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January 11, 2019

Ms. Janet Yale
Chair
The Broadcasting and Telecommunications Legislative Review Panel
c/o Innovation, Science and Economic Development Canada
235 Queen Street, 1st Floor
Ottawa, ON K1A 0H5

Dear Ms. Yale:

**Re: Review of the Canadian Communications Legislative Framework –
Submission of TELUS Communications Inc.**

1. TELUS Communications Inc. (“TELUS”) is pleased to provide its submission to the Broadcasting and Telecommunications Legislative Review Panel (the “Panel”) in response to the issues raised in the Panel’s call for comments issued on September 25, 2018.
2. We trust that this submission will be of assistance to the Panel in formulating its recommendations to the Government of Canada.
3. TELUS wishes to express its appreciation to the Panel for the opportunity to provide these comments.

Yours truly,

{Original signed by Johanne Senécal}

Johanne Senécal
Senior Vice-President
Government & Regulatory Affairs

AH/io

cc. James Nicholson, Executive Director, Broadcasting and Telecommunications
Legislative Review Panel Secretariat

Attachments

Broadcasting and Telecommunications Legislative Review Panel



Review of the Canadian Communications Legislative Framework

Submission of TELUS Communications Inc.

January 11, 2019

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Appendix 6– Rights Ownership of the Top 100 TV Programs in Canada (English Channels) According to AMA, a report prepared for TELUS by Mario Mota, Boon Dog Professional Services Inc.

Appendix 7 – Financing and Promoting National Audiovisual Media Services: Review of the Regulatory and Legal Requirements for Commercial Undertakings in Selected Jurisdictions, a report prepared for TELUS by Suzanne Lamarre, Therrien Couture SENCRL LLP

Appendix 8 – International Comparison of Intermediary Liability Measures

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1.0 Introduction and Executive Summary

1. TELUS welcomes the opportunity to submit these comments to the Panel and commends the federal government for launching this joint review of Canada's communications legislation. This review is timely. Much has changed since the *Telecommunications Act* and *Broadcasting Act* were enacted in 1993 and 1991, respectively. Both of these statutes, as well as the *Radiocommunication Act*, require important revisions if Canadians are to continue to benefit from world-leading communications and programming services.
2. Today's telecommunications sector has undergone a transition from an era characterized by monopoly supply to one where competition is prevalent, and the broadcasting landscape has been revolutionized by the presence of new, unregulated platforms and services that did not exist at the time Canada's communications statutes were enacted. In the face of these changes, legislative and regulatory inertia are not viable options.
3. The types of communications and programming services provided, the types of facilities over which they are provided, and the structure of the media and communications industries are all substantially different than they were in the early 1990s. The digital economy is fast overtaking other sectors of the economy in importance. Ultra-fast advanced broadband networks such as 5G will act as a stimulus for disruption in modern digital economies, while serving as a platform for innovation, and will drive digital development in industries such as health care, transportation, agriculture, manufacturing, automation, and smart cities. As a result, 5G networks and beyond will become a central technological pillar in the realization of the federal government's Innovation Agenda.

1.1. Recommendations for legislative reform

4. In the coming years, technology disruption is predicted to be of a scale so great that it is described as a fourth industrial revolution. To meet the challenges of this new reality and harness its opportunities, TELUS makes the following proposals in relation to each of the themes set out by the Broadcasting and Telecommunications Legislative Review Panel.

Recommendations relating to reducing barriers to access by all Canadians to advanced telecommunications networks

5. In respect of its recommendations regarding telecommunications, TELUS has proposed eleven guiding principles, which are attached as Appendix 1 to TELUS' submission, and are referred to throughout this submission. Under the *Theme A: Reducing barriers to access by all Canadians to advanced telecommunications networks*, TELUS proposes:

- Placing greater legislative emphasis on dynamic efficiency, competition, investment, and innovation, as the best means to address the issue of affordability. Communications services are already demonstrably affordable and sector-specific measures are not required to address affordability.
- Removing substantive Canadian ownership and control requirements in the *Telecommunications Act*, or in the alternative, liberalization of the current regime to allow for up to 49% foreign direct investment.
- Amending the *Telecommunications Act* to ensure that public access rights for carriers apply to the construction of "transmission facilities" instead of "transmission lines" to enable faster deployment of network infrastructure.
- Changing the *Radiocommunication Act* to accelerate the deployment of wireless network facilities by eliminating some site approval requirements, and providing for access to supporting structures owned and operated by third parties, as well as procedures governing the access to those structures.

Recommendations relating to supporting creation, production and discoverability of Canadian content

6. Under *Theme B: Supporting creation, production and discoverability of Canadian content*, TELUS notes that the global digital market place for programming content has fundamentally disrupted the traditional Canadian broadcasting system as a result, its foundational pillars are crumbling. First, the "walled-garden" in which consumers have no choice but to obtain programming through the regulated system is now a thing of the past; consumers are moving to alternatives outside the regulated system. Second, the distinct Canadian program rights market which has allowed Canadian media companies to build

business models based on reselling foreign content (rather than relying on their own home grown productions) is eroding. The good news is that the global digital environment is ripe with opportunities for the Canadian content creation and production market. A truly new broadcasting legislative framework is needed to maximize these opportunities proffered by the new global digital environment and take into account the challenges it presents.

