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

Dear Panel Chair and Panel Members:

Re: Responding to the New Environment
Review of the Communications Legislative Framework

1. DHX Media Ltd. ("DHX") is pleased to file this submission regarding the review of Canadian Communications Framework.

Introduction

2. DHX is a global children's content and brands company headquartered in Canada. Recognized for high-profile properties such as *Peanuts*, *Teletubbies*, *Strawberry Shortcake*, *Caillou*, *Inspector Gadget*, and the *Degrassi* franchise. DHX is a leading producer and distributor of children's shows, with the world's largest independent library of children's content, top-tier production studios and the most viewed network of children's content on YouTube (WildBrain). DHX also owns and operates four Canadian television channels: Family, Family Jr., Family CHRGD and Télémagino.

3. DHX's global success is founded on a vibrant Canadian domestic market for children's programming. The vibrant domestic market has been supported for many decades, by Canada's inter-related communications legislative framework. Canada's *Broadcasting Act*, in particular, has served Canada well over nearly a century through various iterations.

4. DHX participated in the extensive consultation process initiated by the Department of Canadian Heritage regarding the future of *Canadian Content in a Digital World*.[1] We also participated in an in-depth examination of future distribution models conducted by the Canadian Radio-television and Telecommunications Commission ("CRTC") initiated by the Governor-in-Council under section 15 of the *Broadcasting Act*.[2] That examination resulted in the CRTC's report *Harnessing Change*: *The Future of Programming Distribution in Canada*.

5. Those extensive consultations resulted in detailed findings by the Department of Canadian Heritage and the CRTC, as well as the appointment of the Panel. Several important findings made by the Department of Canadian Heritage and by the CRTC reflect submissions made by DHX by other parties.

6. These include the following:

- That a diverse and strong domestic market is essential to Canadian cultural industries and serves as a launchpad for global success.[3]

- That online services, both Canadian and non-Canadian, have become a part of Canada's creative ecosystem and have a role to play in the production, distribution and discovery of Canadian content.[4]

- That without a viable and healthy broadcasting sector, the continued success of Canadian creators, independent producers, and the content they produce is at risk.[5]

- That global online services are already present in Canada and are disrupting the broadcasting ecosystem that supports Canada's creative industries.[6]

- That certain genres of programming, including Canadian children's content, are challenging to produce without key public support.[7]

7. While the Panel's terms of reference present other concerns and issues to be considered in this review of the communications legislative framework, the key

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[1] Submission of DHX Media Ltd. dated November 25, 2016.
[2] Submission of DHX Media Ltd. dated December 1, 2017 and submission of DHX Media Ltd. dated February 13, 2018.
[3] *Creative Canada Policy Framework*, section 2.1.
[4] *Creative Canada Policy Framework*, section 2.2 and *Harnessing Change: The Path Forward, Conclusions and Potential Options.*
[5] *Broadcasting and Telecommunications Legislative Review*, section 10.
[6] *Harnessing Change: The Path Forward, Opportunities and Risks.*
[7] *Harnessing Change: The Path Forward, Market Insights Part 5 – Figure 44*, and, as the Panel has noted in its Call for Comments, "[P]roducing quality Canadian content – particularly drama and children's programming – remains a challenge under the current Canadian content rules that were designed to focus on a domestic rather than a global marketplace."

factors set out above are the most critical from DHX's perspective. These factors must be addressed sooner rather than later in order to ensure the continued vitality of Canada's audio-visual sector, and the continued creation of high-value Canadian children's content.

8. Based on these findings, DHX wishes to make the following specific recommendations:

Recommendation 1 – Engage with online services and content providers

As an urgent legislative priority, immediate measures are required to engage with large non-Canadian companies that are directly active in the Canadian market through online services but which are not required to make any contribution to Canadian content.

This would be accomplished through targeted and timely changes to the *Broadcasting Act* to make explicit the role of online services within Canada's broadcasting policy.

Recommendation 2 – Emphasize the importance of content for children and youth

The *Broadcasting Act* should recognize Canada's international excellence in the production and distribution of children's and youth content. It should emphasize both (i) the cultural importance of certain types of programming, such as children's content, and (ii) creation and distribution of that content both in Canada and around the world as a measure of success of broadcasting policy.

