Broadcasting Notice of Consultation CRTC 2017-359,

Call for comments on the Governor in Council's request for a report on future programming distribution models

Comments of the

Canadian Media Producers Association

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EXECUTIVE SUMMARY

1. Canada's broadcasting system consists of three pillars: i) the producers and creators of content; ii) the exhibitors that provide a platform or platforms to exhibit content; and iii) the distributors that deliver the content to audiences.[1]

2. In Canada's traditional or closed broadcasting system, the exhibitors are broadcasters and licensed video-on-demand (VOD) services,[2] and the distributors are broadcasting distribution undertakings (BDUs).[3] In our closed system, the second and third pillars must contribute to the creation and presentation of Canadian programming pursuant to the *Broadcasting Act* ("the Act").[4] This contribution framework helps to ensure that the producers and creators of content in the first pillar make varied and comprehensive, informative and entertaining, regionally reflective, and diverse Canadian programming.[5] Through this contribution framework, each element of the Canadian broadcasting system contributes to the creation and presentation of Canadian programming.[6]

3. In other words, Canada's contribution framework provides the foundation for the three pillars. The strength of these pillars working together ensures the continuing creation, exhibition, and distribution of content made for Canadian and international audiences and ensures a vibrant domestic market.

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[1] Please refer to Appendix A for a graphical representation of the three pillars of the Canadian broadcasting system as described in the Executive Summary.

[2] City television stations, YTV, and Bell's BDU-specific VOD service are examples of exhibitors in Canada's closed broadcasting system. Broadcasters must meet minimum levels of Canadian programming expenditures (CPE), programs of national interest (PNI), and independently-produced programming as well as exhibition levels of Canadian programming while licensed VOD services must offer a certain amount of Canadian titles in their inventory and make contributions to an unrelated Canadian production fund.

[3] BDUs make contributions to the Canada Media Fund (CMF), certified independent production funds (CIPFs), and offer a majority of Canadian television services.

[4] *Broadcasting Act*, S.C. 1991, c. 11, s. 3(1)(e) and (f).

[5] Ibid., s. 3(1)(i).

[6] *Broadcasting Act,* s. 3(1)(e).

4. However, we are no longer operating in a closed broadcasting system. Internet-based video services,[7] which include subscription video-on-demand (SVOD) services like Netflix, hybrid VOD services like CraveTV,[8] advertising video-on-demand (AVOD) services like YouTube, and transactional video-on-demand (TVOD) services like iTunes, (hereinafter collectively referred to as "internet television services") provide programming to Canadians alongside, in competition with and as substitutes for, the traditional broadcast television system. The delivery of programming over the internet and wireless networks has opened our broadcasting system up to internet television services – whether they are domestic or foreign – operating outside of our contribution framework. In actual practice, our broadcasting system has evolved outside of the carefully created policy framework for a closed system and now includes online exhibitors and distributors.

5. Internet service providers (ISPs) and wireless service providers (WSPs) are delivering television programming through online platforms to Canadians. We now see clear trends that Canadian audiences are watching more internet television and less broadcast television, causing modest revenue declines to BDUs, and consequently reduced contributions from BDUs to the Canada Media Fund (CMF) and certified independent production funds (CIPFs). When internet television services that do not contribute to the creation of Canadian programming take business away from the BDUs and broadcasters that do, there will be reduced support for the production and delivery of Canadian programs. As a result, the shift to online exhibitors and distributors is introducing a value gap into our system. The second and third pillars will remain well-funded as their business models adapt to the online environment but without changes to our broadcasting policy, those pillars will no longer provide stable funding supports to the first pillar.

6. With the recent revenue declines in the BDU sector and the increasing influence of online exhibitors and distributors, it is now the time to address those new programming distribution models as part of our broadcasting system. We must modernize our contribution framework to ensure that it continues to uphold the objectives of Canada's

[7] The same definition of "internet-based video services" is used in the 2017 Communications Monitoring Report (CMR), s. 4.2, ii. Internet-based video services.
[8] Please note hybrid VOD services are a type of SVOD service.

broadcasting policy (and consequently, the vibrancy and success of the domestic industry) as viewers continue to migrate from BDUs and broadcasters to internet television services.

7. The CMPA respectfully submits that the Commission must make the following determinations in its report responding to Order in Council P.C. 2017-1195 (the “OIC”) and initiate the following proceedings in order to prepare the Canadian broadcasting system for future programming distribution models and ensure a vibrant domestic market:

    - Determine that the current broadcasting system that requires contribution, expenditure, and exhibition requirements of BDUs and broadcasters helps to facilitate a vibrant domestic market and ought to remain in place;
    - Review the Commission’s definition of “independent production company” to truly ensure the independence of those companies;
    - Initiate a proceeding to review the Digital Media Exemption Order (DMEO) and the Video-on-Demand Exemption Order (the “VOD Exemption Order”);
    - Determine that the Commission’s information gathering powers with respect to internet television services should be clarified to allow for better data collection; and
    - Determine that ISPs and WSPs are key elements of Canada’s broadcasting system, that they have a role to play in contributing to the Act’s objectives, and that the Commission should be given the power to require them to contribute to Canada’s broadcasting policy.

8. These determinations and proceedings will ensure that Canada’s broadcasting system continues to support a vibrant domestic market as online video consumption increases and business models change.

RESPONSES TO CRTC QUESTIONS

Future programming distribution model or models

Q1. How is the growth in online audio and video consumption changing the business models of program creators and distributors? What are the new models?

Response:

The Distributors: The Delivery of Internet Television Services by Internet and Wireless Distributors is Causing a Modest, but Growing, Decline in the Revenues of Broadcasting Distribution Undertakings, thereby Shifting Business Models

9. BDU revenues and subscriptions are declining in Canada and can be expected to continue declining as internet and wireless service providers increasingly deliver internet television services. The number of BDU subscriptions dropped from a total of 11.5 million subscribers in 2012, to 11.1 million in 2016.[9] Overall BDU revenues have dropped from a high of $8.93 billion in 2014 to $8.73 billion in 2016.[10]

10. Historically, the Canadian distribution system has been dominated by cable and direct-to-home (DTH) satellite providers, however, trends in the sector show that business models are moving away from cable and DTH satellite services towards internet protocol television

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[9] This represents a 3.5% decrease in the number of BDU subscriptions from 2012 to 2016. 2017 CMR, Table 4.3.3 Broadcasting distribution undertakings subscriber (thousands) number – Basic and non-basic services.

[10] This represents a 2.24% decrease in the overall BDU revenues from 2014 to 2016. 2017 CMR, Table 4.3.1 Revenues ($ millions) of broadcasting distribution undertakings (BDU) – Basic and non-basic services.

(IPTV).[11] As a result of the BDU sector shift from cable and DTH to IPTV, IPTV subscriptions and revenues are growing exponentially.[12]

11. Access to internet television services is the major driver of consumer demand for broadband internet services and higher bandwidth broadband capacity. According to Cisco's *2017 Visual Networking Index Report*, Canadian internet video traffic was 67% of all consumer Internet traffic in 2016, up from 65% in 2015.[13] Looking at Canada's mobile data traffic, video took up 64% of data traffic in 2016, and that number is expected to reach 80% by 2021.[14] Monthly household spending by Canadians on internet services has increased by 9.63% and on mobile wireless services by 5.54% from 2014 to 2015. BDU monthly household spending, on the other hand, has declined by 3.25% for the same period.[15] BDU revenues are shifting to, and being replaced by, internet and wireless distributor revenues as a result of the proliferation of internet and wireless delivery of television programming.

The Exhibitors: The Growth of Internet Television Services is Shifting the Business Models of Broadcasters, but Canadians Still Watch Mostly Broadcast Television

12. Canadians, along with viewers around the world, are increasingly going online to watch television programs from internet television services. Online video consumption by

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[11] IPTV provides consumers with an improved user interface, interactivity, and allows audiences to seamlessly access SVOD services, such as HBO Go Canada, CraveTV, and Netflix, from their set-top box. In the last five-year period, cable and DTH service provider revenues declined by 12.6% and 13.8% respectively, while IPTV service provider revenues increased by 205%. 2017 CMR, s. 4.3, p. 192.

[12] The total number of subscribers to IPTV has increased by 145% over the last five years, from just over 1 million in 2012 to 2.5 million in 2016. 2017 CMR, Table 4.3.3 Broadcasting distribution undertakings subscriber (thousands) numbers – Basic and non-basic services.

[13] Cisco. "VNI Forecast Highlights Tool: Canada." cisco.com. https://www.cisco.com/c/m/en_us/solutions/service-provider/vni-forecast-highlights.html# (accessed November 25, 2017.)

[14] Ibid.

[15] 2017 CMR, Table 2.0.3 Monthly household spending on communications services, by service and by income quintile ($/month/household). Please note that 2015 is the most recent data available.

Canadian audiences is undoubtedly on the rise. The availability of internet television services is driving the growth in online video consumption. Recent data released by the Media Technology Monitor reports that 57% of Canadian Anglophones subscribe to internet television services.[16]

13. Netflix remains dominant among SVOD services available in Canada with a 53% penetration rate in Fall 2017, up from 50% in Spring 2016. Bell Media's hybrid VOD service CraveTV was launched in 2015, and now has a 9% penetration rate, and Amazon Prime Video only entered our market in 2016, and already has a 5% penetration rate.[17] However, Canadian viewers are not only looking to SVOD services to watch professionally-produced videos online. AVOD services also offer Canadians the opportunity to watch internet television, whether it's the newly launched YouTube channel encore+, which gives viewers access to Canadian film and television series from the past few decades, or live streams of CBC's *The National* and Vice Media's video news clips on Facebook. TVOD services provide Canadian viewers with the ability to purchase specific television series or films without signing up for a full subscription to a particular service. All of these internet television services are providing consumers with even more choice when it comes to television programming – and Canada's BDUs are now feeling the repercussions with declines in their sectors.

