing models, global studios and streaming services are expanding the availability of Canadian-owned content, generating new audiences, revenues and discoverability for Canadian creators and producers of that content.

    (e) In 2021-22, global studios and streaming services provided 13% of total financing for independent Canadian producers; outspending the CBC and other public broadcasters, private broadcasters and the CMF.

    (f) High budget, large-scale productions also make a significant impact on Canadian local businesses with spending across the country. In 2021, the MPA Studios alone spent more than $3.4 billion on local production-related goods and services for their made-in-Canada productions. This spending supported more than 49,922 local businesses across Canada.

37. We also refer the Commission to the extensive contributions described in the individual submissions filed in this proceeding by Disney, Netflix and Paramount, and other online undertakings such as Amazon and Apple.

38. Indeed, in its submission, BCE cites from the Profile 2022 Report published by the CMPA, which "noted that between April 2021 and March 2022, media production in Canada generated $11.69 billion in production volume and $13.73 billion in GDP, with 240,760 jobs across Canada".[30] Further, BCE includes the following quote from the CMPA's Profile 2022 Report, which clearly states that the biggest contributions to Canada's film and television production industry have come from foreign investments:

> Every segment of Canada's film and television production industry contributed to this growth, although *the biggest contributions came from foreign location and service (FLS) production, increasing*

[30] BCE submission to BNC 2023-138, at para. 26.

> *27.3% to $6.71 billion*, and Canadian television production, increasing 38.9% to $3.51 billion.[31] [emphasis added]

THE CONTRIBUTION FRAMEWORK SHOULD INCENTIVIZE LARGE-SCALE PRODUCTIONS

39. While the contributions described above have been voluntary and market-driven, we recognize that certain foreign online undertakings may be required to make formalized contributions to the Canadian broadcasting system pursuant to a contribution framework established by the Commission. However, we agree with Amazon that "[i]n designing the contribution regime of the future, the Commission should take care not to artificially distort or disincentivize continued investments in the growth of vibrant Canadian creative industries".[32] Instead, as we noted in our initial submission, a modernized contribution framework should incentivize global producers and foreign online undertakings to continue to bring large-scale productions to Canada. Moreover, the support that foreign online undertakings provide to the Canadian broadcasting system and Canada's creative economy must be reflected in a revised, modern definition of a "Canadian program".

40. This is in keeping with the Government's intention with respect to the *Online Streaming Act* (Bill C-11). As explained by the Associate Assistant Deputy Minister of Cultural Affairs at Canadian Heritage, Thomas Owen Ripley, in his appearance before the Standing Senate Committee on Transport and Communications (the "**TRCM**") as part of its study of Bill C-11, the Government's intention is that a portion of the existing production investments that foreign online undertakings are already making in Canada would be shifted to expenditures on Canadian programs, as redefined by the Commission:

> **Senator Klyne:** … It has been related that this act will bear $900 million in incrementally new revenue, and I doubt that will come off willingly from shareholders of the online broadcasters' streaming services and platforms. In that scenario, the revenue is likely to come on the backs of Canadian subscribers, or are there some provisions of policy and regulations that say otherwise?
>
> **Mr. Ripley:** It relates a little to your previous question to the minister. *The bulk of the modelling behind that had those what we will call "expenditure requirements," so that's an expectation that streaming services invest a certain amount of money on an annual basis in the production of Canadian programs. It's not a "pay all that money into a fund,"* for example, which I agree with you would have a direct flow-through effect to consumers. But *this starts from a premise that many of these streaming services already have a deep production footprint in Canada. They are producing a variety of programs here, and the bill is fundamentally about saying to them in that production footprint moving forward, we expect a portion of*

[31] *Ibid.*, citing the CMPA's Profile 2022 Report, at p. 5.

[32] Amazon submission to BNC 2023-138, at para. 12.

> *that to be Canadian programs, where you use Canadian creative talent and tell Canadian stories. That relates to the discussion we were having about the definition of what Canadian program will be moving forward.*
>
> **Senator Klyne:** That will be an incremental investment and expense on their part to play in the Canadian sandbox.
>
> **Mr. Ripley:** *No, it will not be all incremental expense. Many of these streaming services are already investing billions of dollars in production. I always characterize it as being about a spectrum of that and challenging them to move a portion of that investment into what is Canadian program once we work through what that new definition will be.* It's about saying, "It's great that you do so much business here." Yes, there will continue to be foreign location shooting that happens in Canada, but *for big streaming services with a big production footprint in Canada it will also be about challenging them to invest a percentage of their production budget in Canadian programs. That $900 million is not on top of what they are already doing. It's about shifting the ambition around their production here in Canada.*
>
> **Senator Klyne:** Essentially recognizing it.
>
> **Senator Quinn:** A very brief follow-up to Senator Klyne: As revenues accrue, will there be any offsets from departmental budgets? As new revenues accrue, the funds that you may be accruing from streamers, will there be offsets in other areas of the department to balance that?
>
> **Mr. Ripley:** With respect to expenditure requirements, that money is never transferred. *An expenditure requirement stays within the company. It's essentially an investment obligation on their part to invest that in Canadian production, but they still retain control in the decision making over how they will do that.*[33] [emphasis added]

41. Thus, the Government clearly intended that the revised Act would result in foreign online undertakings "that already have a deep production footprint in Canada" shifting some of their foreign location and service spending in Canada to expenditures on "Canadian programs", as redefined by the Commission.

42. It is therefore critical that the Commission be afforded the opportunity to understand the current market conditions for content spending and the broader streaming market, in order to assess the appropriate contribution framework for foreign undertakings to fulfill the priority

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[33] TRCM, Bill C-11 Evidence, November 22, 2022.

set for the creation, production, and distribution of Canadian programs. Entertainment industry and financial experts uniformly point to 2023 as the end of "peak tv" and a "tipping point" in the globally competitive cost-sensitive content market. Broader economic conditions across the globe that have put pressure on household spending and advertising investment have required studios to implement cost-saving measures and reduce content expenditure on film and series around the world.[34]

43. We note that while many members of the CMPA have benefitted from the contributions that have been made over the years by foreign streaming services and studios, the CMPA now argues that the Commission's new contribution framework must distinguish between the domestic production industry and foreign service production based on a theory of cultural and competition policy versus industrial policy.[35] We believe this theory is without merit. If a production is advancing the broadcasting policy objectives of the Act -- with respect to use of Canadian creative and human resources; the telling of Canadian stories; displaying Canadian talent; encouraging the development and export of Canadian programs globally; serving the needs and interests of all Canadians; reflecting and being responsive to the preferences and interests of various audiences (among others) -- we fail to see how that production is not advancing cultural policy. As set out in the individual submissions filed by Disney, Netflix and Paramount, oftentimes so-called "service productions" tell more genuinely Canadian stories that showcase Canadian storytellers, talent, culture and geography than domestic "Canadian content".