7. TELUS submits that re-imagining the legislative framework for Canada's broadcasting system should:
 - Re-define the "Canadian broadcasting system" in the *Broadcasting Act* to acknowledge the presence of a "foreign element", which should be added to the private and public elements of the Canadian broadcasting system. This acknowledgement is an important first step towards removing the asymmetry in the broadcasting regulatory framework which is putting Canadian participants in the broadcasting system at a disadvantage.
 - Overhaul the objectives of the *Broadcasting Act* in a way that clearly distinguishes between the roles of the private and public elements of the Canadian broadcasting system.
 - The private element's objectives should be streamlined to primarily focus on the creation and production of home grown programming for the purposes of commercial success, domestically and globally. The objectives applicable to the private element of the broadcasting system should be reasonable and attainable without the current guaranteed internal revenue streams. The contribution regime to support private broadcasting is no longer sustainable in a global market and given the high degree of vertical integration in the Canadian media market, it merely leads to some content aggregators being required to fund the business models of their competitors.
 - The public element's objectives can be more extensive to address a variety of social and cultural goals but should be prioritized for greater clarity.
 - Update the definitions in the *Broadcasting Act* to better reflect the reality of today's global digital multi-media content environment, in which there are "programming services" which exercise exclusive rights over the distribution of programming in

the Canadian market, and “content aggregators” which merely aggregate and curate programming offerings for consumers without exercising any exclusive rights. These new definitions address concerns relating to artificial distinctions created by the existing definitions which are increasingly unwieldly.

- Restrict the licensing powers of the Canadian Radio-television and Telecommunications Commission (“CRTC”) under the *Broadcasting Act* to “programming services”, which would continue to be subject to foreign ownership restrictions. Foreign programming services would be required to be authorized to operate in the Canadian market and such authorization would be subject to certain conditions requiring some form of contribution to the objectives of the Act. The licensing/authorization powers should be further subject to a requirement to exempt from licensing those programming services which do not meet a threshold of subscribers.
- Eliminate any licensing requirements for “content aggregators” as they do not exercise the same degree of influence over programming decisions (the main concern in respect of the maintenance of cultural sovereignty) and therefore should not be subject to licensing, nor any foreign ownership restrictions. A permissive and incentive-based approach should be taken in regard to content aggregators whereby certain privileges (such as access to the retransmission regime under the *Copyright Act*, and access to the CRTC’s dispute resolution services to ensure commercially reasonable terms of distribution of licensed programming services) could be accessed in exchange for taking on certain obligations such as distribution of the public broadcasters, implementing discoverability and promotional measures in relation to Canadian content, or contributing to the creation and production of Canadian content.
- Grant new powers for the CRTC to address the negative incentives arising from vertical integration. Vertically integrated Canadian communications companies have incentives to defeat some of the broadcasting policy objectives in order to maximize the profitability of their more lucrative network operations side. These incentives could negatively affect innovation and competition in the broadcasting

sector and the attainment of the Canadian broadcasting policy objectives. A renewed *Broadcasting Act* must provide for powers for the CRTC to make regulations and to impose licensing conditions on vertically integrated entities in order to address these concerns.

8. Finally, TELUS cautions against heeding calls to shift cultural obligations to telecommunications providers. The solution to declining contribution monies as a result of global competition should not be to shift this obligation to other communications providers, such as ISPs. Instead, Canadian broadcasting policy should promote exporting of content as a revenue stream.

Recommendations relating to improving the rights of the digital consumer

9. Under *Theme C: Improving the rights of the digital consumer*, TELUS proposes:
 - No legislative changes are required pertaining to consumer protection and rights, or the related matter of accessibility, in the *Telecommunications Act*. The CRTC already has authority over these matters as is amply demonstrated by its activities over the past number of years.
 - No legislative changes are required to address privacy under the *Telecommunications Act*. The CRTC already has authority over privacy, and most privacy matters are best addressed through laws of general application.
 - No legislative changes are required regarding net neutrality principles as the existing provisions of the *Telecommunications Act* provide the CRTC with sufficient tools.
 - A new limitation of liability should be added to the *Telecommunications Act* such that carriers have no liability for the content they carry.
 - Supporting the need to address the proliferation of false or misleading information in order to ensure an informed citizenry which is essential to the democratic process but recognizing that much of what is needed falls outside the purview of the *Broadcasting Act*.

- Supporting digital literacy enhancement (as a role of governments). Digital literacy remains the single greatest opportunity to increase participation in the digital economy. While the issue is outside of the scope of the CRTC, various other federal government departments, as do other levels of government, have a role to play in increasing digital literacy.

Recommendations relating to renewing the institutional framework of the communications sector

10. Under *Theme D: Renewing the institutional framework of the communications sector*, TELUS recommends numerous changes to the institutional framework which are necessary to calibrate the regulatory system to modern conditions. In particular, TELUS makes the following recommendations pertaining to the Governor in Council and the Department of Innovation, Science and Economic Development (“ISED”):

- Repealing the Governor in Council’s power to vary, rescind or refer back CRTC decisions.
- Transferring the responsibility for spectrum regulation from the Minister of Industry and the Governor in Council to the CRTC and codifying the principles of independent regulation and governance of the communications statutes, in particular in the *Radiocommunication Act*.
- Regardless of which agency regulates spectrum, establishing that overall spectrum policy be set in a manner that is transparent and provides for public input.
- Including a form of radio authorization for flexible commercial use of the spectrum having exclusive usage rights and being tradable in the secondary market and being subject to bankruptcy and insolvency laws, and permitting the sub-lease of spectrum usage rights to third parties.
- Establishing through the *Radiocommunication Act* reasonable and measurable timelines for spectrum auctions in line with other international spectrum jurisdictions.
- Requiring the spectrum regulator to maintain a registry of apparatus, spectrum and class licences and devices to be made publicly available on the regulator’s website.