14. Even with the growth in online video consumption, most Canadians still watch television by traditional means, whether it be over-the-air television stations or through BDU subscriptions to cable, DTH satellite, or IPTV. Average viewing to broadcast television is 28.2 hours per week in 2016 compared to 3.1 hours to internet television.[18]

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[16] The Wire Report. "57% of Canadians subscribe to OTT services: MTM." thewirereport.ca. https://thewirereport.ca/2017/10/19/57-of-canadians-subscribe-to-ott-services-mtm/ (accessed November 26, 2017).

[17] Roday-Mantha, Bree. "Most OTT users still subscribe to TV: study." *Media in Canada*, October 23, 2017, http://mediaincanada.com/2017/10/23/most-ott-users-still-subscribe-to-tv-study/ (accessed November 26, 2017).

18 2017 CMR, Figure 4.2.16 Average number of hours Canadians watched traditional television (2011-2012 through 2015-2016 broadcast years) and Internet television (2010 to 2016).

The Producers and Creators of Content: Independent Producers are Embracing the Shift with New and Innovative Business Models

15. The growth in online video consumption presents a wealth of opportunities for Canadians to produce new, innovative, and high-quality content. This growth provides new opportunities for independent producers who are developing innovative business models and working with a variety of platforms to deliver great programming to both Canadian and international audiences. From supplying television series to broadcasters and SVOD services to creating branded content available for viewing on AVOD services, independent producers bring great stories to every screen on every platform.

16. Independent producers contemplate both broadcast and internet television platforms from the beginning of every project. Content is not developed without a business model that explores all avenues of distribution and exploitation from the earliest development stage. Innovation in online-specific content is the new frontier for Canadian producers - and they are already fully engaged in the creation and exploration of new business models to meet the demands of the market. Canada's independent producers have rapidly expanded into the production of online content. Independent producers are not only a major creative force in the expression of Canadian culture, they are also vital contributors to the digital economy.

17. Some of the new business models of Canada's independent producers are provided below as case studies - from how television series are developed and financed in our broadcasting system to the various platforms where they can be viewed by audiences to interactive media extensions. These case studies are but a few examples of how producers are embracing the digital shift and how their business models have changed with the growth in online consumption of content. They also demonstrate the importance of both domestic and international markets. International financing sources from foreign broadcasters, digital platforms, and the investment of distribution advances by Canadian international content exporters and producers are becoming increasingly important to the production of Canadian television series.

    - ***Alias Grace:*** Based on the award-winning novel by Canadian author Margaret Atwood, *Alias Grace* is a six-hour miniseries inspired by the historical true story of convicted murderer Grace Marks. The miniseries was written by Sarah Polley, directed by Mary

Harron, and produced by Halfire Entertainment; in association with CBC and Netflix; with the participation of the CMF, the Harold Greenberg Fund, the Cogeco Fund, and the Rogers Group of Funds; and investment by Halfire of production tax credits. It is broadcast in Canada on CBC and streams globally on Netflix.

- ***Letterkenny***: This series began as YouTube shorts which garnered more than 15 million views and a Canadian Screen Award nomination for Best Web Series. *Letterkenny* is produced by New Metric Media, in partnership with DHX Media and Playfun Games and in association with Bell Media, with the participation of the CMF and the Northern Ontario Heritage Fund, and investment by New Metric Media of production tax credits. The series is the first original series commissioned by CraveTV and premiered in February 2016 to record-setting audiences. Brand support includes the continued cross-platform marketing campaigns for the series, as well its brand extensions including merchandise, Puppers Premium Lager, and a 26-city Letterkenny Live! Tour. New Metric Media and CraveTV recently announced that they will partner on the production of more than forty new episodes.

- ***Murdoch Mysteries***: One of Canada's most successful and longest-running dramas, *Murdoch Mysteries* was adapted for television from Canadian author Maureen Jennings's popular Detective Murdoch novels. The series has been licensed to broadcasters in 110 countries and territories around the world. In addition to being Canada's #1 drama reaching 1.3 million Canadians weekly, ratings have been high in many countries including on Britain's crime channel Alibi, where *Murdoch Mysteries* ranks as the number one original series. The Murdoch Mysteries brand also has licensing deals which include The Murdoch Mysteries Escape Series (an all-ages immersive game experience) and series merchandise. *Murdoch Mysteries* is developed and produced by Shaftesbury; in association with CBC, ITV STUDIOS Global Entertainment, and UKTV; with the participation of the CMF and the Cogeco Fund; and investment by Shaftesbury of its production tax credits.

- ***Cardinal:*** This crime drama series is produced by Sienna Films and Entertainment One in association with CTV; with the financial participation of the Northern Ontario Heritage Fund, the CMF, and the Cogeco Fund; and investment by the producers of production tax credits. Super Écran has commissioned the series for French-language Canadian broadcast. The series is available in many countries including the U.S. (on Hulu), in the U.K., France, Germany; Spain, Sweden, Denmark, Finland, Norway, and Australia.

- ***Love it or List it:*** *Love it or List it* was originally produced by Big Coat Media in association with The W Network (now HGTV), with the participation of the Bell Fund, and investment by Big Coat Media of its production tax credits. This Toronto-based original series airs in 150 territories globally, has yielded several other versions, including *Love it or List it - Vancouver* and *Love it or List it - Vacation Homes*, as well as the app *Love it or List it: The Game*. This Canadian format has spawned versions in Quebec, the U.K., and Australia as well as formats in France, Belgium, Denmark, Netherlands, Germany, Sweden, and Norway.

- ***Annedroids:*** *Annedroids* is produced by Sinking Ship Entertainment in association with TVO, Amazon, and Kika; with the participation of the CMF, Shaw Rocket Fund, and the Bell Fund; and the investment by Sinking Ship of its production tax credits. This kid's series celebrates science, technology, engineering, and math through the story of eleven-year-old genius Anne, her friends, and android creations. *Annedroids* features photo-real CGI android characters in a gritty live action world. The series airs on TVO and Knowledge Network in English, Société Radio-Canada in French, and internationally in over 200 countries. It is also available on Amazon Prime Video globally. Audiences can also engage with Anne and STEM principals explored through the series on multiple games and apps.

- ***Canada's Smartest Person:*** *Canada's Smartest Person* is developed and produced by Media Headquarters in association with CBC and with the participation of the Bell Fund. It is a ground-breaking interactive television series that redefines what it means to be smart. It shatters the myth that to be smart you need to have a high IQ, be a math whiz, or trivia buff. Every week six new hopefuls battle it out in front of a live studio audience in six categories of smarts: musical, physical, social, logical, visual, and linguistic. In the series finale five finalists go head-to-head to earn the title of Canada's Smartest Person. Viewers can play along with the award-winning *Canada's Smartest Person* app. The app syncs to the broadcast in real time allowing viewers to participate in every challenge from home. The format is on the air or sold in fifteen countries, including Finland, France, Germany, Turkey, and Argentina.

- ***Pure***: This television series was developed by Two East Productions and produced by Two East Productions and Cineflix Media with the participation of the CMF and the Eastlink TV Independent Production Fund as well as investment by the producers of production tax credits. *Pure* tells the story of a Mennonite pastor who is determined to rid his community in Southern Ontario of drug traffickers. Having premiered in January 2017 on CBC, the series will also be available in the U.S. on Hulu (an SVOD service) and WGN America (a U.S. cable and satellite service channel).

- ***Halcyon***: *Halcyon* is produced by Secret Location (a division of Entertainment One) in association with Showcase and Syfy, with the participation of the Independent Production Fund, and the investment by Secret Location of production tax credits. A first-of-its-kind, *Halcyon* pushes boundaries to merge active and passive storytelling, seamlessly alternating between short-form linear and interactive virtual reality (VR) episodes. The fifteen-part series (ten short-form videos and five interactive VR episodes) opens with a murder that happens in VR and invites viewers into the crime scene to help solve the case. The series was launched on-air on SyFy International in over 80 countries and online and as an immersive app for Oculus Rift and Samsung Gear VR. *Halcyon* has been critically successful, with nominations by the Webby Awards, a Rose D'Or Award, and Banff World Media Festival's Rockie Awards. The series has also received recognition from the Atomic Awards and New York Festivals, with wins in their Innovation, Technology, and VR categories.

- ***Carmilla***: Produced by Shaftesbury with brand partner U by Kotex®, the online series follows the adventures of university student Laura Hollis after a vampire moves into her dorm room. Available on KindaTV, the largest scripted YouTube channel for millennials in Canada (also operated by Shaftesbury), the series has generated over 70 million views in 193 countries and been translated in over 20 languages by fans. *Carmilla* has been recognized with numerous national and international awards including the Streamy Awards, the Webby Awards, the Shorty Awards, and the Canadian Screen Awards. Following up on the popularity of the original online series, *Carmilla The Movie* was released in Fall 2017 with the financial participation of Telefilm Canada, the CMF, and Hollywood Suite. The movie's unique release strategy included a one-night-only event screening in 30+ Cineplex cinemas across Canada, was made available to fans for digital pre-sales, and will be broadcast on Hollywood Suite in 2018. Shaftesbury is currently in development on a broadcast television series adaptation.