44. As the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada ("**IATSE**") notes in its submission, "the CRTC's new contribution framework must be guided by a modernized definition of "Canadian program" and a flexible interpretation of the Canadian broadcasting policy objectives related to the use of Canadian human resources by foreign undertakings. That will help incentivize foreign undertakings to collaborate with Canadian talent instead of inadvertently discouraging them from investing in Canada".[36]

PUTTING THE CART BEFORE THE HORSE

45. As we indicated in our initial submission, it is premature to consider the intricacies of the contribution framework when core foundational issues, such as the revised definition of a "Canadian program", the funds eligible for contribution and their access rules, and the contribution framework to be applied to traditional broadcasters are unknown. These are fundamental issues that can materially prejudice any position taken by online undertakings in this proceeding.

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[34] See for example, Ampere Analysis Press Release, "Growth in content investment will slump in 2023", 3 January 2023 and Variety.com, "Peak TV Has Peaked: From Exhausted Talent to Massive Losses, the Writers Strike Magnifies an Industry in Freefall".

[35] CMPA submission to BNC 2023-138, at para. 17.

[36] IATSE submission to BNC 2023-138, at p. 2.

46. Numerous parties have voiced similar concerns about the process adopted by the Commission and the questions it raises about procedural fairness. For instance, Rogers indicates that "accurate data regarding Canadian market size and existing production activity, and the Commission's determinations regarding key parameters and objectives of the contribution framework are critical inputs for the purpose of ensuring that Draft Policy Direction's proportionality requirements are met".[37]

47. We also agree with the process concerns voiced by Amazon in its submission and its recommendation that given that the issues in Steps 1 and 2 are interrelated, they should be determined jointly rather than sequentially, as currently proposed by the Commission.[38] As Google notes, "[t]he order contemplated by the Step 1 process subordinates the critical issue of the need for a revised definition of a "Canadian program", leaving the issue of the initial base contribution to be implemented in a "regulatory vacuum".[39]

48. Furthermore, the fact that the Commission will not be considering the existing contributions of traditional broadcasting undertakings until Step 2 of this proceeding has resulted in traditional broadcasting undertakings arguing that Step 1 contributions should be borne entirely by foreign and unaffiliated online undertakings, for the benefit of traditional broadcasting undertakings. This gives rise to significant issues of procedural and substantive fairness. As the Commission is aware, the Supreme Court of Canada has held that "[p]rocedural fairness is a cornerstone of modern Canadian administrative law" and "[p]ublic decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual".[40]

49. We agree with AMC that it is "essential that online undertakings understand the full package of requirements to which they will now be subject as part of Commission's modernized contribution framework".[41] As AMC notes, 'imposing a mandatory base financial contribution without clarity as to how an online undertaking's current or future flexible and intangible contributions may be factored in creates significant regulatory uncertainty and ultimately calls into question whether the online undertaking's current presence in the Canadian market is sustainable'.[42]

EVERYTHING, INCLUDING THE KITCHEN SINK

50. Driven by frustration over the ongoing perpetuation of an outdated contribution regime, the false narratives of foreign streaming services as free riders, and the misperception that foreign online undertakings have unlimited resources to devote to Canada, many parties are using this process to throw everything (including the kitchen sink) on the shoulders of foreign online undertakings. The Commission should reject proposals that are inconsistent with its

[37] Rogers submission to BNC 2023-138, at para. 73.

[38] Amazon submission to BNC 2023-138, at paras. 57-67.

[39] Google submission to BNC 2023-138, at para. 12C.

[40] *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, at para 75.

[41] AMC submission to BNC 2023-138, at para. 27.

[42] *Ibid.*

objective for a flexible, outcomes-based approach that is applied in an equitable manner (as required by the Act) and in accordance with the principles of proportionality (as required by the Draft Policy Direction), fairness (as required by administrative law), and flexibility (as required by both the Act and the Draft Policy Direction).

51. Given the short timeframe allotted for reply, we have not had the opportunity to consider all of the numerous (and oftentimes, conflicting) proposals being made in the over 360 submissions filed in this proceeding. However, taken together, some of the more notable proposals would require as follows:

    (a) In Step 1, only foreign online undertakings (and unaffiliated Canadian online undertakings) would have to contribute anywhere from 2%, 3%, 5%, 10% or 20% of their annual revenues as an initial base contribution to specified existing (and in some cases, new) funds that are accessible only by Canadian broadcasters and independent producers (either indefinitely or during Step 1, depending on the proposal). This means that foreign online undertakings would be forced to subsidize the programming shown on competing services.

    (b) Alternatively, under some proposals, all of Steps 2 and 3 of this process would be bypassed for foreign online undertakings, their entire contributions would be established in Step 1 and 100% would be directed to funds they cannot access. This determination would be made before the Commission has established the foundations of its modernized regulatory framework and with no regard to procedural fairness.

    (c) DTC online undertakings would be regulated as both a programming undertaking and a BDU and be required to make contributions applicable to both. This is despite the fact that this argument is wholly inconsistent with the Act (as described below).

    (d) Along with the initial base contribution imposed in Step 1, in Step 2, foreign online undertakings would have to contribute between 20-40% (in addition to the initial base contribution or in total, depending on the proposal) of their annual revenues to CPEs or funds. Depending on the total level imposed, this would exceed the current (30%) and proposed (20%) contribution levels for large Canadian broadcasting groups.

    (e) Where an online undertaking has within its broadcasting ownership group, a non-Canadian service that is authorized for distribution in Canada by the Commission, it would have to pay contributions against the Canadian broadcasting revenues of that non-Canadian service. This is despite the fact that such non-Canadian services are neither required to be licensed nor registered under the Act.[43]

    (f) Under some proposals, online undertakings would not ever be permitted to allocate any of their direct contributions towards any of the purposes set out in section 11.1(1)

[43] For the reasons set out in para. 7 of our July 12, 2023 final reply to BNC 2023-139 and 2023-140, we support AMC's request (at para. 32 of its BNC 2023-138 submission) that the Commission should clarify that revenues associated with authorized non-Canadian programming services should be excluded from any determination related to the applicability or quantification of contribution payments.

of the Act, namely: (i) the developing, financing, producing or promoting of Canadian programs; (ii) supporting, promoting or training of Canadian creators;[44] (iv) supporting programming services that are of exceptional importance; or (v) supporting participation of public interest organizations in CRTC proceedings.