11. TELUS makes the following recommendations pertaining to the CRTC:

- Streamlining the existing objectives in section 7 of the *Telecommunications Act* to emphasize i) reliance on competition and market forces; ii) efficient, effective and proportionate regulation, when required; iii) importance of investment and innovation. TELUS further recommends the addition of a clause reaffirming the exclusive federal authority over telecommunications.
- Modifying the *Telecommunications Act* such that services are by default forborne from rate regulation and eliminating sections 24 and 24.1 of the Act, to be replaced with more specific powers.
- Minimizing asymmetric regulation. Regulation, when required, must be imposed symmetrically to the extent possible, including removing historical asymmetries borne disproportionately by incumbent local telephone carriers and symmetrical treatment of new digital players. Among other changes, provisions relating to unjust discrimination should apply to all telecommunications service providers, including resellers, rather than just carriers.
- Modifying subsection 27(2) of the *Telecommunications Act* to ensure it applies to all telecommunications service providers, rather than just carriers.
- Establishing an arm's length tribunal to carry out certain adjudicative functions, including applications to review and vary CRTC decisions and hearings to determine whether to impose large administrative monetary penalties.
- Modifying the general administrative monetary penalty regime in the *Telecommunications Act* such that penalties are assessed only through a notice of violation process, that higher-level penalties engage a right to an oral hearing, clarifying that a course of conduct counts as a single violation, and ensuring the consistency of penalty regimes across the communications sector.
- Modifying the appeal provisions to provide that appeals of CRTC decisions are heard as if the CRTC decision were a decision of the federal court.
- Revising investigative powers to be consistent with those exercised by the CRTC under Canada's anti-spam legislation.

- Enhancing the effectiveness of the CRTC by making several institutional changes, including reducing the number of Commissioners, providing budget for expert staff, the establishment of a new Office of Economics and Analytics, publication of a code of consolidated CRTC regulatory rules, and reforming the existing CRTC costs award process.
12. And finally, TELUS also makes this recommendation pertaining to the institutional framework for the communications sector:
- Combining the *Telecommunications Act* and the *Radiocommunication Act* into a single unified Act sharing clear concise economic objectives and requiring market-based approaches to regulation as required in the current Policy Direction.

1.2. What can and should be addressed prior to full legislative reform

13. While TELUS has noted that this legislative review is timely, it recognizes that such legislative reform takes significant time. Some reforms to the communications regulatory framework need more immediate attention and do not require legislative change to implement.
14. For example, to address the exodus of Canadians subscribers from the regulated broadcasting system in favour of foreign alternatives, Government should provide a direction to the CRTC to take immediate measures to reduce the regulatory burden on content aggregators and allow them to better compete with foreign content aggregation services. Such measures might include reducing the number of services required to be provided as part of a basic package to all subscribers, and/or eliminating Part II fees which merely constitute a “tax” on licensed broadcasting services and do not ultimately benefit the Canadian broadcasting system as the monies are simply transferred to the government’s general revenue account.
15. Additionally, to actively support investment in, and the deployment of advanced communication networks, ISED should act to ensure the timely release of spectrum and design spectrum auctions to support efficient outcomes. The CRTC should promptly

resolve access disputes, on specified timelines, consistent with the federal rights of access established in the *Telecommunications Act*. Both the CRTC and ISED should take steps, respectively, to limit wholesale obligations for competitive network infrastructure – particularly where such obligations are at odds with market facts and norms in peer jurisdictions (including: *ex ante* tariffing for wholesale domestic roaming, dual authority over roaming, roaming rights for incumbent wireless operators, and mandated access to competitive FTTP networks).

16. Exclusive federal authority over communications should be guarded and supported by the federal government, as it underpins every goal the government has for Digital Canada. To this end, the CRTC should actively and expressly protect exclusive federal authority over communications against municipal and provincial encroachments, including the purported application of “consumer protection” legislation to the offering and provision of telecommunications services. Exclusive federal authority can be additionally supported by the active and early intervention of the Attorney General of Canada in constitutional disputes.

2.0 Theme A – Reducing Barriers to Access By All Canadians to Advanced Telecommunications Networks

2.1. Introduction

17. The first broad theme that the Broadcasting and Telecommunications Legislative Review Panel has identified for discussion is reducing barriers to access by all Canadians to advanced telecommunications networks. Under this theme, TELUS makes a number of recommendations to reduce barriers relating to the deployment of infrastructure for both landline and wireless networks. Amongst these recommendations are broadening the scope of public access rights in the *Telecommunications Act* beyond “transmission lines” to encompass “transmission facilities,” which would include both wireline and wireless infrastructure and equipment. TELUS also proposes amendments to the *Radiocommunication Act* to eliminate impediments and regulatory barriers which hinder the deployment of infrastructure necessary to support new 5G services. In addition, TELUS makes other recommendations to facilitate the more timely deployment of new networks that will be vital to Canada’s future success, including in those areas where high-speed broadband access services are currently unavailable or require upgrading to meet the CRTC’s new universal service objectives for broadband service.
18. In addition to recommendations for reducing barriers to the timely deployment of infrastructure, TELUS makes recommendations to reduce barriers to foreign investment. TELUS recommends removing Canadian ownership and control requirements under the *Telecommunications Act*. Removal of these provisions will facilitate greater access to capital required for investing in new high-speed fibre and 5G networks that will fuel innovation in the Canadian economy.
19. Also under this theme, the Broadcasting and Telecommunications Legislative Review Panel seeks input on the issue of affordability as it pertains to access by Canadians to advanced telecommunications services. As the Review Panel states, universal access to high-quality and affordable telecommunications services has never been more important. However, the CRTC already has sufficient tools under the *Telecommunications Act* for the funding of broadband services in areas where it would otherwise not be economic to serve