- *Slugterra: Slugterra* is developed and produced by DHX Media in association with Family CHRGD; with the participation of the Bell Fund and Shaw Rocket Fund; and the investment by DHX Media of its production tax credits. *Slugterra* is an animated epic sci-fi adventure series on Family CHRGD in Canada and available in more than 170 territories worldwide on Disney XD and Netflix. *Slugterra* has achieved global success both on-air and off-air, ranking in the top-ten rated kids' series at premiere in several countries, and reaching over 10 million downloads across the Slugterra suite of apps. The Slugterra brand also includes a theatrically released film, *Eastern Caverns*, and the brand new app, *Slug It Out! 2*, available for download on iTunes and Google Play stores.

18. The independent production companies behind these successful projects all started from small operations that became the successful, innovative companies they are today. Each one of these producers started with an idea, invested money into the development of that idea, sought out investors (including funding from the CMF, CIPFs, and tax credits), partnered with a broadcaster, found domestic and international buyers, and hired talent, in order to produce their first great program. In many cases following the success of that first program, the producer then used the revenues from the exploitation of its intellectual property and the equity from its investment in the show as capital to build a company and develop its next great program. None of this would be possible, from the continued production of television programming to the rise of well-capitalized production companies, if the producer did not preserve meaningful retention of the intellectual property or equity in their programs.

19. For example, Sinking Ship Entertainment (the producer of *Annedroids*) is a multiple Emmy Award winning production, distribution, and interactive company specializing in children's live action and computer-generated imagery television series. Since its launch in 2004, Sinking Ship has produced over 500 hours of content and sold to over 200 countries internationally. The Toronto-based company employs more than 125 employees and in addition to production operates a visual effects and interactive studio. Shaftesbury Entertainment is another example of an award-winning creator and producer of original content for television, film, digital, and brands. The success of Shaftesbury's television series (such as *Murdoch Mysteries*) has helped the company to grow and innovate through expansion of its digital and branded entertainment divisions. Those divisions produce original digital, convergent, and branded entertainment projects including the global phenomenon *Carmilla*, scripted comedy *Upstairs Amy*, supernatural drama *Inhuman*

Condition, and the *Slasher* virtual reality app for iOS, Android, and Oculus Rift. Shaftesbury has over 500 award wins and nominations and is also notable as the creator of the first Canadian short-from series to migrate to primetime television, and the creator of the world's first scripted mobile app series.

The Existing Contribution Framework for Canadian Programming Remains Foundational to the Success of New Business Models

20. As is clear from these examples, even with the opportunities that the shift in video consumption brings, Canada's contribution framework is essential to fund and promote the production of high-quality, innovative, compelling Canadian content made by independent producers and other content creators. Many of these producers' new business models continue to contemplate and incorporate the current regime. All of the television programs listed above were produced with the support of a broadcaster licence fee or funding from the CMF or CIPFs.[19] Although almost all of these television series[20] found markets outside of Canada with foreign television broadcasters or SVOD services, they were developed in Canada with Canadian funding supports. Such projects would simply not have been made without the stability and support of the existing framework in our broadcasting system.

21. Canadian producers are embracing the shift from broadcast to online television and innovating in order to meet consumers where they are: online, on-the-go, in their living rooms, or in the app store. However, the challenge producers and other content creators now face is to ensure that online exhibitors and distributors continue to support the creation and presentation of Canadian programming.

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[19] *Carmilla The Movie* received funding support from the CMF but *Carmilla* (YouTube series) did not.
[20] It has recently been announced that *Letterkenny* is now available for international markets: Taylor, Kate. "Is the world ready for Letterkenny?" *The Globe and Mail*. October 27, 2017. https://www.theglobeandmail.com/arts/television/is-the-world-ready-for-letterkenny/article36750954/ (accessed November 26, 2017).

22. Our legislative and regulatory framework requires Canadian broadcasters, licensed VOD services, and BDUs to make meaningful contributions to Canadian programming. As the foundation of the Canadian broadcasting system and the basis of many continuing business models, ensuring the stability of the current system and maintaining system supports for Canadian programming are critical. It is thus imperative that the existing contribution framework is maintained as Canada's broadcasting system evolves with the growth in online television consumption.

Q2. Content is generally monetized through advertising, subscription and/or transaction revenues. How are new business models shaping the evolution of these revenue sources?

Response:

The Value Associated with New Revenue Sources Increasingly Sits with Exhibitors and Distributors

23. The proliferation of online content delivery and the shift towards new business models means that both today and in the future content is (and will be) monetized in many different ways: through advertising, sponsorship, subscription, and transactions. As evidenced by the examples given above, assessing and taking advantage of new and varied business models and new avenues for content exploitation and monetization is the core of what producers do.

24. Today's broadcasting system is made up of three pillars: i) the producers and creators of content; ii) the platform and broadcaster exhibitors of the content[21]; and iii) the distributors that deliver the content to audiences.[22] Producers and creators of content in the first pillar make the content and sell, or otherwise make it available, to exhibitors in the second pillar

[21] Exhibitors used to consist of broadcast television services but now also include Netflix, CraveTV, Sportsnet NOW, and the Treehouse app.
[22] Distributors used to be limited to BDUs such as Rogers Cable and Bell ExpressVu, but now also include ISPs and WSPs such as Rogers Ignite, Freedom Mobile, and TELUS.

such as broadcasters or internet television services, which is then delivered to Canadian audiences via BDU, ISP, or WSP. Each of these three pillars is distinct and necessary in the current Canadian broadcasting system, but, particularly for exhibitors and distributors, are being morphed and merged on the internet. Underpinning all of these pillars is – and should continue to be – Canada's contribution framework.

25. The stark reality of the digital marketplace is that it is returning scant revenues to producers and creators. The rise of digital technology and the relative growth of ancillary revenues have done little to return fair and equitable remuneration back to producers and creators. Virtually all the value derived from advertising, subscription and transaction revenues (being the profits generated from the exploitation of the content) sits with the distributor and exhibitor pillars.

26. One of the reasons for this value gap is that producers are increasingly being forced to act like "production contractors operating in a service industry… unable [to exploit] their content and intellectual property."[23] Because of their heft and relative negotiating power, exhibitors are able to take the vast majority of the intellectual property rights and equity in programs without appropriate revenue share back to the producers. As we know, money follows the IP. In order to maintain a robust Canadian independent production sector in which sustainable, well capitalized production companies are "capable of monetizing the exploitation of their content over a longer period, in partnership with broadcasting services that have incentives to invest in content promotion"[24] producers must have a meaningful retention of the intellectual property in the content they produce and an opportunity to participate equitably in the success of their shows. Indeed, to be truly "independent" and not merely an exhibitor's service company or an adjunct to an exhibitor's in-house production team, a producer must meaningfully own and control both its production company and the content it creates, and must meaningfully share in the economic benefits of its efforts.

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[23] Broadcasting Regulatory Policy CRTC 2015-86, para. 119.
[24] Ibid.

27. New monetization streams have not only shifted the value associated with the exploitation of content too heavily towards the exhibition and distribution pillars, but have also shifted the value within the distribution pillar from BDUs to ISPs and WSPs as a result of declining BDU subscriptions in favour of viewing on the internet and mobile devices as viewers increasingly shave or cut the cord. Similarly, value within the exhibitor pillar has shifted from broadcasters to internet television. These shifts mean that there is less funding available within Canada's broadcasting system because the value now increasingly lies with entities that are not required to make contributions to Canadian programming.

Q3. Many new business models are global. How will the growth of a global content rights market affect business models?

Response:

Producers Must Have Worldwide Exploitation Rights to Compete in a Global Content Rights Market

28. The power imbalance and resulting value gap between producers and creators, on the one hand, and exhibitors and distributors on the other, is amplified by the growing influence of foreign exhibitors on the Canadian broadcasting system. There is no doubt that a relatively small but significant global content rights market has emerged with the growth of internet television services. Global business models are certainly positive: they provide new audiences, new distribution channels and, often, increased investment in the financing of content; but they do require all players in the ecosystem to rethink traditional business models, sales channels, and markets.

29. As the key creators of Canadian content, independent producers are nimble entrepreneurs who readily embrace new business models. As described above, independent producers now develop, produce, and distribute their content with both the domestic and international

markets in mind from the beginning of a project.[25] As such, they are well-placed to conquer the global market.

30. However, with the globalization of content comes the growth and influence of international players who have an increasing dominance in the Canadian market. That dominance can translate into a "rights grab," where foreign exhibitors scoop virtually all of the intellectual property and global distribution and exploitation rights associated with a given project without leaving any meaningful equity or revenue share with producers. When global players play in Canada, they play to win. When global players "invest" in Canada, they pay fees for services (which keep our crews busy) but take virtually all of the intellectual property value with them, meaning that virtually all of the value of the intellectual property leaves the country.

31. Building true partnerships, in which creators and producers, exhibitors, and distributors share in the successful monetization and exploitation of the content, whether broadcast or online, foreign or domestic, is essential for the success of the Canadian production industry and in turn, the Canadian broadcasting system. The health of each of the pillars will ensure a healthy domestic market; a market that continues to produce great content for Canadians.

Q4. Given Canadians' ever-increasing demand for data to stream audio and video content on fixed and mobile broadband networks, how will these networks keep pace with future capacity requirements, particularly in rural and remote areas?