(g) If they are permitted to direct their contributions to CPEs, foreign online undertakings would not be able to own the IP and would have to partner with a Canadian broadcaster or independent producer, who would own the IP.

(h) Foreign (and Canadian) online undertakings would have to enter into terms of trade with independent producers that dictate the commercial terms for the acquisition of program rights and distribution rights for Canadian programs.

(i) Despite being widely available on the public Internet to all Canadians, foreign online undertakings would not be able to have content exclusivity and would be forced to provide their services and/or copyrighted works to Canadian BDUs or broadcasters.

(j) All online undertakings (Canadian and foreign) would be subject to exhibition and library content quotas for Canadian programs. This is despite the fact that the Commission has been moving away from exhibition quotas for over eight years and has indicated that exhibition requirements may not be applicable to on-demand and personalized services.[45]

(k) Foreign online undertakings would be subject to the Commission's tangible benefits policy for change of ownership transactions. This would be regardless of the fact that they are not Canadian owned and controlled, do not hold broadcasting licences and do not operate via scarce public airwaves.

52. Many of the above proposals are self-serving and all are entirely inconsistent with a flexible, outcomes-based approach. They are also at odds with the Commission's objective that "a new and modernized framework should *recognize the new perspectives and opportunities that online undertakings bring to the broadcasting system*, and *ensure flexibility and adaptability in the future*".[46] Further, they are not in the best interests of the Canadian broadcasting system as a whole.

53. As IATSE notes, "[u]ndertakings are usually in the best position to determine how their contributions can most effectively be allocated, based on their unique mandates, operations, structure, and the services they provide. They should have the flexibility and adaptability to

[44] We note that several intervenors, such as IATSE and Creative BC, have indicated that there is a real need for funding for skills training in the creative industries.

[45] BNC 2023-138, at para. 17. In addition, the Regulatory Impact Analysis Statement released with the Draft Policy Direction provides as follows at p. 11: "The proposed directions would also instruct the Commission to consider a wide range of methods for supporting discoverability, promotion and showcasing content that maintain or increase consumer choice, *rather than recommending the AVSMD approach of creating specific quotas on content catalogues*" [emphasis added].

[46] BNC 2023-138, at para. 15 [emphasis added].

make those allocation decisions themselves. That will help encourage support to be spread across the broadcasting industry rather than concentrated in the hands of a subset of the industry".[47]

54. As we proposed in our initial submission, broadcasting undertakings (including foreign online undertakings) should be permitted to choose between paying into a fund(s), making CPEs and making intangible contributions. Contribution to a fund(s) should be only one of several options available to broadcasting undertakings as to how they choose to direct their contributions in the overall contribution framework. As proposed in numerous submissions in this proceeding from deserving equity-seeking groups, the list of eligible funds should not be limited to existing funds. Instead, the Commission should publish a list of a wide variety of eligible funds to which Canadian and foreign broadcasting undertakings may contribute. This flexibility is consistent with the Commission's objectives to "encourage innovation" and to provide undertakings with "greater control over how they will meet their regulatory obligations".[48]

55. MPA-Canada supports the Commission's objective for a flexible, outcomes-based model for *all* participants in the Canadian broadcasting system. If all participants are "empowered to contribute to the achievement of the broadcasting policy objectives in a manner that aligns with their business models and priorities",[49] it will benefit those participants, Canadian viewers, creators, underserved communities and ultimately, the Canadian broadcasting system as a whole.

Foreign Online Undertakings Should Not be Forced to Contribute to Funds

56. Certain intervenors have proposed that foreign online undertakings should be forced to pay all of their contributions to funds and should never be permitted to direct their contributions towards CPEs (or any other means of contributing, such as training Canadian creators). We ask the Commission to reject these proposals, as they are inconsistent with the Act, the Draft Policy Direction and the Government's clear intention in passing Bill C-11.

57. As we noted in our initial submission, there is one mention in the Act of funds being a possible recipient of expenditure contributions.[50] In contrast, the objectives of the Act place significant emphasis on Canadian programs.[51] In addition, the Draft Policy Direction directs the Commission to "where appropriate for a given business model and set of objectives, *prioritize the imposition of requirements to make expenditures directly on the creation, production and presentation of Canadian programming*".[52] As set out in the Regulatory Impact Analysis Statement accompanying the Draft Policy Direction, rather than relying on quotas or content catalogues, the approach to supporting discoverability, promotion and

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[47] IATSE submission to BNC 2023-138, at para. 23.

[48] BNC 2023-138, at para. 58.

[49] As suggested by Rogers in its initial BNC 2023-140 submission, at para. 19.

[50] Pursuant to s. 11.1(5) of the Act.

[51] See ss. 3(1)(d)(ii), 3(1)(e), 3(1)(f.1), 3(1)(q)(i), 3(1)(r), 3(1)(t)(i), 5(2)(a.1) and 5(2)(e).

[52] Draft Policy Direction, at s. 12(e) [emphasis added].

showcasing content would rely "on the incentive for online undertakings *to make available Canadian content to recoup the investments they make* under a new contribution framework".[53]

58. This is also consistent with the Government's stated intention during the TRCM's study of Bill C-11 that for streaming services that are in the business of producing and commissioning content -- their contributions would take the form of an expenditure requirement or an investment obligation that would allow them to harness their expertise in making commissioning decisions:

> **Mr. Ripley:** … The working assumption of the department in terms of how the bill will be implemented for the big streaming services is that they would be subject to similar types of requirements that our big Canadian broadcasting ownership groups are subject to. *For those businesses that are in the business of production and commissioning content, right now that takes the form of an expenditure requirement. It's not a question of them paying into a fund, but it really is a question of an investment obligation on their part. That harnesses and creates a degree of flexibility for them to use their market intelligence and what they're very good at in terms of making those commissioning decisions.*
>
> Again, there certainly is a possibility that, for some services, that will not be the appropriate form of contribution for them, and we may be looking at a question of them paying into something like the Canada Media Fund.[54] [emphasis added]

59. MPA-Canada reiterates our strong objection to the proposal of an initial base contribution to a fund(s), for the numerous reasons set out in our initial submission.[55] Among other things, it would limit online undertakings' flexibility to meet their obligations through their area of core competence, investments in programming. In addition, if foreign online undertakings are required to make initial base contributions (or any base contributions) to the CMF or other production funds, where there is inequitable access as between foreign and Canadian online undertakings, foreign services would be forced to subsidize the programming shown on competing services. That would be an inequitable result that is contrary to the objectives of the Act. As the Commission acknowledges in BNC 2023-138, the "new contribution framework will need to consider how best to *ensure equitable treatment between domestic and international online undertakings in supporting the creation of Canadian and Indigenous content*".[56] Therefore, if an initial base contribution is adopted, it must apply

[53] Regulatory Impact Analysis Statement, at p. 11.