by the private sector. Besides the CRTC's broadband funding regime, federal, provincial and municipal authorities are also supporting broadband network expansion efforts with various broadband funding programs.¹

20. TELUS provides evidence that Canadian prices for telecommunications compare favourably on an international basis when properly analysed, despite the unique challenges facing Canadian telecommunications service providers including a large geographic area, relatively low population density, and relatively higher wireless handset costs for network providers due to lower volumes, exchange rates, and other factors.² Affordability is an issue of broad social concern, and to the extent that affordability remains a barrier with respect to access to telecommunications services, it is an issue best dealt with by various levels of government by means of taxation policy, social assistance or other policy measures, and not through sector-specific legislative measures.
21. With regard to affordability and access to high quality telecommunications services, TELUS discusses the importance of the economic concepts of static versus dynamic efficiency. The focus of static efficiency is on market power and prices whereas the focus of dynamic efficiency is on innovation and investment over the longer term. TELUS recommends placing greater emphasis on dynamic efficiency as the best means to address the important public policy issue of affordability. A short-term focus on price without considering the importance of innovation and investment over the longer term may be counter-productive. In short, emphasizing innovation and investment as public policy objectives will facilitate high-quality and affordable services for everyone.³

¹ For example, the Federal Government is funding broadband projects through the Department of Innovation, Science and Economic Development (e.g., Connect to Innovate program), Infrastructure Canada, and other federal departments. Various provincial governments have broadband funding regimes, including the government of Quebec's Quebec branché program.

² TELUS elaborates further upon this matter in Section 2.4.3.

³ In its call for comments, the Broadcasting and Telecommunications Legislative Review Panel identified the issues of safety, security and net neutrality in its discussion of Theme A (Broadcasting and Telecommunications Legislative Review Panel, Responding to the New Environment: A Call for Comments, Review of the Canadian Communications Legislative Framework, September 24, 2018). TELUS discusses these issues and the issue of digital literacy under Theme C: Improving the rights of the digital consumer.

2.2. Government Policy Should Prioritize Competition and Investment

22. The provision of telecommunications services in Canada has evolved in the years since the *Telecommunications Act* was enacted. The types of services provided, the types of facilities over which they are provided, and the structure of the industry have all evolved substantially since the early 1990s. Retail internet services have been introduced, and become integral to the lives of Canadians. Cable companies developed and delivered telephony services over their distribution plant, and telephone companies developed broadcasting distribution services over their networks. Mobile wireless services have gone from novelty to ubiquitous, from telephone service to mobile broadband internet and smart phones.
23. During this period of technological change, the regulated monopolies which characterized the previous era were displaced by competition. Regulators permitted competition, and Canadian telecommunications services are now provided under conditions of mature competition via multiple competing networks. The regulatory tools for the past era of monopoly supply should be discarded in favour of tools designed to facilitate the dynamic efficiency required for the current age. Tomorrow's goals cannot be achieved with yesterday's tools. Although the *Telecommunications Act* has been amended a number of times since it was enacted (a summary of the major amendments in Appendix 2 to TELUS' submission), many of the more recent changes address granular policy matters and would have benefited from a more holistic assessment of their importance in the legislative scheme, and considered consequential amendments.
24. Throughout this submission, TELUS recommends changes that will make the legislation more effective at promoting deployment of facilities and the facilities-based competition that drives innovation and investment. In particular, TELUS recommends that the policy objectives in the legislation be amended to emphasize competition, innovation and investment and the timely deployment of infrastructure as key Canadian public policy objectives for the telecommunications services industry. These ideas are expanded on below in Section 5.1. TELUS makes additional recommendations regarding changes to

access policy and the institutional and technical amendments necessary to ensure the predictability needed to attract and justify investment.

25. Private investment in facilities has ensured that the vast majority of Canadians have access to high quality networks. Recent data from the CRTC show that the telecommunications industry has a capital intensity⁴ of 40%. This is a higher capital intensity than all other industries in Canada except utilities and far higher than the average capital intensity of Canadian industry at 6.6%.⁵ TELUS' capital expenditures have been around \$3 billion per year for the last three years as it builds out its fibre-to-the-home facilities and prepares to deploy a 5G wireless network. These investments carry a significant amount of risk for even the largest of telecommunications services providers like TELUS.
26. Capital investment by Canadian carriers has also greatly exceeded capital spending in other jurisdictions, including Europe, over the last 10 years. Data from the OECD's recent estimates of total communications sector capital spending in each country for 2011-15, divided by the total communications paths – telephone lines, cable television subscriptions, and wireless (cellular) connections – in each country makes it clear that Canadian carriers have been spending far more than their counterparts in Europe.⁶ For example, between 2011 and 2015, Canadian carriers spent almost US\$180 per communications path. The EU-14 jurisdictions spent an average of approximately \$70 per communications path⁷ -- less than half that spent by Canadian companies – as Europe pursued service-based competition models.
27. Looking to the future, new technologies such as 5G networks and low earth orbit satellites can be expected to provide broadband access to even more Canadians, facilitated by investment by the private sector. Any changes to the legislative framework as a result of

⁴ Capital intensity refers to the ratio of capital expenditures relative to revenues.