Response:

Given the Increasing Demand for Online Video Content, Networks Must Keep Pace

32. It is clear that Canadians' data consumption continues to grow exponentially: it increased by 23.4% on home internet connection and 24.9% on mobile phones from 2015 to 2016.[26]

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[25] Please refer to the case studies provided in response to Question #1 for prime examples of success stories of independent producers in domestic and international markets.

While we leave the question as to how Canada's networks will keep pace with future capacity requirements to the Commission and those networks, the CMPA agrees that Canada must keep pace with capacity requirements to stream audio and video content on fixed and mobile broadband networks.

How and through whom Canadians will access programming

Q5. Canadians currently enjoy audio and video content through a combination of traditional broadcast and Internet-based services. How will consumer behaviour evolve in the next five years? What factors will influence this evolution?

Q6. From whom will Canadians access programming in the future? For instance, will Canadians look to traditional or online providers? Global or domestic providers? Content aggregators or multiple distributors?

Response:

Canadians Still Watch Broadcast Television and BDU Penetration Remains High, but is Declining

33. Canadians currently enjoy television services over-the-air, through BDUs and using internet television services. While viewer behaviour is changing, it is clear that Canadians still watch a significant amount of content on broadcast television. The penetration rate for BDU services remains high in Canada: in 2016, 76.2% of Canadian households still subscribed to a BDU[27] and Canadians still watch an average of 28.2 hours per week of broadcast television.[28] As such, reports of the imminent death of BDUs and broadcasters are greatly exaggerated.

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[26] 2017 CMR, p. 31.
[27] 2017 CMR, Table 4.3.6 Percentage of households subscribing to BDUs.
[28] 2017 CMR, Figure 4.2.16 Average number of hours Canadians watched traditional television (2011-2012 through 2015-2016 broadcast years) and Internet television (2010 to 2016).

34. Despite high BDU penetration in the Canadian market, the number of households that subscribe to a BDU is in decline: 6.6% fewer Canadian households have a BDU subscription as compared to five years ago.[29] While the total revenues of the BDU sector only began declining in 2014, by 2016 they had decreased by 2.2%. While still modest at this time, the downward trajectory of the BDU sector is likely to continue as more Canadian audiences cut and shave the cord and potentially accelerate as generations of "cord-nevers," who have never had a BDU subscription, take the place of those generations who have.[30]

35. In response to these modest declines and competition from internet television services, Canadian BDUs are shifting their focus towards IPTV[31] and broadcasters are offering their own online and mobile channels, like CraveTV and Sportsnet NOW.

36. Even with these competitive responses, there is no denying the ubiquity of internet television services in the Canadian broadcasting system. It is reported that 62% of Canadians spend at least one hour per day watching television/movies online.[32] Estimated revenues for internet-based video services in Canada reached almost $2 billion in 2016, an increase of 17.8% from 2015.[33] SVOD services available in Canada (including Netflix,

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[29] 2017 CMR, Table 4.3.6 Percentage of households subscribing to BDUs. Calculated as follows: 82.8% in 2012 to 76.2% in 2016 = -6.6% percentage decline.

[30] Canada's Internet Factbook 2017 reports a further decline in the number of BDU subscriptions for the current year: Only 68% of Canadians reported that their households subscribed to BDU services in 2017. Of non-subscribers, 15% cancelled their subscriptions in the past year and 57% say the availability of video content online was a factor in their decision not to subscribe to BDU services. Canada's Internet Factbook 2017, cira.ca. https://cira.ca/factbook/canadas-internet-factbook-2017 (accessed November 26, 2017).

[31] There are a variety of reasons that the BDU sector sees IPTV as the future of television. The IPTV infrastructure offers operational efficiencies to vertically-integrated companies as IPTV is distributed via the internet as opposed to cable or satellite. Most vertically-integrated companies offer consumers both BDU and broadband services so it makes little long-term economic sense for these companies to maintain two distribution infrastructures that provide the exact same offering to consumers.

[32] Canada's Internet Factbook 2017, cira.ca. https://cira.ca/factbook/Canadians-online-behaviour/music-movies-and-tv-online (accessed November 26, 2017).

[33] 2017 CMR, Table 4.2.5 Estimated revenues of Internet-based video services in Canada by type of service ($ millions).

CraveTV, and Club Illico) accounted for half of this revenue, which saw an increase of nearly five-fold from 2012 to an estimated $1 billion in 2016.[34]

The Digital Shift is an Evolution, but Digital Services are Having a Substitutive Effect

37. The digital shift is an evolution and not a sudden flip of a switch. Although more and more Canadians are moving to new platforms, the shift is an ongoing process of trial and error. Some new business models will succeed and some will fail. New platforms will emerge and may quickly dominate, even though they are only a tiny speck on the horizon today. Based on all of the above, Canadian audiences will continue to migrate from cable and DTH to IPTV and from BDUs more generally to internet television services. Internet television will continue to grow in popularity but as most Canadians choose to subscribe to both online services and BDUs for the near future, BDUs can be expected to still have significant penetration in the Canadian market.

38. However, these data demonstrate that internet television services are already having a substitutive effect on the BDU and broadcast television markets. Internet television services can no longer be viewed as complementary to the system; but are instead, increasingly determining how Canadian audiences access and view content. They are a critical element of Canada's broadcasting system.

Provided the Right Framework is in Place, Canadians will Access Content from all Exhibitors and Distributors

39. As long as the right legislative and regulatory framework is in place to ensure a healthy domestic market, Canadians will continue to access content from all sorts of exhibitors and distributors.

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[34] 2017 CMR, Table 4.2.5 Estimated revenues of Internet-based video services in Canada by type of service ($ millions).

40. The growing influence of online exhibitors and distributors on the Canadian broadcasting system and contribution framework needs to be addressed. New policies cannot disadvantage production companies that have found a way to succeed in the current environment, as this would needlessly put at risk the vibrant domestic industry that we have collectively built over the last 50 years. Retrofitting the contribution framework means retaining place of pride for BDUs and broadcast television, which continue to overwhelmingly deliver the financing for professionally produced content. At the same time, the growing influence of online exhibitors and distributors on the Canadian broadcasting system and contribution framework needs to be addressed.

<u>**Ensuring a vibrant domestic market capable of supporting the continued creation, production and distribution of Canadian programming**</u>

Q7. What are the characteristics of a vibrant domestic content creation and distribution market?

Response:

All Three Pillars of Canada's Broadcasting System Must be Strong

41. A vibrant domestic content creation and distribution market requires that all three pillars of the Canadian broadcasting system – producers and creators, exhibitors, and distributors – be healthy and strong. It is a virtuous cycle of production exhibition and distribution that helps ensure that all elements of the Canadian broadcasting system contribute to the creation of compelling content for Canadian and international audiences.

42. A strong independent production sector is particularly necessary to do effective and fair business both with a consolidated broadcasting industry in Canada and with powerful global players. As noted by the Commission regarding the production sector generally,

> The Canadian production sector plays an essential role in the ultimate success of the future television system. A robust Canadian production sector will be

> better able to offer compelling high-quality content to Canadians and to global audiences. The creation and promotion of Canadian programs must be supported by appropriate funding models and tools.[35]

43. Independent production companies need to be well capitalized and able to exploit and monetize their content in partnership with both domestic broadcasters and foreign internet television services. To do so, Canadian independent producers must retain meaningful ownership of the intellectual property in their content and be able to exploit that content in Canada and abroad. Being able to build off of the success of a show, and re-invest those revenues and equity into the next one, will help ensure a vibrant domestic content creation market.

44. As noted in the Creative Canada Policy Framework, a strong public broadcaster is also a hallmark of a vibrant domestic content creation market:

> Public broadcasting continues to be an essential part of our cultural ecosystem, broadcasting news and information to local communities and championing great Canadian entertainment and public interest programming. It connects every region of the country, and many communities rely on the news and local content provided on radio, television and online, and in both official languages. In a digital world, public broadcasting remains critically important. It connects Canadians to each other, and to diverse Canadian perspectives on culture and current affairs in Canada and abroad.[36]

45. The issues surrounding how best to position the CBC going forward to help reflect Canadian identities, promote sound democracy, and ensure it is a source of creativity and ingenuity for the creative sector are complex, but as our national public broadcaster, it is important that the CBC commission content that speaks directly to – and for certain shows and subject matter, perhaps solely to – Canadian audiences.

[35] BRP 2015-86, introductory section A.

[36] Creative Canada Policy Framework, s. 3.1.

A Vibrant Domestic Market Requires Diversity

46. A healthy domestic industry will reflect a diversity of voices.[37] This means diversity in both the types of content available to Canadians and diversity in the size, shape, and structure of those who make it. Independent producers ensure that Canadian programming represents all of our citizens, not just those with the loudest voices or the biggest bank accounts. In today's highly concentrated broadcasting system, where most television programming decisions are made by a limited number of people in a few very big companies centralized in one city, independent producers ensure that there is real variety and diversity on our screens. That is why independent production companies of all sizes, in different genres and formats, from different perspectives and regions across Canada play such a critical role in the health of our domestic content creation market.

47. A healthy domestic market reflects a range of independent production companies of various sizes, from small- and medium-sized enterprises to large, publicly traded production companies, in all regions, with various business models. In fact, it is those small "mom and pop" companies that grow into publicly traded companies. The consolidation of Canadian broadcasters has also led to some consolidation of independent production companies in the hopes of providing the necessary scale to negotiate with those powerful broadcasters. However, even Canada's largest multi-national production companies, such as Entertainment One, Boat Rocker Media, and 9 Story Media Group, can be traced back to one or two-person operations in their beginnings. It is important to maintain a diverse spectrum of companies now and into the future as it is this diversity that makes the Canadian broadcasting system unique in the world, and is also a fundamental element of our national identity and international reputation.