[54] TRCM, Bill C-11 Evidence, November 22, 2022.

[55] See MPA-Canada initial submission to BNC 2023-138, at paras. 22 to 34.

[56] BNC 2023-138, at para. 18 [emphasis added].

equitably to all Canadian and foreign online undertakings (excluding those exempted from contribution obligations) and there must be equitable access to the funds.

60. Certain intervenors have proposed that if the Commission decides to implement an initial base contribution, part of it should be made a local news fund. However, as noted by the CMPA, the Parliamentary Budget Office expects that the *Online News Act* (passed as a result of Bill C-18) will result in news businesses receiving compensation from digital platforms totalling as much as $329.2 million per year, of which $247.6 million (or 75.2%) would be paid to broadcasters.[57] Therefore, it is questionable whether additional relief from an initial base contribution or any base contribution is required.

61. In particular, we strongly object to the proposal by certain intervenors, such as the CAB and Corus, that Step 1 of this proceeding should focus exclusively on establishing the complete financial contribution requirements for 'large standalone online undertakings that are unaffiliated with currently licensed broadcasting undertakings' (i.e., foreign online undertakings), which should all be directed to third-party Canadian funds.[58] This proposal is asking the Commission to force online undertakings to direct *all* of their contributions to funds at this preliminary stage, before the Commission has had the opportunity to establish the modernized regulatory framework, including the revised definition of a "Canadian program". It completely violates the principle of procedural fairness and we ask that the Commission reject it in its entirety.

Canadian Undertakings Should Contribute More than Foreign Undertakings

62. We strongly agree with AMC's position that given the vastly different environments in which traditional broadcasting undertakings operate as compared to online undertakings, any contribution rate imposed on online undertakings should be much lower than the rates that have historically applied to traditional Canadian broadcasting undertakings. As AMC notes:

> The realities of the digital marketplace are vastly different. Online undertakings compete globally to produce and distribute high-quality content through a range of business models which are not designed to accommodate high barriers to entry. Additionally, many online undertakings have the ability to provide benefits to Canadian creators in a way that these traditional undertakings do not, such as the widespread distribution and promotion of Canadian content to global audiences. Given the vastly different environments in which traditional broadcasting undertakings operate as compared to online undertakings, AMC submits that any contribution rate imposed on online undertakings should be much lower than the rates that have

[57] CMPA submission to BNC 2023-138, at para. 75.

[58] CAB submission to BNC 2023-138, at paras. 6, 31-32 and Corus submission to BNC 2023-138, at paras. 59-60.

> historically applied to traditional Canadian broadcasting undertakings.[59]

63. Some intervenors have argued that foreign online undertakings should be required to make the same or larger contributions than domestic broadcasters. It would be a perverse, inequitable, disproportionate and unfair result if international online undertakings were required to contribute more to the Canadian broadcasting system -- including to Canadian programs (which have not yet been redefined to apply to them) or funds (to which they have inequitable access) -- than Canadian broadcasters who operate almost entirely within the Canadian market.

64. This applies (but is not limited) to:

    (a) proposals to increase the annual revenues threshold for contributions to inflated amounts such as $50 million per service, if that would result in large foreign online undertakings being required to make contributions, while virtually all others are exempted from contributions; and

    (b) BCE's proposal that all Step 1 initial base contributions (to which we are opposed) should be: (i) set at 20% of annual revenues; (ii) required only from foreign online undertakings and unaffiliated online undertakings; and (iii) accessed under existing rules and exclusively to the benefit of Canadian producers and broadcasters.[60]

65. In addition to BCE's proposal for a 20% contribution level presupposing the overall contribution level that the Commission plans to address in Step 2, the Armstrong Report filed by BCE in support of this proposal should be given little probative weight. Its sole purpose is to justify an arbitrary contribution percentage provided to Armstrong by BCE -- in order to support BCE's goal of significantly reducing its own contribution levels -- by requiring foreign online undertakings to contribute equally, rather than equitably, to Canadian broadcasters.

66. Proposals such as these are entirely inconsistent with the Act, which *requires* Canadian broadcasting undertakings to make *higher* contributions than foreign online undertakings. As noted by CBC/Radio-Canada in its submission:

> While this may be obvious, a sustainable contribution framework must recognize that Canadian broadcasting undertakings and their associated online platforms will remain the cornerstone in supporting the production, distribution and promotion of Canadian programming. *It would simply make no sense to develop a new regulatory framework that would rely on foreign online undertakings as the primary mechanism to offer Canadians a diverse range of Canadian content* in English, French and

[59] AMC submission to BNC 2023-138, at para. 35.

[60] BCE submission to BNC 2023-138, at paras. 13 and 86.