This would be accomplished by focusing specifically on providing meaningful content for children – consumed in Canada and worldwide – as a *Broadcasting Act* objective.

Recommendation 3 – Recognize ownership diversity as essential to a healthy domestic market

Ongoing excellence in content creation and its related domestic and international success requires the support of a healthy domestic market. Maintaining a healthy domestic market in turn relies in large part on diversity in the broadcasting environment. As such, there should be greater focus in the *Broadcasting Act* on maintaining a diverse and innovative ecosystem by encouraging and supporting the presence of an independent sector – meaning entities (whether producers, broadcasters or other types of content platforms) that do not own distribution networks.

This would be accomplished by recognizing ownership diversity as a key to innovation and diversity of expression within the *Broadcasting Act*. In addition, the *Broadcasting Act* should expressly state that the CRTC has the authority to regulate economic relationships between market participants. This will help to foster the independent sector and other types of diversity.

Engaging with online services and content providers

9. Both the Government of Canada and the CRTC have explicitly stated that all participants in the broadcasting system in Canada must make an appropriate contribution to Canadian content. The alternative is a continued weakening of support that makes content creation possible in the relatively small Canadian market.[8]

10. DHX agrees with the conclusions reached by the CRTC in its *Harnessing Change* report. The CRTC concluded that Canadian communications statutes should recognize the existence and role of new services in the Canadian system:

> To ensure a vibrant domestic market and be equitable to all players, it will be essential to develop better regulatory approaches that engage all audio and video services and for each to participate in the most appropriate ways in creating and promoting content by and for Canadians. Accordingly, if legislative change is to take place, it should clearly and explicitly make any video or audio services offered in Canada and/or drawing revenue from Canadians subject to the legislation and incorporate them into the broadcasting system. This should apply to traditional and new services, whether Canadian or non-Canadian.

11. However, DHX is concerned that it will take far too long to conceive, write, debate and implement *comprehensive* legislative amendments to the entire communications legislative framework. This endeavor is necessary – but it is likely the work of at least five years, if not a decade. This is simply too long, as the damage to the Canadian broadcasting system over that period would be substantial and irrevocable. It is not adequate as a legislative response to the rapid and pressing change that is now upon us.

12. Therefore, as a matter of urgent legislative priority, the *Broadcasting Act* should be amended quickly so that there is no question that all types of audio and video services are captured within the *Act*. The CRTC's mandate and responsibility to regulate all such services appropriately should be made crystal clear. These amendments should be made within the context of the existing legislative framework – even though with time different regulatory tools and approaches may ultimately be adopted.

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[8] See *Creative Canada Policy Framework*, section 2.2 and *Harnessing Change: The Path Forward, Conclusions and Potential Options.*

13. DHX recommends the following specific measures:

- The definitions in the *Broadcasting Act* should be amended to recognize *online services* as a type of broadcasting undertaking.
- Objectives for online services should be framed, taking into account the diversity of roles of these services. The objectives would include making the maximum contribution to the creation and presentation of Canadian programming commensurate with their presence in the Canadian market.
- The CRTC's authority in section 9 and section 10 of the *Broadcasting Act* should be amended to include making regulations or orders regarding the funding, presentation and distribution of programming by online services.

The suggested amendments set out in Schedule "A" to this submission illustrate these recommendations.

14. By enacting these amendments: (i) the CRTC's authority and mandate to regulate all online services providing services to Canadians would be clear; (ii) the CRTC would have guidance regarding the role to be played by these services in the Canadian broadcasting; and (iii) the CRTC would be provided with direction that any regulatory exemption of online services (the current manner of regulation in this area) must take into account the role to be played by these services.

15. These limited and focused amendments would permit the CRTC to move forward with confidence to carefully examine the immediate impact and role of online services and the most appropriate means for them to contribute to Canadian broadcasting policy objectives.

Emphasizing the importance of content for children and youth

16. Canadian children's programming has long been recognized as fundamentally important to Canadians and to the broadcasting system. For example, in the *Lets Talk TV* policies, the CRTC noted that

> The Commission considers children's and youth programming to be an integral part of the broadcasting system. During all phases of the Let's Talk TV consultation, individual Canadians and other interveners wrote and spoke about the value of children's programming and the importance of Canadian children watching Canadian programming.[9]

[9] *Broadcasting Regulatory Policy CRTC 2015-86* at paragraph 298.