48. While it is important to create high-quality Canadian programming with global audiences in mind, it is also critically important to ensure that more vulnerable, niche Canadian markets are served as well. These might include educational curriculum-based programming such as

[37] Broadcasting Public Notice CRTC 2008-4, para. 18.

MathXplosion[38] or *Hi Opie!*[39] or Canada-specific programs such as *Keeping Canada Alive,*[40] *Emergency Room: Life and Death at VGH*,[41] or *Having Our Baby; The Surrogacy Boom.*[42] Indeed, not all programming must travel: some Canadian programming may primarily be intended for domestic audiences. A successful domestic industry allows for the production of this domestic content, and protects and promotes it in support of the objectives of Canada's broadcasting policy.

49. Independently produced non-PNI programming (such as *Love It or List It* and *Canada's Smartest Person*) is also an important part of a vibrant domestic market. Not all independent producers focus on dramas or documentaries; instead, many have built their businesses producing other types of programming that speaks to Canadians and adds diversity to the system – both in the content created and the people who make it. Therefore, like support for PNI, support for independently produced non-PNI programming is important to help build a healthy domestic market, a robust Canadian production sector, and sustainable, better capitalized production companies which can succeed domestically and internationally and continue to employ Canadians and invest in infrastructure across the country.

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[38] *MathXplosion* is a multi-award-winning webisode series produced by GAPC Entertainment, in association with Canadian broadcasters, TFO, TVOKids, and funded by the CMF, Bell Fund, and Shaw Rocket Fund. In each exciting, entertaining, and funny math-short, "mathemagician" Eric shares secrets from the not-so-hidden world of math. Guided by Ontario's elementary mathematics curriculum, these fun math-shorts will give children aged 6 to 8 and beyond, the tools to thrill family and amaze friends.
[39] With its combination of candid, improvised moments by real kindergarten children, character-driven story lines, magical puppetry, and significant curriculum goals, *Hi Opie!* (marblemedia) tells stories that spring from the play-based, child-directed learning experience and gives children tools to handle emotional challenges in kindergarten. Children can extend their play and learning with Opie through online and mobile games.
[40] *Keeping Canada Alive* (Force Four Entertainment) is an intimate six-part factual series and online experience that gives viewers a powerful 24-hour snapshot of Canada's health care system. Sixty camera crews filmed at over forty healthcare facilities and private residences in twenty Canadian cities across ten provinces and one territory. The companion online experience features almost forty hours of extended breakout footage, original content, and more, as well as an online 24-hour stream of raw footage.
[41] *Emergency Room: Life and Death at VGH* (Lark Productions) is a documentary television program series which follows doctors and nurses at Vancouver General Hospital as they navigate a day of work.
[42] *Having our Baby; The Surrogacy Boom* (Soapbox Productions) follows two childless couples and their surrogates as they navigate the legal and ethical challenges of surrogacy in Canada.

A Vibrant Domestic Market Requires High-quality Content

50. A vibrant domestic industry will also continue to produce high-quality Canadian content; content that is appealing to both Canadian and foreign audiences. The CMF is a critical source of funding for high-quality independent Canadian productions, and as such, maintaining support to the CMF as BDU revenues decline and are replaced with the shift to ISP and WSP delivery of content is critical to a healthy domestic market. The case studies examples highlighted above demonstrate the track record of the compelling, high-quality content being produced by Canada's independent producers through the support of the current contribution framework.

A Vibrant Domestic Market Requires that Those Who Benefit from the Canadian System must Contribute to it

51. Finally, those services that benefit from operating in Canada, must contribute to the objectives of the Act. A guiding principle of Canadian communications policy is that those who benefit from participating in the Canadian system must also contribute to it by supporting the creation and presentation of Canadian content. Canada has successfully adapted this principle in the past to keep up with changes in technology and consumer behaviour, and given the digital shift currently underway, it should be updated again now.

52. Internet television services, ISPs, and WSPs are now significant players in our broadcasting system. They provide great services and generate substantial revenues from Canadians who are increasingly using these platforms to access the professionally produced video content they want to watch. These services are no longer complementary to the Canadian broadcasting system, but increasingly are substitutions for BDUs and broadcasters.

53. These internet and wireless services are now having a negative impact on the Canadian broadcasting system's ability to meet the objectives of the Act. The addition of new services means that consumers have new choices. These new choices are shifting the market and thereby diverting revenues away from BDUs and broadcasters to internet television services the market. By doing so, the market is now also shifting money away from supporting the creation and presentation of Canadian content. A modern, forward-looking regime must

bring these important players into the contribution fold to ensure a vibrant domestic market capable of supporting the creation and presentation of Canadian content.

Q8. Will new business models support a vibrant domestic content and distribution market? If so, which ones and why? If not, what content or distribution services would be missing?

Response:

New Business Models will not Support a Vibrant Domestic Content Market without Regulation

54. Canada's domestic content and distribution market has developed under a strong legislative and regulatory framework that ensures contribution to Canadian content and support of Canadian producers and creators. This framework ought to be maintained.

55. Changing business models are obviously having a significant influence on the success of the domestic market. As noted above, total revenues from the BDU sector have shown recent modest declines and the sector is therefore already experiencing a decrease in the overall level of financing for Canadian content. On March 31, 2017, the CMF announced a program decrease of 5.8% (totalling $21.5 million) as a result of expected declines in contributions from BDUs in 2017-18.[43] Simply put, the move away from BDUs and Canadian programming services to online services has caused there to be less private funding available to Canadian programming. As noted in the Creative Canada Policy Framework, "With Canadians increasingly watching content online, contributions from the broadcasting sector to the CMF have started to decrease in step with their declining revenues."[44] Recognizing the critical role of our contribution framework, and in particular the importance of the CMF to the production of Canadian programming, the Department of Canadian Heritage recently

[43] CMF Announces 2017-2018 program budget, guidelines and deadlines, 2017. https://cmf-fmc.ca/en-ca/news-events/news/march-2017/cmf-announces-2017-2018-program-budget,-guidelines (accessed November 26, 2017).
[44] Creative Canada, s. 1.2.

announced it will increase the federal contribution to the CMF in order to maintain its level of funding in the face of BDU revenue declines.[45]

56. While the Department of Canadian Heritage will increase its contribution to the CMF in 2018, Minister Joly stated that this action is intended to be a temporary solution until we “develop a model that will be viable for the CMF over the long term.”[46] If the right regulatory framework is not in place to deal with BDU revenue declines in the future then there will be a contraction within Canada’s production sector. That would result in a significant loss of high-quality jobs in every corner of Canada, reduced volumes of Canadian content produced annually,[47] less diversity in content presented to Canadian viewers, and several steps back for Canada’s brand on the world stage.

57. Canada’s contribution framework can be modernized while adhering to three main principles: i) it should provide a level of funding to Canadian programming that is at a minimum equal to the historical level of financing provided by the existing regime, and can continue to be determined as a percentage of gross revenues; ii) it need not generally result in an increased cost to the large, integrated communications companies operating in Canada, and can be mindful of very small companies’ financial capacity to support Canadian programming; and iii) it should not generally result in increased costs for Canadian consumers.

58. In addition to the impact of declining BDU contributions, the fact that internet television services are not currently required to invest in PNI means that this category of Canadian content will likely be missing or underrepresented if the contribution framework is not modernized.

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[45] Minister Melanie Joly, “Launch of Creative Canada” (speech, Ottawa, Ontario, September 28, 2017), https://www.canada.ca/en/canadian-heritage/news/2017/09/creative_canada_-avisionforcanadascreativeindustries.html (accessed November 26, 2017).
[46] Ibid.
[47] Nordicity and Peter Miller, “Canadian Television 2020: Technological and Regulatory Impacts,” 2015. http://www.actra.ca/wp-content/uploads/Nordicity-Miller-Lets-Talk-TV-economic-impact-forecast.pdf?utm_medium=newsrelease&utm_source=actra.ca&utm_campaign=nordicityltt (accessed November 26, 2017).

59. Requiring expenditures on PNI is one of the key ways that the Commission fulfils the objectives of Canada's broadcasting policy. This underrepresented programming consists of scripted drama and comedy, long-form documentary and specific Canadian award shows that celebrate Canadian creative talent;[48] "programs that are expensive and difficult to produce, yet are central vehicles for communicating Canadian stories and values."[49] The Commission has recognized the importance of PNI to a healthy domestic market and noted that Canadians held this view as well, finding that:

> The Commission is maintaining the existing expenditure requirements on programs deemed to be of national interest. The Commission considers that Canadians must have access to certain types of programs that make an important contribution to the broadcasting system. This view was shared by many Canadians who provided comments during the Let's Talk TV proceeding.[50]

60. Independent production requirements in Canadian programming are important to Canada's broadcasting policy for a number of reasons. First, the Canadian broadcasting system must serve the interests of all Canadians and their need to express themselves, in order to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[51] The system must also encourage Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas and values, by displaying Canadian talent and by offering a Canadian point of view.[52]

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[48] Broadcasting Regulatory Policy CRTC 2010-167, para. 72.

[49] Ibid., para. 71.

[50] BRP 2015-86, introductory section C. The Commission reiterated its commitment to maintaining PNI expenditures as recently as May 2017, stating: "In Broadcasting Regulatory Policy 2015-86, the Commission determined that PNI expenditure requirements continue to be an appropriate tool for ensuring that Canadians have access to the maximum number of programs from program categories that are of national interest and that require regulatory support". Broadcasting Decision CRTC 2017-148, para. 34.