> Indigenous languages that is reflective of and relevant to Canada's diverse communities.
>
> In fact, the Commission recognized this in its 2018 Harnessing Change Report noting that "*these (i.e. Canadian and foreign) services are not identical and so should not make identical contributions.* Instead, their contributions should be appropriate to their circumstances, while providing the greatest benefit to Canadians. *These contributions, however, should be equitable to ensure that all players can compete fairly and effectively, which also benefits Canadians*".
>
> *The important role played by Canadian broadcasting undertakings is explicitly set out in the legislation.* Paragraphs 3(1)(f) and 3(1)(f.1) of the *Broadcasting Act* set out distinct obligations for Canadian broadcasting undertakings and foreign online undertakings. Each Canadian broadcasting undertaking is required to "make *maximum use, and in no case less than predominant use*, of Canadian creative, and other human resources in the creation, production and presentation of programming". Each foreign undertaking is required to "make the *greatest practicable use* of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming".
>
> This supports the view that while both Canadian broadcasting undertakings (traditional and online) and foreign online undertakings must contribute to the system, *Parliament's intent was for Canadian broadcasting undertakings to continue to have more onerous obligations with respect to spending on Canadian programming*. As such, determinations about the appropriate level of base contributions and access to funding to support the creation and promotion of Canadian content should reflect this reality.[61] [emphasis added]

67. In explaining why it is necessary to distinguish between the contributions of Canadian broadcasters and foreign online undertakings in subsections 3(1)(f) and (f.1) of the Act, Senator Mark Gold indicated as follows during the TRCM's study of Bill C-11:

> **Senator Gold:** …we need to recognize the reality that foreign players operating in Canada have global business models. *It is just not realistic, in the opinion of the government, to expect that foreign*

[61] CBC/Radio-Canada submission to BNC 2023-138, at paras. 45-48.

> *broadcasters who operate in a global marketplace to be subject to the same provisions as Canadian broadcasters.*[62] [emphasis added]

68. As described by Corus, the high requirements placed on traditional Canadian broadcasters are part of a "regulatory bargain" that has afforded them certain regulatory benefits and protections, which they still enjoy today,[63] in return for their contributions:

> Historically, the Canadian Radio-television and Telecommunications Commission ("**CRTC**" or "**Commission**") controlled access to the Canadian audio and video programming market. In that closed system, CRTC-issued broadcasting licences conferred sizeable positions of Canadian audiences and stable financial returns to broadcasting licence-holders. In exchange, licence-holders met commensurately high requirements to support the social, cultural, and industrial policy objectives of the *Broadcasting Act* ("**Act**"), particularly in relation to Canadian content.
>
> For decades, this regulatory bargain delivered on its promise of informing, enlightening, and entertaining Canadians; nurturing generations of Canadian creative and journalistic talent (in front and behind the camera); empowering successful broadcasting organizations to deploy Canadian creative and other human resources; and supporting a rich and sovereign Canadian culture. But that model is broken, and it has been for the better part of ten years.[64]

69. Foreign online undertakings should not be expected to bear the brunt in repairing a system that traditional broadcasters have benefitted from for decades, but have now declared is "broken". As previously noted, the current state of the Canadian broadcasting system is a result of long-standing, systemic issues that predate the entry of foreign online undertakings.

70. Instead, MPA-Canada agrees with the more balanced approach proposed by Rogers, namely: "the new direct and indirect contribution requirements imposed on online undertakings should be <u>lower</u> than traditional broadcasting groups' existing contribution requirements".[65] However -- rather than ensuring that the contribution requirements imposed on traditional broadcasting undertakings are "significantly reduced to ensure *parity* between Canadian and non-Canadian broadcasting undertakings",[66] as espoused by Rogers -- the Commission

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[62] TRCM, [Bill C-11 Evidence – November 30, 2022](#).

[63] These include, but are not limited to, foreign ownership restrictions, access to domestic funds, and as described in the submissions by Rogers and Eastlink, rights with respect to priority distribution, preponderance of Canadian services and simultaneous substitution.

[64] Corus submission to BNC 2023-138, at paras. 1-2.

[65] Rogers submission to BNC 2023-138, at para. 62 [emphasis in original].

[66] *Ibid.* [emphasis added].

should ensure that the contributions of traditional broadcasting undertakings and foreign online undertakings are *equitable*, in light of the fundamental differences between the two groups of broadcasting undertakings, as required under the Act.[67]

71. We strongly disagree with the DGC's argument that an overall contribution of at least 25-40% of annual revenues is required from large online undertakings, in order to meet the $800 million to $1 billion in additional funding that the Ministers of Canadian Heritage stated would be available as a result of Bill C-11 (the DGC also proposes contributions of at least 20-25% of annual revenues for smaller online undertakings):

> It should be noted that when Bill C-11 was introduced into the House of Commons (and when its predecessor bill, Bill C-10 was introduced), the Ministers for Canadian Heritage in office at the time respectively publicly stated that they anticipated that this new legislation for online undertakings would result in approximately $800 to $1 billion in additional funding for Canadian and Indigenous programming. Consequently, an overall contribution of at least 25 to 40% is consistent with the statements made by the Ministers of Canadian Heritage about the impact that this new legislation will have on the broadcasting and independent production sectors.[68]

72. Likewise, the WGC repeatedly emphasizes throughout its submission that the Commission must uphold the Government's "promise" of $1 billion since it "was the clear aspiration behind Bill C-11 and what drove its support by the Canadian creative community".[69] For instance:

> In touting the benefits of the Bill C-11, the Government provided an estimate of around $1 billion annually in contributions by online broadcasters to Canadian content and creators. This was from online undertakings alone, and not a combined level from both online undertakings and traditional Canadian broadcasters. This significant new money in the system was always the promise of the *Online Streaming Act*, and we respectfully submit that the Commission must uphold this goal.[70]

73. As set out in the transcript excerpt from the TRCM's study of Bill C-11 (in paragraph 40 above), the Government has clearly indicated that the $900 million number it speculated would result from the passage of Bill C-11 would *not* be an incremental expense on top of what online undertakings are already doing. Instead, it expects that it would result from

[67] Including, but not limited to ss. 3(1)(a.1), 3(1)(f), 3(1)(f.1) and 5(2)(a.2).

[68] DGC submission to BNC 2023-138, at para. 43.

[69] WGC submission to BNC 2023-138, at para. 19.

[70] *Ibid.*, at para. ES.2.

online undertakings shifting their existing production expenditures in Canada to "Canadian programs", as redefined by the Commission.

74. Notwithstanding, it would be a complete violation of the principles of administrative law if the Commission, as an "independent public authority",[71] were to determine the level of contributions it extracts from online undertakings on the basis of meeting a funding number speculated by elected officials, with no evidentiary backing. In addition to fettering the discretion of the Commission, there would be an inherent lack of procedural and substantive fairness, as well as a reasonable apprehension of bias, as the Commission's decision would have been predetermined before this proceeding had even begun. We are mindful that statements by elected officials (such as the ones relied on by the DGC and WGC) that are made in a vacuum using derogatory terms such as "web giants" (which have been repeated by various intervenors in their submissions) have already tainted these proceedings against foreign online undertakings. We trust that the Commission will indeed approach these proceedings with "a blank sheet of paper before it" as it has indicated, and not one imprinted with a predetermined total.