⁵ Communications Monitoring Report 2018, CRTC, December 20, 2018, pp. 12-13.

⁶ Expert Report of Dr. Robert W. Crandall, p. 17, in Appendix 3.

⁷ *Ibid*, p. 18.

the review of the current communications legislative framework should not distort the market or disincite such investments in new networks and new technologies.

28. In areas where private investment alone is not economically feasible, the current legislative framework provides for a system of subsidies. The CRTC is using this framework, established under subsection 46.5 of the *Telecommunications Act*, to focus its subsidies away from local telephone service and on to broadband. TELUS recommends that this aspect of the legislation remain in place. Other sources of subsidies include federal government programs such as the Department of Innovation, Science and Economic Development's Connect to Innovate program and provincial funding as noted above. These subsidies will be used to deliver broadband to rural, remote and Indigenous communities at affordable prices.
29. Given the risk associated with network investments, legislative and regulatory frameworks should focus on creating incentives for such investments to be made. While there are no guarantees of a return on investment, nor should there be in respect of forborne services, companies that make such investments must have the *opportunity* to make a reasonable rate of return. This means that competition between facilities-based providers should determine the market price of access to the network, whether retail or wholesale. Mandated wholesale access at low regulated rates, for example, reduces the incentive for all providers to make investments that are beneficial to Canadians.
30. The communications industry legislative framework should enable and encourage investment. Limited, clear and coherent policy objectives would focus the regulator's activities on encouraging investment and prevent the uncertainty caused by frequent government intervention. Timely and principled decisions by regulators would also enable faster deployment of new networks and deliver innovations to Canadians sooner.
31. TELUS makes several concrete recommendations in this submission to achieve these goals. In particular, TELUS recommends changes to the telecommunications policy objectives in Section 5.1 to ensure a focus on investment. Moreover, TELUS makes several recommendations regarding access policy and antenna siting to enable more timely

network deployment in Section 2.6, and numerous specific recommendations to promote more principled and timely regulator decisions throughout Section 5.0, addressing theme D.

2.3. Promoting Facilities-Based Competition Drives Investment and Innovation

32. In Canada, the legislative and regulatory framework has for the most part promoted platform competition among telecommunications companies, cable systems, satellite companies, and wireless carriers. Platform competition continues to drive the positive outcomes seen by Canadians, including world-leading wireline and wireless networks in terms of attainable speed, LTE networks that cover 99% of the Canadian population⁸ and investments being made in fibre-to-the-home and 5G technologies.
33. In contrast, other jurisdictions that focus on service competition and promote policies like mandatory unbundling of facilities at regulated rates see less investment, fewer innovative technologies and poor consumer outcomes. For example, many European countries have pursued service competition policies by choosing to rely heavily on providing entrants with low-cost regulated wholesale access to incumbents' networks. The result has been major underinvestment in European countries' networks, with poor outcomes for consumers.⁹
34. Canadian households have far wider access to broadband services with download speeds of 30 Mbps or 100 Mbps than most European countries. For example, while 83 percent of Canadians have access to speeds of 100 Mbps or more in 2016,¹⁰ only 34 percent of French households, 19 percent of Italian households, and 24 percent of United Kingdom households had access to such speeds at that time. Even Sweden, with its municipally-subsidized fibre networks, has extended 100 Mbps coverage to just 69 percent of its households.¹¹ Moreover, the CRTC recently concluded that the Canadian wireline

⁸ TELUS 2017 Annual Report, p. 53. 88.2% of Canadians can access faster LTE-A networks as well.

⁹ Expert Report of Dr. Robert W. Crandall, p. 18, in Appendix 3.

¹⁰ CRTC, Communications Monitoring Report 2017, Figure 5.3.16. This figure increased to 84% according to Communications Monitoring Report 2018 (see Figure 5.17, Broadband service availability by speed (% of households)).

¹¹ European Commission, Broadband Access in the EU, Data as of January 2016 (2017), Online: <https://ec.europa.eu/digital-single-market/en/news/broadband-access-eu-data-january-2016>.

broadband network infrastructure is now capable of supporting download and upload speeds of up to 1 Gbps without requiring significant additional investment.¹²

35. Given the success seen in Canada and other jurisdictions that support facilities-based competition and the failure of different approaches in other parts of the world, the legislative framework should continue to support facilities-based competition.
36. The legislative and regulatory framework will need to shift its focus from ensuring static efficiency to ensuring dynamic efficiency in order to ensure that the latest networks are available to as many Canadians as possible. Static efficiency is focused primarily on market power and regulating the price of services.¹³ It generally ignores innovation and focuses on replication of services competition¹⁴ to drive down consumer prices in the short term. However, in the longer term this may lead to under-investment in telecommunications facilities and, ultimately, worsen consumer outcomes. An example of this can be seen in Europe, where access to high-speed (100Mbps+) broadband lags significantly behind Canada due to an emphasis on service competition with a focus on lower prices.
37. On the other hand, dynamic efficiency views the optimal investment and innovation as its main objective.¹⁵ Dynamic efficiency is critical in infrastructure that drives economic growth, including telecommunications. It recognizes that true competition comes not from “shops of the same type” but from competition which commands a cost, quality or other advantage over existing firms.¹⁶ The consensus among economists is that dynamic efficiency is more effective than static efficiency at creating positive outcomes for consumers.¹⁷

¹² *The path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496, para 79.