[51] Broadcasting Act, s. 3(1)(d)(i).

[52] Ibid., s. 3(1)(d)(ii).

61. In order to do so, the Canadian broadcasting system seeks to reflect a diversity of expression, voices, culture, and range of opinions articulated by contributors that are independent of those who control the exhibition of the programming: in this case, the Broadcasters. As noted by Peter S. Grant and Chris Wood in their book *Blockbusters and Trade Wars*,

> The television and film universe falls into two very broad parts: making shows and showing shows. The most direct way competition policy can secure a diversity of expression is to keep the two apart. Policies that limit the extent to which exhibitors of cultural products may own the production houses that supply films or television programs also prevent those exhibitors from favouring their own products and discriminating against others.[53]

62. Given the consolidation of broadcasters in Canada, there is a real risk for ownership concentration to reduce the programming options and the number of distinct creative and editorial voices available to Canadians.

63. The independent production sector is uniquely positioned to provide the widest possible diversity of programming to the Canadian broadcasting system, including programs that reflect each of Canada's distinct regions. Independent production companies, primarily small- and medium-sized businesses, are located across the country, and infuse the projects they produce with the distinctive voice that is unique to their part of Canada. This is in contrast to Canada's large broadcasters, where programming decision-making is centralized in Toronto.

64. In order to ensure that Canadian audiences receive content from different sources and voices, the broadcasting system, which now includes ISPs, WSPs, and online video services, must include a significant contribution from companies that are truly independent from the exhibitors and distributors. Without appropriate regulatory measures, and the proper implementation and enforcement of those measures, the Canadian broadcasting system

[53] Peter S. Grant and Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World*, (Vancouver: Douglas & McIntyre, 2004), p. 275.

risks representing too few concentrated voices, both in terms of the amount of programming available to Canadians and in terms of ownership and control of the programs themselves.

65. The Commission recognized the critical role of PNI and independent production expenditure requirements in achieving the objectives of the Act in the Create Policy:

> The objectives set out in the Act declare that the programming provided by the Canadian broadcasting system should be varied, comprehensive and encourage the development of Canadian expression by providing programming that reflects Canadian values and attitudes. The objectives also declare that the programming should include a significant contribution from the Canadian independent production sector. To ensure the fulfilment of these objectives, the Commission has encouraged the production of certain types of programs – drama, long-form documentary, music/variety and award shows – generally through expenditure requirements. These are called programs of national interest (PNI).[54]

66. There are good policy reasons to require the production of content that might not otherwise be available to Canadians, including when the widespread availability of such content is necessary to the achievement of the objectives of the Act. If we allow a free market (and thus only dominant players) to decide what Canadians get to watch, certain types of content will simply not be made available without regulatory support: content that is generally expensive to produce and therefore carries greater risk, content that is niche in its subject-matter, or content that otherwise has smaller audiences.[55]

67. PNI and independent expenditure requirements are equally important, if not more so, as viewers move online. Domestic PNI programming is particularly vulnerable to the increasing shift of Canadian audiences to foreign internet television services, such as Netflix, as these types of services flood our market with expensive dramatic (including children and youth) and documentary programming. Domestic dramas and documentaries that reflect Canadian

[54] BRP 2015-86, para. 276.
[55] Ibid., para. 296.

values, diversity, and culture face a real risk of drowning in this sea of content. As such, there is a risk that this important Canadian content will be missing from our market if the appropriate contribution framework is not in place.

68. It is no longer the case that these new business models are complementary to our domestic broadcasting system. As these new business models grow and infiltrate Canadian audiences, the contribution framework must adapt to deal with these new influences. New business models that have significant access to, and influence on, Canadian audiences must support Canada's broadcasting policy.

Q9. What are the legislative, public policy or regulatory measures currently in place that will facilitate or hinder a vibrant domestic market? What needs to stay in place? What needs to change?

Response:

The Current Broadcasting System that Requires Contribution, Expenditure, and Exhibition Requirements of BDUs and Broadcasters Helps to Facilitate a Vibrant Domestic Market and Ought to Remain in Place

69. As noted above, the CMPA expects that the BDU/broadcaster contribution model will still be viable for the foreseeable future as a significant majority of Canadians continue to access programming from BDUs (and specifically, IPTV services) and Canadian broadcasters in addition to online television service providers. Clearly, Canadians are shifting their viewing habits but broadcast television remains the foundation of our domestic market.[56] During the digital shift, it is critically important that the current system remains stable and that the

[56] Current measures designed to support, foster, and protect Canada's broadcasting policy include: contributions to the CMF by BDUs and licensed VOD providers and expenditure, exhibition, and PNI requirements for Canadian broadcasters, and conditions of licence designed to ensure that the system includes a significant contribution from the Canadian independent production sector.

contribution framework and regulatory instruments currently imposed by the Commission on BDUs and broadcasters to assist in the creation of Canadian content stay in place.

70. There is no reason for the Commission to reduce or eliminate these very useful regulatory instruments in the near to medium term. These regulatory measures foster great Canadian content by ensuring that Canadian television tells Canadian stories and supports Canadian creators. For all of these reasons, the policy measures implemented by the Commission to assist in the creation of Canadian content continue to be viable and must stay in place.

Review the Commission's Definition of "Independent Production Company"

71. That being said, there are some Commission practices currently in place that hinder a vibrant domestic market because they fail to implement the policy objectives they seek to achieve. In particular, the Commission's current definition of "independent production company" does not ensure that programs claimed by broadcasters as "independent" are truly independent in terms of ownership and control. Nor does the current definition help to ensure that independent producers retain a meaningful share of the intellectual property rights or profits associated with the content they produce.

72. The large English-language ownership groups of Rogers, Corus, and Bell and other broadcasters have conditions of licences that require them to spend a portion of their expenditures on independent production. The Commission enforces this obligation by requiring broadcasters to self-report that programs they claim under their independent production expenditure obligations meet the Commission's definition of "independent production company."[57] The CMPA has previously raised concerns that Corus, and possibly

[57] The Commission defines independently produced programs by reference to the definition it has established for "independent production company": An "independent production company" is a Canadian company that is carrying on business in Canada with a Canadian business address, that is owned and controlled by Canadians, whose business is the production of film, videotape or live programs for distribution and in which the licensee and any company related to the licensee owns or controls, directly

other broadcasters, were exploiting the current definition of "independent production company" to structure and claim projects that they effectively own and control (and which, hence, are not independent) for the purposes of meeting their conditions of licence. Corus, in particular, made it quite clear with its purchase of Shaw that it intended to take full advantage of its increased market power over independent producers by taking ownership and control of their programs.[58]

73. One of the ways that Corus has exerted this market power is by implementing its Producer-of-Record (POR) programs. In the typical POR model, Corus owns and controls the vast majority of all rights in the concept, concept materials and format underlying the program, even if originally pitched and substantially developed by an independent producer. This means that Corus alone will control whether and when additional episodes, sequels, or spinoffs of the program will be produced, and by whom. Also in this POR model, Corus acquires, in addition to Canadian broadcast rights, the vast majority of related worldwide distribution rights and related ancillary rights, such as merchandising, for the life of the program's copyright.[59]

74. In other words, in the case of Corus's POR programs, Corus not only owns and controls the underlying rights to an entire television franchise, but it also reaps substantially all of the economic benefit to each individual program that the independent producer may be engaged to produce.[60] This "own and control" strategy is consistent with the approach taken

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or indirectly, in aggregate, less than 30% of the equity." See for example, Broadcasting Decision CRTC 2011-444, Bell Media Inc. - Group-based licence renewals, Appendix 3 (Definitions).

[58] Corus Presentation, FISCAL 2016 FIRST QUARTER EARNING AND TRANSACTION CONFERENCE CALL, 13 January 2016, https://seekingalpha.com/article/3808496-corus-entertainment-cjref-ceo-doug-murphy-q1-2016-results-earnings-call-transcript (accessed November 26, 2017).

[59] See for example testimony of Gary Maavara, Executive VP and General Counsel, Corus, Transcript, Hearing December 1, 2016, online: http://crtc.gc.ca/eng/transcripts/2016/tb1201.htm, paras. 6347-6348.

[60] Ironically, Corus's adoption of its POR program and resulting appropriation of independent producers' rights and revenues in their own shows is precisely the outcome the Commission has said its policies were intended to prevent. In the Create Policy, for example, the Commission articulated its concern that, in their relationship with broadcasters, independent producers are effectively being required "to behave like production contractors operating in a service industry, i.e., only producing on behalf of licensed

by the vertically integrated US networks since the elimination of the Financial Interest and Syndication Rules (the so-called "fin-syn rules") by the Federal Communications Commission. The fin-syn rules, adopted in 1970, prohibited the "Big Three" broadcast networks (ABC, NBC, and CBS) from owning any of the programming they aired in prime time. The aim of the rules was to promote programming diversity by having prime time programming be exclusively supplied by independent producers. The FCC's elimination of the rules in 1993 sparked a wave of industry consolidation, and the progressive squeezing out of independent productions from the prime time schedules of the major networks. Commissioning decisions became increasingly tilted in favour of in-house studio production, and where independent productions were commissioned, the deal terms were overwhelmingly favourable to the network.[61]

75. Corus's POR program is contrary to the Commission's policy objectives in establishing independent production requirements and deviates from industry norms. Plainly, this was never the intention of the Commission nor does this uphold the requirement in the Act that Canadian programming have a "significant contribution" by the independent production sector.