17. In addition to being valued by Canadians, Canadian children's programming is among the most watched genres of content.[10] Canadian children's content also exports very well – making it a top choice for foreign buyers and audiences. Canada is a world leader in the creation and distribution of children's content and DHX is a key stakeholder in the sector.

18. Notwithstanding the importance and success of children's programming, and the continuing popularity of children's content on TV, new distribution models are disrupting the domestic market for children's content.[11] In addition, funding for this type of programming is at historically low levels. For example, between 2015/16 and 2016/17, funding provided by the CMF for children's content dropped by an alarming 43% and it remained at that low level the following year.[12]

19. Currently, there is no mechanism in the *Broadcasting Act* to explicitly recognize areas of programming (such as children's and youth programming) that are of importance to Canadian culture, and/or in which Canada has achieved or is striving for recognition as a centre of excellence. Existing policy objectives speak only to providing for the widest range of programming and reflecting the needs and interests, circumstances and aspirations of "men, women and children", while also reflecting cultural diversity and the special place of aboriginal peoples.

20. These are admirable objectives and they should be maintained. At the same time, the *Broadcasting Act* should provide guidance to the Commission regarding areas of particular importance for Canadian culture, and areas in which Canada can strive to excel globally. There is currently no reference in the *Broadcasting Act* to Canada's place in providing programming and content to the global market.

21. DHX believes that giving priority to certain genres within the *Broadcasting Act*, such as children's and youth programming, will help to ensure that this content remains front and centre for policy makers. In addition, the *Broadcasting Act* should recognize the world-wide scope of demand for certain types of Canadian programming and encourage Canadian creators and services to look outside Canada to showcase our content to the world.

22. DHX recommends that the *Broadcasting Act* include provisions for the recognition and advancement of programming genres that are of the greatest cultural importance, that reflect areas of excellence in Canadian production, or that are the

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[10] See *Profile 2017: Economic Report on the Screen-based Media Production Industry in Canada*, prepared by Nordicity Inc. for Canadian Media Producers Association, Department of Canadian Heritage,Telefilm Canada, and Association québécoise de la production médiatique, Exhibit 11-8, page 103.
[11] See the discussion in the submission by DHX Media Inc. to the CRTC dated December 1, 2017 (in response to *Broadcasting Notice of Consultation CRTC 2017-359*).
[12] Canada Media Fund, *Annual Report, 2017-2018*.

well-suited to a global audience and world-wide exposure. Suggested amendments that reflect this recommendation are set out in Schedule "B" to this submission.

Recognizing ownership diversity as essential to a healthy domestic market

23. The Department of Canadian Heritage has recognized that a robust domestic market for Canadian broadcasting services will not only ensure that Canadians are well-served by their broadcasting system, but also provide the foundation for success for Canadian culture and cultural entrepreneurs in other markets.

24. However, one of the defining features of the Canadian market, compared to all other markets around the world, is the extent of consolidation of ownership and vertical integration in Canadian broadcasting.[13] The Terms of Reference for the Panel recognized as much in identifying the need for a joint review of the broadcasting and telecommunications sectors:

> Some of Canada's largest broadcasters are also the largest telecommunications carriers owning a large portion of Canada's wired and wireless network infrastructure and they often market and sell services in bundles. Both sectors are subject to many of the same global trends given the spread of digital technologies and the growing importance of the Internet; and companies benefit economically from scale, but the specific needs of smaller communities are also important . . . Moreover, both the broadcasting and telecommunications sectors benefit from policies that encourage competition, innovation, and affordability of service.

25. DHX agrees with the view that both the broadcasting and telecommunications sectors benefit from policies that encourage competition, innovation and affordability. One of the key means by which the CRTC has sought to promote competition and innovation in the broadcasting sector is through its ownership policy.

26. Broadcasting ownership policy typically restricts the number of broadcasting services (radio, television or discretionary services) that a single company may own in a single market. The CRTC's policy does not, however, deal explicitly with the equally important issue of cross-ownership of services that create and provide programming to the public (i.e. programming undertakings) and services that distribute that content in their capacity as broadcasting distribution undertakings

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[13] See Canadian Media Concentration and Research Project, *State of the Digital Media and Internet Industries in Canada, 1984-2017*. http://www.cmcrp.org/publications/annual-reports/

or even as telecommunications service providers.[14] In our view, this is a material gap in the existing legislative and policy framework.