¹³ Bauer, Johannes M.; Bohlin, Erik (2008): From static to dynamic regulation: Recent developments in US telecommunications policy, *Intereconomics*, ISSN 0020-5346, Springer, Heidelberg, Vol. 43, Iss. 1, pp. 38-50.

¹⁴ Weisman, Dennis L. (2010): A “principled” approach to the design of telecommunications policy, *Journal of Competition Law & Economics* 6(4), pp. 927-956.

¹⁵ *Ibid*, p. 934.

¹⁶ *Ibid*, p. 935.

¹⁷ Kahn, Alfred E., *Whom the Gods would destroy, or how not to deregulate*, AEI-Brookings Joint Center for Regulatory Studies, 2001.

38. A policy and regulatory framework that is set up to reward lower cost or better quality competitors will work to increase network speed and quality while lowering the price of services for all Canadians. This has been shown to be true in practice: in the past 25 years, speeds have gone from 56kbps to 1Gbps and the price per megabit of data has gone down very significantly. In fact, the price of a megabit of data dropped by 33% between 2010 and 2013 alone.¹⁸
39. On the other hand, if the policy and regulatory framework focuses only on price, while it may be that consumers would see lower prices in the short term (although even that is not a given), there may also be a gradual degradation in service because there would be no incentive to invest in maintaining and expanding telecommunications networks. This can be seen across Europe, where decades of policies that discouraged investment have now forced European Union to face the prospect of spending 21 billion euros of public money on improving telecommunications networks.¹⁹ This is effectively a use of public funds to subsidize the true cost of private broadband internet – a need for public money having been caused by policies aimed at keeping short term prices low.
40. A focus on dynamic efficiency will ensure optimal investment in technology and make prices lower for everyone. Policies that support investment in the construction and deployment of competing facilities achieve this goal. This requires the CRTC to step away from yesterday's regulatory tools (such as tariffed wholesale access) in favour of measures that facilitate investment in and the construction and deployment of competing networks. The recommendations TELUS makes throughout this submission will realign the legislative framework with dynamic efficiency. Consistent with TELUS' guiding principle 11, the new telecommunications policy objectives recommended in Section 5.1 are designed for this purpose. Similarly, the recommendations that services be by default "forborne" and that section 24 of the *Telecommunications Act* be amended in Section 5.3

¹⁸ Report of Dr. Robert W. Crandall, p. 12, in Appendix 3.

¹⁹ European Commission, *Commission Staff Document: A Digital Single Market Strategy for Europe - Analysis and Evidence*, June 5, 2015, p. 85.

are intended to entrench the central role of market forces in the policy framework for telecommunications.

2.4. Canadian Telecommunications Services Are Affordable and Compare Favourably to Other Jurisdictions

41. The Broadcasting and Telecommunications Legislative Review Panel has requested comments on the affordability challenge for low-income Canadians. However, it is apparent that Canada's reliance on platform competition has delivered superior benefits to Canadian consumers, including price, when comparing Canadian prices to those in other jurisdictions. Notwithstanding this fact, affordable telecommunications remain a challenge for some Canadians. This challenge is best addressed by broader social policy measures rather than through sector-specific telecommunications policy measures. The legislative framework should prioritize investment and competition, which will in turn ensure that prices are affordable for the vast majority of Canadians.

2.4.1. International Comparison of Wireline Prices

42. Dr. Robert W. Crandall recently undertook a comparison of wireline internet access prices as part of TELUS' response to the Competition Bureau's current Market Study in Broadband Services. TELUS includes Dr. Crandall's report as a part of its submission to the Broadcasting and Telecommunications Legislative Review Panel in Appendix 3 to TELUS' submission. Dr. Crandall concludes that "the best data available allow one to conclude that Canadian consumers face wireline broadband prices that are slightly lower than those in similar countries throughout the world despite Canada's obvious topographical disadvantages."²⁰ Moreover, Canadian prices are declining when considering the price Mbps download speed.²¹
43. The repeated claims from some quarters that Canadian prices are "too high" are simply untrue. Measuring Canadian prices to relevant international comparators shows that

²⁰ Report of Dr. Robert W. Crandall, pp. 13-14, in Appendix 3.

²¹ Report of Dr. Robert W. Crandall, p. 14, in Appendix 3.

Canadian are able to subscribe to high-speed wireline Internet services at very reasonable prices.²²

2.4.2. *International Comparison Wireless Prices*

44. Canadians wireless services prices also compare favourably on an international basis. Dr. Christian Dippon of NERA Economic Consulting recently conducted a price comparison of communications services in Canada and select foreign jurisdictions.²³ TELUS includes a link to Dr. Dippon's report as a part of its submission to the Broadcasting and Telecommunications Legislative Review Panel in Appendix 4 to TELUS' submission.
45. Dr. Dippon determined that mobile wireless telephony prices in Canada are lower than international benchmarks once all relevant factors are taken into account. Comparing the forecasts at the country level demonstrates that of the 246 Canadian mobile telephony plans that Dr. Dippon studied, 197 plans, or 80 percent, have prices that are *below* the forecast international benchmark prices.²⁴
46. As is the case with wireline services, claims that Canadian wireless prices are high when compared to the prices in other countries do not withstand scrutiny. When assessed using valid methodology, prices for Canadian wireless services compare favourably with those in other jurisdictions.