76. To this end, the CMPA submits that the Commission ought to review and replace the current definition of "independent production company" with the following definition in order to ensure that the programs commissioned and claimed as meeting the Broadcasters' independent production expenditure obligations are in fact, independently produced:

> For the purpose of this condition of licence, "programs produced by independent production companies" means programs produced by a Canadian company carrying on business in Canada with a Canadian business address,

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broadcasting services but [incapable] of exploiting their content and intellectual property." (BRP 2015-86, para. 119.)

[61] Mara Einstein, "The Financial Interest and Syndication Rules and Changes in Program Diversity." *The Journal of Media Economics*, 17. no. 1 (2004): 1-18. Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming*. Chicago: University of Chicago, (2007). Commissioned by the FCC. William M. Kunz, "Prime-Time Television Program Ownership in a Post-Fin/Syn World." *Journal of Broadcasting & Electronic Media 53.* no.4 (2009): 636-651.

owned and controlled by Canadians, whose business is the production of film, videotape or live programs for distribution and in which the licensee and any company related to the licensee owns or controls, directly or indirectly, in aggregate, none of the equity, and in respect of which the licensee and any related entities is not identified as the producer in the program's credits and does not own or control, directly or indirectly, and cannot exploit or acquire to its benefit any of the following:

- The copyright in the program;
- Any rights upon which the program is based (the underlying rights);
- Any non-Canadian distribution or licence rights to the program, or to any products or projects ancillary or derivative to the program;
- A share of net profits, or revenue share (unless derived from the exploitation of the program, or any products or projects ancillary or derivative to the program), and provided that such share does not exceed, on a percentage basis, the licensee's (including any affiliated or related entities) cash contribution that is over and above the licensee's (including any affiliated or related entities) fair market value cash licence fee contribution to the financing of the program's budget; and
- An equity share in the program, or in any products or projects ancillary or derivative to the program, unless such share does not exceed, on a percentage basis, the licensee's (including any affiliated or related entities) cash contribution that is over and above the licensee's (including any affiliated or related entities) fair market value cash licence fee contribution to the financing of the program's budget.

77. A lack of independence would undermine the quantity, quality, and diversity of programming available in the market and reduce consumer choice. It would also negatively impact on employment in the sector, and particularly in the regions; indeed, smaller, regional production companies (and those working for them) could be the hardest hit if they are unable to reinvest in their companies due to a loss of their independence. For the success of the domestic industry, all pillars must be strong. Independent producers must be able to equitably participate in the success of their shows in order to build and sustain successful companies. Canadian broadcasters either have no experience in this area, or, like Corus Entertainment and Blue Ant Media, have required producers to give up distribution rights in order to obtain a broadcast licence fee, with only nominal distribution revenues

from programs ultimately flowing to the producer. Independent producers are often in the best position to determine what export partner (be it the producer's own content export arm, any other Canadian international content exporter, or sales agent) is best suited to sell a program internationally, what partner may bring additional financing to a program, and what international viewpoint or experience will help the producer attract an audience outside of Canada. This proposed definition therefore helps to address the current issue in POR and other broadcasters' deals regarding lack of intellectual property retention, and thus independence, in the Canadian system, and also helps ensure that those who are best placed to exploit and promote a program internationally are able to do so.

Review the Digital Media Exemption Order and the Video-on-Demand Exemption Order

78. Internet television services can no longer be considered complementary to Canada's broadcasting system. They are critical elements of the broadcasting system and must be recognized as such through a review of the Commission's DMEO and the VOD Exemption Order.

79. The Commission first issued a report on "new media" in BPN CRTC 1999-84 and Telecom PN CRTC 99-14, concluding that new media would only have a limited effect on television audience size until such time as high-quality video programming can be distributed on the internet. The New Media Exemption Order (NMEO) issued in PN 1999-197 clarified this with respect to internet retransmission in BPN 2003-2 and expanded to include broadcasting services received by way of mobile devices in BPN 2007-13. The Commission reviewed the NMEO in BPN 2008-44 and issued in BRP CRTC 2009-329 on June 4, 2009. The policy found that new media broadcasting did not pose a threat to licensees' ability to meet their obligations.

80. In October 2011, the Commission released its results of a fact-finding exercise on over-the-top (OTT) programming services.[62] The report concluded that "the evidence does not

[62] Broadcasting and Telecom Notice of Consultation CRTC 2011-344.

demonstrate that the presence of OTT providers in Canada and greater consumption of OTT content is having a negative impact on the ability of the system to achieve the policy objectives of the Act or that there are structural impediments to a competitive response by licensed undertakings to the activities of OTT providers." The report also stated: "Given the fast pace of change in this environment, the Commission intends to maintain a watching brief on OTT, and conduct financial data collection and another fact-finding exercise in May 2012 to determine if the scenarios put forth by parties with respect to potential regulatory impacts and opportunities have materialized."

81. The NMEO was renamed the Digital Media Exemption Order in 2012. Since that time the Commission has not re-examined its conclusion that OTT services are not having a negative impact on the Canadian broadcasting system's ability to meet the objectives of Canada's broadcasting policy. For instance, the Commission reaffirmed its determination in the Create Policy that it is not necessary to license internet television services to achieve the objectives of the Act and so determined there was no reason to review the DMEO pursuant to the Let's Talk TV policy decisions on the future of Canadian television.

82. The Commission also introduced the hybrid VOD service category in the Create Policy with the intention of allowing Canadian companies to compete on a more equitable regulatory footing with foreign internet television services. Similar to a licensed VOD service, a hybrid VOD may be offered over the closed network of a BDU to its customers, and similar to an internet television service operating under the DMEO, it is not required to make contributions to Canadian programming and may offer exclusive programming as long as the hybrid VOD service is also available over the internet to all Canadians without authentication to a BDU subscription. At the time, the Commission determined that the creation of this new VOD category would not undermine the objectives of the Act because the licensing of these services would not result in a material contribution to Canada's broadcasting policy.[63] Over time, both CraveTV and shomi became available to all Canadians without authentication to a BDU subscription.

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[63] In Broadcasting Regulatory Policy CRTC 2015-355 and Broadcasting Order CRTC 2015-356, the Commission revised the exemption order for certain classes of VOD undertakings and updated standard

83. There are currently three authorized methods to offer VOD services in Canada: (1) through a BDU-specific VOD service, (2) though an internet-based VOD service pursuant to the *DMEO*, and (3) through a hybrid VOD service. Only BDU-specific licensed VOD services are required to make contributions to Canadian programming.[64]

84. It can no longer be justified to exempt internet television services from contributing to Canadian programming. VOD services are no longer emerging technologies that need time to grow but are critical elements of the Canadian broadcasting system. As such, they must contribute to the objectives of the Act.

85. At the time the Create Policy was released and the exemption orders were last cursorily reviewed it was not yet apparent that BDU revenues were in decline: the Create Policy was released in 2015 and BDU revenues only started declining after 2014. However, based on the recent data it is now clear that BDU revenues are in fact declining and internet television services are having a substitutive, not complementary, impact on our system. Now is the right time to properly revisit the DMEO and VOD Exemption Order so that the proper regulatory measures can be determined and put in place before the decline becomes too great for the Canadian broadcasting system to bear.

86. The conclusions from the Commission's various reviews that concluded that OTTs ought to be exempt from licensing would be different today: (a) internet television services are competing directly with broadcasters and BDUs and are clearly having a significant impact on broadcast television; (b) high quality video programming is now being distributed on the internet; and (c) internet television services do pose a real competitive threat to broadcast television and BDUs. Internet television services are thus having a negative impact on the ability of the broadcasting system to achieve the policy objectives of the Act. Consequently, licensing of internet television services today would result in a material contribution to Canada's broadcasting policy.

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conditions of licence for licensed VOD undertakings to exempt hybrid VOD services from holding a broadcasting licence.

[64] BDU-specific VOD services operated by BDUs serving fewer than 20,000 subscribers are exempt from holding a licence.

87. Finally, allowing non-contributing internet television services to compete with licensed or contributing Canadian broadcasting services is both unfair and harmful to those contributing services. Over time, there will be reduced support for the production and delivery of Canadian programs and fewer rather than greater opportunities for Canadian and global audiences to experience the best programming that Canada has to offer.

88. Since the conclusions of the previous reviews are no longer correct, it is time to conduct a fresh review of the DMEO and the VOD Exemption Order to modernize the Canadian broadcasting system and determine how current categories of exempt internet television services should contribute to Canada's broadcasting policy. Of course, good decision-making and good public policy requires good data. A proceeding to review the DMEO and VOD Exemption Order will give participants the opportunity to provide the Commission with empirical evidence in support of their submissions.