27. While the CRTC has put in place some measures to support ownership diversity in the broadcasting system generally, and independent players in particular, these measures are often secondary in thinking to other concerns. For example, a recent, scholarly analysis of the Commission's Let's Talk TV policy process came to the following conclusion:

> [I]t is clear that the commission's priority was supporting consumer sovereignty, even if it meant disproportionately impacting smaller players. The biggest loser in this system are likely to be small BDUs, and non-VI and independent broadcasting services.[15]

28. A comprehensive communications policy framework should ensure, instead, that a broader view is taken and that the communications environment enables new entrants and fosters innovation and growth.

29. We wish to note, however, that while the independent sector is under considerable pressure, it is also highly dynamic and innovative. A report prepared by Nordicity Inc. on the economic contribution that is made by the independent broadcasting sector has found that the independent broadcasters represent:

- $1.842 billion in annual revenue in Canada ($752 million in television and $1.09 billion in radio and audio)
- $691 million in annual expenditure on television production
- $146 million in distribution and brand licensing revenue and $45 million from other media operations

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[14] See *Broadcasting Public Notice CRTC 2008-4*. This policy, which predates certain transactions that resulted in a heavily vertically-integrated broadcasting industry, considers different broadcasting activities in separate "silos" and does not consider cross-ownership or vertical integration. The Commission's vertical integration policy, *Broadcasting Regulatory Policy CRTC 2011-601*, and elements of its *Let's Talk TV* policy, *Broadcasting Regulatory Policy CRTC 2015-96*, seek to regulate certain implications of vertical integration (for example, through the critically important *Wholesale Code*), but those policies seek to counteract some of the potential negative consequences of vertical integration and do not consider the overall competitiveness and viability of the broadcasting market itself – and whether there is simply *too much* concentration of ownership and vertical integration.

[15] Blake, Sylvia, *Diversity for everyone? Mapping the evolution of broadcast diversity objectives in the CRTC's Let's Talk TV proceedings*, section 1.4.3 (https://crtc.gc.ca/eng/acrtc/prx/2018blake.htm). 2018 winner of the CRTC Prize for Excellence in Policy Research, PhD Category.

- the employment of 7,820 FTEs, directly in broadcast operations, and a further 5,870 FTEs in other activities

- a direction contribution to Canadian GDP of $1.29 billion and a total direct and indirect contribution of $2.6 billion.

This study, which was commissioned by DHX Television, Independent Broadcast Group/Le groupe de diffuseurs indépendants and other independent broadcasters has been filed as a part of the IBG/GDI submission to the Panel.

30. While the size and influence of the independent sector, as described further in the Nordicity report, is important to Canadian innovation and diversity, the independent television sector is facing competitive pressures in the Canadian environment. As noted by Nordicity,

> Between 2013 and 2017, independent broadcasters' broadcasting revenue fell by 15%. This drop was much faster than the 5% decline in revenue experienced by the entire Canadian broadcasting sector during that period and meant that independent broadcasters' market share declined from16% in 2013 to 10.9% in 2017.

The decline in the independent sector represents not only a potential loss of the economic activity in Canada that this sector represents, but also a loss of programming and editorial diversity. Similarly, with less activity in the independent broadcasting sector, there are fewer purchasers of Canadian programming.

31. It is also a cause for concern that doubt has been raised recently regarding the Commission's authority to regulate and supervise the economic relationships between network owners and content providers. DHX believes that the Commission's authority to do so is clear. However, recent jurisprudence has raised concerns and has already resulted in unnecessary, wasteful and time consuming litigation. If the Commission lacks adequate tools to mediate disputes between large vertically integrated companies, and independent players, the current challenges faced by independent players will only get worse.

32. The *Broadcasting Act* should, therefore, be amended to provide specific guidance on the need for diversity of ownership in the broadcasting system and to ensure that the Commission's authority to intervene to protect such diversity is preserved.

33. DHX recommends the following specific measures:

- The objectives in the *Broadcasting Act* should be amended to recognize the desirability of ownership diversity and its role in ensuring a diversity of voices and innovation.

- The *Broadcasting Act* should recognize that there is a need for a thriving independent sector (whether producers, broadcasters or other types of content platforms), moving beyond the existing language that recognizes only "independent producers".