2.4.3. *The Cost of Providing Services in Canada Is High*

47. Even though prices of telecommunications services in Canada, once correctly measured, are not higher than in other jurisdictions, the cost of providing those services is far higher. This is due to numerous factors explained below. While some of those factors, such as population density and topology, are beyond the control of the regulatory system, other

²² Report of Dr. Robert W. Crandall, p. 15. in Appendix 3.

²³ Dr. Christian M. Dippon, *An Accurate Price Comparison of Communications Services in Canada and Select Foreign Jurisdictions*, NERA Economic Consulting, October 19, 2018, see in Appendix 4.

²⁴ *Ibid*, p. 33.

costs have been driven up government intervention. As explained below, certain policies have the effect of increasing prices.

48. As part of his analysis of wireline broadband prices, Dr. Robert W. Crandall looked at the cost of providing services in Canada compared to other developed countries. He concluded that a fundamental difference between Canada and most other developed countries is Canada's low population density. Providing fixed-wire or wireless broadband services requires carriers to deploy expensive networks comprised of copper wires, coaxial cable, fiber-optic cables, or a combination of these transmission media, and wireless towers. These networks must be deployed over pole lines, through underground ducts, or by interconnected wireless transmission facilities. For these technologies, the cost of serving customers rises substantially as the population density of the covered area declines.²⁵
49. Dr. Crandall notes that Canada's average population density is far below that of the United States and even farther below the population densities found in Europe, Japan, and Korea. Even in urban areas Canada is less densely populated than most other developed countries.²⁶
50. Canada has lower urban population concentration than all but 12 of the 34 most developed countries in the world, and its concentration is far below the urban concentration in countries such as the United Kingdom, Japan, and Korea. Canada's rural areas also have much lower population density than the rural areas in the United States and the larger European countries. Thus, even in rural areas, Canada has a cost disadvantage relative to other major developed countries. Given the economics of network deployment, this low population concentration means that it simply costs more to serve broadband subscribers in Canada than in most other developed countries.²⁷
51. In addition to Canada's challenging geography, topology and population density, Canadians telecommunications carriers have little leverage when negotiating with large

²⁵ Report of Dr. Robert W. Crandall, p. 6, in Appendix 3.

²⁶ *Ibid*, p. 7.

²⁷ *Ibid*.

global handset and device manufacturers (“OEMs”). As a result, OEMs are able to dictate prices and certain terms to TELUS and other Canadian wireless carriers. Most importantly, some devices now cost TELUS more than \$1,000 per unit, and as a result of Canadians’ continued expectation of receiving the latest flagship devices with significant subsidies and low upfront prices, the cost for carriers continues to increase.

52. Prior regulatory intervention has also driven up costs for customers. The Wireless Code, first enacted in 2013, provides a good example. By effectively limiting contract terms to two years by preventing the charging of a cancellation fee after 24 months, telecommunications carriers were forced to amortize the full cost of the device over a two years²⁸ instead of the three years that was customary before the Wireless Code came into effect. That led to higher up-front device prices and higher monthly fees for customers as carriers took steps to ensure that they did not lose money on subsidizing devices. Although the Wireless Code was expected to be a consumer-friendly piece of regulation, it resulted in increased prices for Canadians.
53. Another aspect leading to price increases for consumers have been the set asides in spectrum auctions by which major wireless carriers have been prohibited from bidding on certain spectrum blocks. This created artificial scarcity of a critical resource and raised the cost of the acquired spectrum for companies like TELUS. Partially as a result of the set-asides, spectrum in Canada is significantly more expensive than in other jurisdictions.²⁹ For example, the average price of AWS spectrum in the 2008 auction in Canada was C\$1.55 per MHz-pop, whereas the same spectrum cost in the United States cost an average of US\$0.54 per MHz-pop.³⁰ Part of the reason for the disparity in spectrum cost is that companies bidding on spectrum that was set aside for them also bid on unrestricted blocks of spectrum, driving up prices for companies like TELUS that would only bid on the unrestricted blocks. Competitive measures led to significantly higher prices paid at auction

²⁸ *The Wireless Code*, Telecom Regulatory Policy 2013-271 at para 220. The Wireless Code was updated in Telecom Regulatory Policy 2017-200, but the 24 month cap on contract terms remained.

²⁹ *Investment in Spectrum*, p 14 of the *Telecommunications Overview* section of the 2018 CMR, reporting “investments in spectrum” of over \$8 billion in spectrum from 2013-2016.

³⁰ Robert Bok and Michael Lee, *AWS Auction Finally Ends - \$4.25B Is A Big Tally*, CIBC World Markets, July 21, 2008.

in 700 MHz (2014) due to a spectrum cap and in AWS-3 (2015) due to a set aside. Major Canadian wireless carriers paid an average of C\$2.99 per MHz-pop for restricted 700 MHz spectrum,³¹ while US carriers paid an average of US\$1.29 per MHz-pop. Higher spectrum costs in turn led to higher prices for consumers as Canadian wireless carriers sought to recoup their investment.