The Perils of Overregulation

75. Certain intervenors have pointed to the regulatory framework adopted in Europe, and France in particular, in support of their proposals for large contributions from foreign online undertakings. The Commission should reject calls to adopt similar contribution levels to those employed in France for the following reasons: (a) the EU and Canadian markets are very different; (b) France is the exception in the EU, not the rule; (c) countries like France and Italy that have adopted high investment requirements for foreign VOD services are currently experiencing negative, unintended, inflationary impacts on their local production sectors; and (d) the Italian regulator has very recently recommended that Italy reduce its investment obligations in light of the comparative success achieved by Spain, which has adopted a significantly lower investment obligation.

76. First, as the Government indicated in the Regulatory Impact Analysis Statement accompanying the Draft Policy Direction, "[t]he EU and the North American contexts present different challenges. Differences in regulation between Canada and the EU are necessary to respond to different local needs and priorities, industry contexts, jurisdictional requirements, constitutional frameworks, and histories of broadcasting regulation".[72] Therefore, the Commission cannot simply emulate France's model without first determining its appropriateness for the Canadian broadcasting system.

77. Second, France is an outlier and is expected to have the highest investment obligation placed on foreign audiovisual services of any member state under the EU's Audiovisual Media Services Directive (the "**AVMSD**"). For instance, Spain, which is traditionally aligned with France on cultural policy, has opted for a flexible 5% investment obligation. In addition,

[71] As set out in s. 3(2) of the Act.

[72] Regulatory Impact Analysis Statement, at p. 12.

almost half of EU countries have not implemented *any* investment obligations on foreign and domestic VOD services.[73]

78. Third, EU member states that have adopted high investment obligations, such as France and Italy, are now experiencing negative, unintended, inflationary impacts on their local production sectors due to these excessive regulatory frameworks. In a recently published issue brief entitled "Cultural Levies and the EU Audiovisual Market", the International Center for Law & Economics (the "**ICLE**") points to the risk of serious unintended consequences from excessive regulation if lawmakers do not take market realities adequately into account. As noted by the ICLE:

> …the history of this sort of regulation in the EU and the basic economics underlying these schemes, however, both point to the *risk of serious unintended consequences if lawmakers do not take market realities adequately into account*. … The regulatory caution needed to avoid trapping local content-production industries in destructive cost spirals is embodied in the "proportionality principle," which essentially requires that *the cost of regulatory intervention not be disproportionate to the benefits sought*…
>
> More data are needed to assess optimal financial contribution levels, but it appears highly risky to venture out as far on a limb as France and Italy have done. *Assessing a total 20-25% financial obligation—whether in the form of a national fund levy or investment obligations on the turnover of multiple companies (some of them quite large)—in order to fund local production could easily have dramatic inflationary effects on local content markets*. Perhaps a large and wealthy country like France can absorb and offset some of these effects, but it would only be through heavy subsidization of the very industries the financial obligation otherwise threatens to destroy.
>
> Moreover, this approach fails to deal with the distribution problems that these sorts of regulations have historically created in the EU. *There is such a thing as too much content and too little distribution.* Huge local catalogs can be generated and never adequately shared across member states. Indeed, as noted above, *large VOD providers like Netflix have, to a large extent, actually solved this historical problem. Penalizing these providers for offering such solutions is a curious move*.[74] [emphasis added]

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[73] As described in a September 2022 publication of the European Audiovisual Observatory (a state-funded agency belonging to the Council of Europe) entitled "Investing in European works: the obligations on VOD providers", which discusses the rules concerning financial obligations for VOD services in the EU, the implementation of the AVMSD varies greatly amongst the EU member states.

[74] International Center for Law & Economics, Issue Brief: Cultural Levies and the EU Audiovisual Market, July 11, 2023, at p. 10.

79. The ICLE cautions EU member states choosing to experiment with financial contribution rates to "start with impact assessments and proceed from there incrementally, consistent with the principle of proportionality".[75]

80. Fourth, just this month, the Italian Communications Authority (Autorità per le Garanzie nelle Comunicazioni) ("**AGCOM**") issued an advisory opinion to the Italian government regarding certain aspects of its law on audiovisual media services (known as TUSMA). As set out in AGCOM's advisory opinion (machine translated below), AGCOM recommends reassessing and potentially lowering Italy's high investment quotas for VOD providers (18% for 2023 and 20% in 2024), in light of the fact that Spain's relatively low investment quota (5%) has achieved excellent results compared to Italy in meeting audiovisual incentive objectives:

> The Authority wishes to better analyze the high amount of investment quotas for VOD AVMS providers, in particular when compared to the investment quotas for Italian linear AVMS providers and to the investment quotas set forth by other Member States having national markets of the similar size of Italian one.
>
> For example, France has provided for an investment quota varying between 25% (for catalogs offering cinematic works within a year of theatrical release) and 15% for other VOD AVMS providers. It should be underlined that the Italian investment quota for VOD AVMS providers includes an obligation to invest a percentage of their annual net revenues in Italy equal to 18% for 2023 and 20% from January 1, 2024, and that the investment obligation also applies to VOD AVMS providers established in another Member State.
>
> Spain has instead introduced a relatively low investment quotas, equal to 5%, but the introduction of this quota has corresponded to excellent results in terms of productive liveliness in the audiovisual sector (for example, in 2021 Italy generated an export of audiovisual services equal to 168 million dollars, Spain over one billion) and generation of workforce (compared to only 7 large companies active in Italy in the audiovisual sector with a number of employees exceeding 250, in 2020, Spain has 20) net of the easier possibility of exporting to Spanish-speaking countries. Therefore, the market incentive objective was largely achieved with a decidedly lower quota than the Italian one.
>
> In the light of the foregoing, it is believed that the legislator may also consider, in addition to a simplification of the quota system,

[75] *Ibid.*, at p. 11.

> also a lowering of the mandatory investment quota with particular reference to audiovisual media services.[76]

81. The EU experience demonstrates that any contribution requirements should be properly impact-assessed with a clearly defined aim and be in line with the principles of proportionality, fairness and flexibility. For example, the Commission should consider elements like the following:

    (a) assess the inflationary effect of a possible financial requirement on the market via an independent and neutral economic impact assessment;

    (b) examine the capacity of the market to absorb the possible mandated investment; and

    (c) measure the effect on business activities of legal uncertainty caused by a possible legislative change.