- The authority of the CRTC to resolve disputes and to regulate the economic relationships among broadcasting undertakings of different types should be made clearer.

34. The suggested amendments set out in Schedule "C" to this submission reflect these recommendations. These amendments would address the existing gap in the *Broadcasting Act* regarding ownership diversity in the broadcasting system. It will require the CRTC to consider ownership diversity in its rulings and, specifically, the role of diversity in fostering innovation and creativity. In addition, the changes would provide greater attention to *independent* ownership and make clear the Commission's authority to regulate the commercial relationships between different broadcasting undertakings.

Conclusion

35. DHX appreciates this opportunity to make these submissions to the Panel to assist with its important work. We have provided a brief summary of our comments and recommendations in the Introduction to this submission.

Yours truly,

DHX MEDIA LTD.

Mark Gosine
Executive Vice President, Legal Affairs, General Counsel and Corporate Secretary

<u>**Schedule "A"**</u>

Proposed Amendments – Engaging Online Services

- Amend section 2 of the Act (the definitions section) by adding the following:

  "online service" means a distribution undertaking or programming undertaking that receives and retransmits broadcasting or transmits programs by means of the Internet;

- Update the broadcasting policy set out in section 3 of the Act by adding the following new policy objective:

  "online services"

  (i) should give priority to delivering or providing access to Canadian programs;

  (ii) should, to an extent consistent with their operations in Canada, contribute to the creation and presentation of Canadian programs; and

  (iii) should, to the extent they operate as programming undertakings or distribution undertakings, fulfill the policy objectives applicable to such undertakings;

- Amend section 4 (which deals with the application of the Act) by adding new subsection (5) as follows:

  (5) For greater certainty, this Act applies to online services that offer services to the public in Canada regardless of the location of any facilities of the online service provider.

- Amend section 9(1) (licensing and other powers) by adding a new paragraph dealing specifically with online services as follows:

  9.(1) Subject to this part, the Commission may, in furtherance of its objects,

  (i) require any online service that would require a licence to operate if it were not exempted by an order made under subsection 9(4), to carry, on such terms and conditions as the Commission deems appropriate, programming and programming services specified by the Commission.

- Amend section 9 by adding a new subsection that explicitly addresses the exemption of online services to ensure that any such exemption takes into account broadcasting policy objectives for such services:

9.(5) For greater certainty, any order made under subjection 9(4) in relation to online services shall ensure that online services contribute substantially to the implementation of the broadcasting policy set out in subsection 3(1).

- Amend section 10 (regulation-making authority) by adding express regulatory authority with respect to online services as follows:

  10.(1) The Commission may, in furtherance of its objects, make regulations

  (j.1) respecting the delivery or provision of access to Canadian programs and the contribution to the creation and presentation of Canadian programs by online services;

  (j.2) requiring persons operating online services to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify with respect to their operations or services provided in Canada;

<u>Schedule "B"</u>

Proposed Amendments – Emphasizing Children and Youth

- Amend paragraph 3(1)(d) of the *Broadcasting Act* to identify specific areas of programming for support and advancement, including children's and youth programming by adding the following policy objective

3.(1)(d) The Canadian broadcasting system should

> *support and cultivate programming of particular cultural importance and excellence, such as but not limited to children's and youth programming, intended for domestic or international audiences*

Schedule "C"

Proposed Amendments – Recognizing Ownership Diversity

- Amend paragraph 3(1)(d) of the *Broadcasting Act* (which sets out Canadian broadcasting policy) to add a new policy objective as follows:

  3.(1)(d) The Canadian broadcasting system should

  (v) Foster innovation and creativity in the provision of programming through a diversity of voices and diversity of ownership, including independent ownership

- Amend subsection 5(2) (the regulatory policy) to add a new regulatory policy:

  5.(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that

  (h) encourages diversity of ownership, including independent ownership

- Amend paragraph 10(1)(h) (regarding dispute resolution) to explicitly address disputes regarding economic relations between broadcasting undertakings:

  10.(1) The Commission may, in furtherance of its objects, make regulations

  (h) for resolving, by way of mediation or otherwise, any disputes arising between broadcasting undertakings concerning the provision of programming or other operations and providing for terms, whether monetary or otherwise, for the provision of programming, related data, and any other matters