Solidify the Commission's Information Gathering Powers

89. Speaking of good data, the Commission already has information gathering powers over internet television services[65] and clearly, the Commission recognizes the importance of monitoring internet television services. For the first time, revenue estimates for internet

[65] As an example, clause 4 of the DMEO requires the following from digital media undertakings: "The undertaking submits such information regarding the undertaking's activities in broadcasting in digital media, and such other information that is required by the Commission in order to monitor the development of broadcasting in digital media, at such time and in such form, as requested by the Commission from time to time." However, during the public hearing for the Let's Talk TV policy decisions, the Commission ordered Netflix to provide information in confidence about viewership and Canadian activity on its video-streaming site. Despite the requirements of the DMEO that this undertaking must provide information to the Commission, Netflix refused to do so. In a September 22, 2014 letter to the Commission, Netflix stated that the Commission's orders "are not applicable to Netflix." Netflix stated that it provided some information "voluntarily" but was not acknowledging the jurisdiction of the Commission or Canadian laws. In response, the Commission stated "Netflix's intervention and supporting documentation will be removed from the public record of this proceeding." Letter from Commission to Netflix, dated September 29, 2014.

television services were included in the 2017 CMR. However, this data is limited to revenues. The number of subscribers, amount of expenditures on Canadian programming, and other information that the Commission tracks from licensed broadcasting undertakings is noticeably absent. As well, all of the revenue figures are estimates as none of the internet television services are submitting actual data to the Commission. The Commission must be given explicit information gathering or subpoena power to require information from internet television service providers to ensure the appropriate regulatory framework is in place. The Act should be amended to clearly allow the Commission to gather information from internet television service providers.

Give the Commission the Power to bring Internet and Wireless Service Providers under the Act

90. Given the increasing shift in television viewing from BDUs to the internet, it is clear that ISPs and WSPs are delivering video programming to Canadians. While there is a multitude of new content forms and services available on these new platforms (e.g. Facebook, Instagram, and Twitter), traditional television programming continues to be at an all-time high in popular culture. Despite the erosion of the traditional broadcasting sector, the demand for television programming continues to grow across new platforms. This is the golden age of television and a time where there is nothing unusual about spending your weekend binge-watching the latest series on Netflix. The number of new platforms and the tendency to access content over internet- and wireless-based distribution systems will only increase over time and further accelerate the shift from BDUs to ISPs and WSPs.

91. The internet is truly a "network of networks" and while video is but one of the networks it provides, it is, by far, the dominant one. As previously stated, Canadian internet video

traffic accounted for 67% of all consumer internet traffic in 2016. In peak viewing times, Netflix's subscriber base alone amounts to 35.2% of broadband usage in North America.[66]

92. Recent analysis also concludes that the core networks of Canada's ISPs and BDUs are "virtually indistinguishable."[67] A 2017 report by Moody's Investors Services finds that the delivery infrastructure of internet and cable television services by Canada's large communications and media companies is so similar that the only differences appear in the "last-mile connections" where either coaxial cables or copper wires typically deliver service. In many newer neighbourhoods, however, fibre-to-the-premise connections have been built making the delivery networks identical. It is therefore anticipated that the technological capabilities supporting the various business lines of the dominant players are "likely to converge."[68] A similar report from Moody's in 2016, asserts "For customers, the historic network architecture distinctions are irrelevant; [internet protocol] technology has nearly converged the Canadian cable and telecommunications sectors into a unified broadband communications market."[69]

93. The top five communications and media companies in Canada (i.e. Bell, Quebecor, Rogers, TELUS, and Shaw) together account for approximately 83% of total revenues in the communications (i.e. broadcasting and telecommunications) industry.[70] As the Commission points out, this "market concentration plays a role in the rise of bundling, since the largest entities are well positioned to offer their customers discounts in exchange for subscribing to a range of services."[71]

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66 Sandvine, "2016 Global Internet Phenomena: Latin America & North America," p. 4. https://www.sandvine.com/downloads/general/global-internet-phenomena/2016/global-internet-phenomena-report-latin-america-and-north-america.pdf (accessed November 26, 2017).

67 Moody's Investor Services/Wolfe, B. (2017). *Broadband Communications – Canada: Unique Market Structure Guides Capital Spending for Broadband Providers.* Moody's Investor Services. March 17, 2017.

68 Ibid.

69 Moody's Investor Services/Wolfe, B. (2017). *Broadband Communications – Canada Cross-Platform Efforts Fuel Competition, but Also Risks More Market Concentration*. Moody's Investor Services. March 1, 2016. p. 5.

70 2017 CMR, p. 80.

71 Ibid.

94. As the distribution mechanism through which programs are delivered to Canadians, ISPs and WSPs clearly have a role to play in contributing to the Act's policy objectives. Online video consumption has reduced BDU revenues, while broadband ISP and WSP revenues are expected to increase. The 2017 CMR reports that Canadian household expenditures on internet services took the lead in terms of growth (9.6%), followed by expenditures on mobile wireless services (5.5%).[72] These increases reflect the observed trends in subscriptions to higher internet speeds and to mobile plans with more data – both of which are being driven by the increase in online video consumption. This shift in revenues from BDUs to ISPs and WSPs is having a negative impact on the ability of the current system to achieve the objectives of the Act.

95. According to the 2012 Supreme Court of Canada decision in *Reference re: Broadcasting Act*, ISPs are not subject to the Act and as a consequence, the Commission has no power under the Act to regulate, or otherwise require contribution from, ISPs or WSPs.[73] Accordingly, legislative change is required to make it clear that ISPs and WSPs are key elements of the Canadian broadcasting systems and that they have a role and responsibility in contributing to the Act's policy objectives. This could be done by either amending the *Broadcasting Act* or the *Telecommunications Act,* or both.

CONCLUSION

96. The evidence before the Commission shows modest declines in the BDU sector, shifting viewer behaviour from broadcast to online television services, and an increasing influence of online exhibitors and distributors on our broadcasting system. While Canada's broadcasting system will most likely remain viable for the next five years, now is the time to address those online exhibitors and distributors in our broadcasting system and modernize our contribution framework.

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[72] Ibid., p. 46.
[73] *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142.

97. Accordingly, the CMPA respectfully submits that the Commission must make the following determinations in its report responding to the OIC and initiate the following proceedings in order to modernize the Canadian broadcasting system for current and future programming distribution models:

- Determine that the current broadcasting system that requires contribution, expenditure, and exhibition requirements of BDUs and broadcasters helps to facilitate a vibrant domestic market and ought to remain in place;
- Review the Commission's definition of "independent production company" to truly ensure the independence of these companies;
- Initiate a proceeding to review the DMEO and the VOD Exemption Order;
- Determine that the Commission's information gathering powers with respect to internet television services should be clarified to allow for better data collection; and
- Determine that ISPs and WSPs are key elements of Canada's broadcasting system, that they have a role to play in contributing to the Act's objectives, and that the Commission should be given the power to require them to contribute to Canada's broadcasting policy.

98. In order to support a vibrant domestic market and usher the Canadian broadcasting system into the online era, it is necessary to implement all of these proposals.

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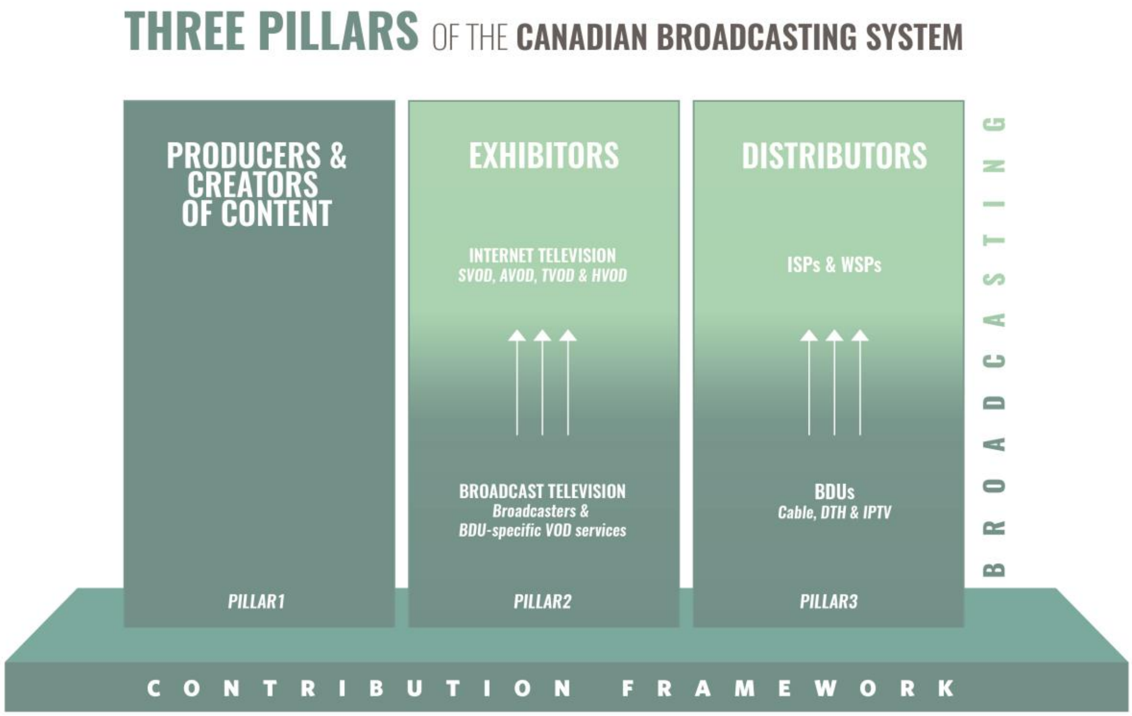
THREE PILLARS OF THE CANADIAN BROADCASTING SYSTEM
PRODUCERS & CREATORS OF CONTENT
PILLAR1
EXHIBITORS
INTERNET TELEVISION
SVOD, AVOD, TVOD & HVOD
BROADCAST TELEVISION
Broadcasters &
BDU-specific VOD services
PILLAR2
DISTRIBUTORS
ISPs & WSPs
BDUs
Cable, DTH & IPTV
PILLAR3
BROADCASTING
CONTRIBUTION FRAMEWORK

Appendix A