Online Undertakings are Not Programming Undertakings or Distribution Undertakings

82. We respectfully ask the Commission to reject proposals by the CMF and TELUS that online undertakings offered on a DTC basis should be subject to the contribution obligations of both programming undertakings *and* distribution undertakings,[77] as such proposals are inconsistent with the Act.

83. The CMF uses this assertion to ground its proposal for an initial base contribution by arguing that the appropriate level of initial base contributions for all audiovisual online undertakings (Canadian and foreign) should be the same level as the current contribution obligation of BDUs (i.e., 5%), since they are supplanting BDUs. TELUS, on the other hand, uses this proposal to reduce the existing contribution obligation of BDUs by attempting to place the same burden on online undertakings (at 3%). Both intervenors argue that DTC services would also have to make contributions applicable to programming undertakings. Each of these proposals appear to be thinly disguised efforts to have online undertakings "take up the slack" for ISPs (as in the CMF's proposal), which currently do not have contribution obligations, and virtual BDUs ("**vBDUs**"), which TELUS argues should not be subject to any contribution obligations.

84. We also ask the Commission to reject a similar proposal made by the CAB that online undertakings should only be permitted to contribute to funds because they have direct relationships with subscribers and hence compete with BDUs.[78]

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[76] AGCOM, Segnalazione al Governo ai sensi dell'articolo 1, comma 6, lett. c), n. 1) della legge 31 luglio 1997, n. 249, sulle necessità di revisione del quadro normativo in materia di promozione delle opere audiovisive europee e di produttori indipendenti e di credito di imposta per le imprese di produzione cinematografica e audiovisiva. Available at: https://www.agcom.it/documents/10179/30687246/Segnalazione+al+Governo+27-06-2023/e1dc0a82-7abc-46b1-b8a4-61e06743431d?version=1.0

[77] CMF submission to BNC 2023-138, at paras. 25-35 and TELUS submission to BNC 2023-138, at paras. 3, 15-16.

[78] CAB submission to BNC 2023-138, at para. 35.

85. All of these intervenors are attempting to rewrite the Act, which was just recently amended after an extensive legislative review period during which Parliamentarians were obviously aware of the difference in functions performed by a DTC online undertaking, an ISP and a vBDU. Armed with that knowledge, Parliament revised the definition of a "distribution undertaking" under the Act, to expressly state that it "*does not include such an undertaking that is an online undertaking*". In contrast, subsection 9.1(1)(i) was added to the Act and specifically references the only scenario in which an online undertaking is acting in a manner similar to a BDU, by referring to "a person carrying on an online undertaking *that provides the programming services of other broadcasting undertakings in a manner that is similar to a distribution undertaking*". Therefore, unless an online undertaking is retransmitting third-party programming undertakings in their entirety (i.e., is a vBDU), it is not performing the functions of a BDU and should not be subject to any of the regulatory or contribution obligations applicable to BDUs. In addition, the Act explicitly carves out online undertakings from the definition of a "programming undertaking" and applies an entirely different and lower contribution objective to foreign online undertakings in subsection 3(1)(f.1), than Canadian broadcasting undertakings in subsection 3(1)(f).

86. Thus, it is evident that Parliament's intention is that online undertakings are to be treated as a separate class of broadcasting undertaking from BDUs and programming undertakings, and foreign online undertakings, in particular, are to be subject to lower contribution requirements than Canadian broadcasting undertakings.

87. The CMF also points to various models adopted in Europe to argue, "there is international persuasive precedent for applying a dual responsibility on online undertakings".[79] In doing so, the CMF simply ignores the fact that the only two English-language examples (UK and Australia) of the four examples it points to, do not require online undertakings to contribute to funds, with the UK deciding as recently as March 2023 that it will not require online undertakings to make *any* contributions whatsoever. In Germany, foreign streaming services are only required to contribute a small levy (1.5-3%) to a public film fund, while as noted above, France is an outlier and its local production sector is now facing negative, unintended, inflationary consequences.

Terms of Trade Would Hinder the Success of Canadian Programs

88. The CMPA is attempting to circumvent the Commission's process by arguing for Codes of Practice (i.e., terms of trade),[80] despite the fact that the Commission has not called for comments on this issue. In addition to raising procedural concerns, CMPA's proposal ignores the Government's repeated rejections of its attempts to include terms of trade in the Act. Further, the Commission has previously determined that terms of trade are not in the best interests of the Canadian broadcasting system for reasons that remain true today. Therefore, we ask that the Commission reject this proposal.

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[79] CMF submission to BNC 2023-138, at paras. 36-43.

[80] CMPA submission to BNC 2023-138, at paras. 35-37.

89. When it discontinued its previous terms of trade policy in 2015, the Commission determined that due in part to terms of trade, there was little to no long-term monetization of Canadian programming, because most independent producers lacked the capacity to support long-term exploitation and export of content. In addition, broadcasters did not have an incentive to promote the long-term exploitation and export of programs, since the international rights were often held by producers under terms of trade agreements.[81] The Commission also recognized that in order to create higher quality Canadian programming with more success domestically and internationally, broadcasters should be allowed to own equity in content and IP.[82] The same is true of online undertakings.

90. In addition, the EU regimes cited by the CMPA as models for its proposal are either: (a) not comparable since terms of trade in the UK and Germany only apply to public service broadcasters and not to foreign streaming services, which continue to have full contractual freedom when commissioning audiovisual works; or (b) extreme examples of investment obligations under AVMSD, since France -- which does not have terms of trade -- has complex provisions relating to rights retentions for independent producers that is the exception, not the rule, in the EU. Indeed, broadcasters and streaming services enjoy contractual freedom in the vast majority of EU countries.

91. Creating and distributing audiovisual works is high risk, and flexibility -- including being able to choose from different types of deal models and terms based on the nature and scale of the project -- is needed to ensure the vitality of the audiovisual sector. Contractual freedom is the backbone of the audiovisual ecosystem. The contractual framework underlying each audiovisual work reflects the uniqueness of each project (e.g., specific content, acquisition cost, territorial scope, duration, modes of exploitation, financing/distribution models, the risks taken by each entity, etc.). Imposing burdensome regulatory constraints (including IP ownership limitations) would artificially regulate the allocation of rights in individual audiovisual works, distort market dynamics, and severely impact the overall economic vitality of the audiovisual sector, while limiting choices for commissioners and producers.

92. Contrary to the CMPA's allegation that a "market imbalance provides broadcasters and foreign streamers alike with a structure that facilitates grabs of IP rights",[83] global studios and streaming services play a crucial role in financing the development and production -- and facilitating the distribution, promotion and exhibition -- of Canadian-owned content. As set out in the CMPA's own Profile 2022 report, global studios and streaming services provided 13% of total financing for independent Canadian producers in 2021-22, outspending the CBC and other public broadcasters, private broadcasters and the CMF.[84]

93. Indeed, global partnerships have played a huge part in the domestic and, more notably, global success of many of the Canadian-owned independent productions referenced by the CMPA

[81] Broadcasting Regulatory Policy CRTC 2015-86: *Let's Talk TV: The way forward - Creating compelling and diverse Canadian programming*, 12 March 2015, at para. 117.

[82] *Ibid.*, at para. 121.

[83] CMPA Submission to BNC 2023-138, at para. 34.

[84] CMPA, Profile 2022, Exhibit 2-10: Financing for Canadian film and television production, at p. 29.

to support its argument that "Canada's cultural policy framework has helped to deliver both massive hits and culturally important independently produced content to domestic and international audiences".[85] Whether financing on the front-end, or showcasing on the back-end, global studios and online undertakings make significant contributions to the creation, production and promotion of Canadian-owned content. Their marketing efforts – both on and off-service – also help to generate discoverability of Canadian-owned content and producers of that content.

94. Like Canadian broadcasters and the CMF, global partners provide critical development financing and creative input to Canadian producers to develop their projects. (e.g., CBC's partnership with Paramount's BET+ on *The Porter*[86]). The significant distribution advances or license fees they pay to Canadian producers ("Pre-Sales") often provide the key production financing needed to fully finance their budgets and successfully produce their projects. (e.g., CTV's partnership with NBCUniversal on *Transplant*[87]).

95. Global streaming services provide an unparalleled opportunity to expand availability and generate discoverability of Canadian-owned content. When global partners, in particular online streaming services, license completed Canadian-owned content productions, they make them available to a worldwide audience, helping to generate significant new interest in the productions and revenue for Canadian independent producers. (e.g., Netflix's licensing of CBC's *Schitt's Creek,*[88] which went on to win numerous awards).

96. In many cases, the partnerships that global studios and foreign online undertakings have formed with independent Canadian production companies have helped them grow and establish themselves as leaders in their fields. This is especially apparent in children's programming (e.g., *Dino Ranch* producer Boat Rocker's partnership with Disney[89]).

97. Netflix's submission provides more examples of Canadian programs it has licensed, co-produced and commissioned in conjunction with Canadian broadcasters.[90] Paramount's submission describes how it provides development financing, licensing, promotion, exhibition and distribution of Canadian content to audiences around the world.[91] Disney's submission describes how its partnerships with other Canadian independent producers have contributed to their international recognition and success.[92]

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[85] CMPA Submission to BNC 2023-138, at para. 29.

[86] "CBC and BET Plus partner on 'The Porter,' depicting 1920s Little Burgundy in Montreal" in *The Toronto Star*, December 10, 2020.

[87] "Canada's CTV Partners With NBCU International Studios On Medical Procedural 'The Transplant" in *Deadline* January 31, 2019.

[88] "The Unlikely Rise of *Schitt's Creek*" in *Vulture*, April 7, 2020.

[89] "Boat Rocker's Hit Preschool Series "Dino Ranch" Renewed for Third Season" on Newswire.ca, October 13, 2022.

[90] See Netflix submission to BNC 2023-138, at paras. 10-13.

[91] See Paramount submission to BNC 2023-138, at paras. 11-15, and 16-20.

[92] See Disney submission to BNC 2023-138, at paras. 18-19.

98. While global online undertakings may not acquire IP rights for all programs, *requiring* global online undertakings to forgo IP and international rights to programs would be impractical and may result in potentially attractive Canadian programming never being produced, or being unavailable to Canadian and international viewers on popular online platforms.

Forcing Online Undertakings to Provide their Copyrighted Works to Others

99. The Commission should also reject proposals that it should somehow force foreign online undertakings to provide their services and/or copyrighted works to Canadian BDUs or broadcasters, as proposed by certain interested parties.[93]

100. There is *no justifiable public policy reason* for such self-serving proposals, since the content of DTC streaming services is available over the public Internet to all Canadians, with no semblance to a traditional closed system that is dependent on a subscription to a specific BDU, ISP or TSP. Indeed, as noted above, some of the very same companies that are making such proposals are also benefitting from the distribution of foreign online services on their Internet and telecommunications networks.

101. Furthermore, such proposals would be in violation of the *Copyright Act*, since as the Supreme Court of Canada has previously held with respect to the Commission's powers under the Act, "property interests created by the *Copyright Act* cannot be constrained or diminished unless authorized by Parliament"[94]:

> The *Copyright Act* is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright owners in works or other protected subject matter, typically *in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner's consent*. It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions. …Among the categories of subject matter protected by copyright are the rights of broadcasters in communication signals … In addition, "program[s]" within the meaning of the *Broadcasting Act*, are often pre-recorded original content which may constitute protected works, namely "dramatic work[s]" or "compilation[s]" thereof, under the *Copyright Act* …

[93] See for example, TELUS submission to BNC 2023-138 at para. 23, and CCSA submission to BNC 2023-138, at paras. 16-24. BCE also suggests (at para. 6 of its BNC 2023-138 submission) that "the new contribution framework must incentivize foreign rights holders to continue to partner with Canadian broadcasters", without elaborating on this suggestion.

[94] As described by the Federal Court of Appeal in *Bell Canada v. 7262591 Canada Ltd.*, 2018 FCA 174 (CanLII), [2019] 2 FCR 414, at para 36.

> … as *it would be impermissible for the CRTC*, a subordinate legislative body, *to implement subordinate legislation in conflict with another Act of Parliament, the open-ended jurisdiction-conferring provisions of the Broadcasting Act cannot be interpreted as allowing the CRTC to create conflicts with the Copyright Act*.[95] [emphasis added]

102. Therefore, we ask that the Commission deny these self-serving and baseless proposals.

103. MPA-Canada appreciates the opportunity to submit this reply submission in the Contribution Consultation on behalf of the Companies.

All of which is respectfully submitted,

Wendy Noss
President, Motion Picture Association-Canada

*****End of Document*****

[95] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 (CanLII), [2012] 3 SCR 489, at paras. 36 and 39.