54. In summary, the increased costs arising from unfavourable population density, challenging geography, lack of bargaining power with global OEMs, more expensive spectrum and costly regulatory intervention contribute to the price of telecommunications services that Canadians face.

2.4.4. *Price Is Not a Standalone Barrier to Broadband Adoption*

55. Price is merely one of many factors, and not the most important one, deterring some people from subscribing to broadband service. Three recent studies have shown that age, education, and income are the primary factors that limit broadband adoption.^{32, 33, 34} However, the main reason offered by non-users of the Internet is a lack of interest or no need for the service, which is the reason given by “66.5% of Internet non-users in 2012.”³⁵ In this study conducted by Statistics Canada and Industry Canada (now Innovation, Science and Economic Development Canada), only 7.7% of non-users indicated that the cost of service or equipment was the main reason for not using the Internet. In this same study, the authors present the results of a multivariate statistical analysis and conclude that “education and age are the most discriminating factors in determining an individual’s use of the Internet.”^{36,37}

³¹ Spectrum that was set aside was auctioned for C\$0.81/MHz-pop.

³² Karine Landry and Anik Lacroix, “The Evolution of Digital Divides in Canada,” *2014 TPRC Conference Paper*, August 15, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418462.

³³ Kathryn Zickuhr, “Who’s not online and why,” *Pew Research Center*, September 25, 2013, <http://www.pewinternet.org/2013/09/25/whos-not-online-and-why/>.

³⁴ “Équipement et Branchement Internet des Foyers Québécois,” *Cefrio, NETendances*, Vol. 5, No. 2, 2014, http://www.cefrio.qc.ca/media/uploader/NETendances2013_V4N2_Equipement_branchement.pdf

³⁵ Landry and Lacroix, *op. cit.*, p. 12.

³⁶ Landry and Lacroix, *op. cit.*, p. 14.

³⁷ According to Zickuhr, *op. cit.*, 34% of Americans surveyed stated that relevance (not interested, waste of time, too busy, don’t need or want) was the principal reason that they did not subscribe to an Internet service.

56. As can be seen in these and other studies, the price of broadband service is not a major standalone deterrent but is typically combined with other factors, such as the cost of the necessary technology to support the broadband service (*i.e.*, computers), and the ability to access the data another way (*i.e.*, smartphones). While there are deterrents to adoption, price is only one of many factors, and far from the most important one, discouraging some Canadians from subscribing to broadband services. As noted in other sections of this submission, the most important factor in adoption of broadband services is digital literacy.

2.4.5. *Affordability for Lower-Income Canadians Should Be Addressed as a Matter of Broader Social Policy*

57. While Canada's wireline and wireless networks are affordable relative to other countries, low income Canadians may still be unable to afford access. As a result, they risk being left behind in the digital economy. Low-income Canadians may have trouble paying for food, rent, clothing, and Internet access. If low incomes require some income augmentation to make the purchase of all goods and services, including broadband Internet, more manageable, this suggests a solution that goes beyond the capability of sector-specific regulation. TELUS' proposed principle 6 pertains to this issue: social regulation and technical regulation, where required, should be applied symmetrically and should be applied through laws of general application, as distinct from sector-specific regulation, whenever possible.
58. Issues of income and affordability are best dealt with by other government departments, for example, through GST rebates or through tax policies of the Department of Finance. Issues of affordability cannot be solved with the limited tools at the disposal of a sector-specific regulator. It is unfortunate, though nonetheless true, that the magnitude of this problem is such that lowering any telecommunications price by a few dollars a month will do little to address systemic, economy-wide problems of income distribution. The problem

Only 19% stated that price (too expensive, don't have a computer) was the main factor. Another subgroup of users who use the Internet but not from their residence indicated that the main deterrent to household adoption is the total price (the combination of a lack of computer, the ability to access data another way and the price of the service). None of these studies separates the price of the broadband service itself from the cost of computers and equipment necessary to access the Internet, rendering it even more difficult to conclude that the price of broadband service itself is a major deterrent to using the Internet.

of poverty is larger than the price of any single good or service. Rather than sector-specific solutions to this problem, direct government funding from general tax revenues should be used to pursue the objective of allowing low income Canadians to subscribe to broadband. Tax-based subsidies are not only preferable because they are the least distortionary in terms of market outcomes and incentives to innovate but also, as noted by the Consumer Groups in previous policy reviews, “(t)ax-based subsidies are preferable to service/subscriber-based subsidies insofar as they are more progressive, *i.e.*, less burdensome on low income households.”³⁸ Tax-based subsidies are the only ones that can successfully target low income Canadians where such subsidies are needed the most.

59. Notably, the CRTC agreed with this conclusion and has acknowledged that affordability issues need to be addressed in a broader social context by other federal government departments and other levels of government.³⁹

2.5. Legislation Should Promote Investment By Providing Greater Flexibility for Foreign Investment

60. A further legislative change that can be made to remove barriers to access to advanced telecommunications services is to promote investment by the removal of substantive Canadian ownership and control requirements and removal of these requirements as a Canadian telecommunications policy objective. In the alternative, TELUS proposes the liberalization of the current regime to allow for up to 49% direct investment.
61. Canadian telecommunications ownership and control is a specified Canadian telecommunications policy objective (*Telecommunications Act*, section 7(d)). The existing regime is embodied in the section 16 of the *Telecommunications Act* and in the *Canadian Ownership and Control Regulations* made pursuant to section 22 of the

³⁸ Telecom Policy Review Panel, Comments of the Consumer Groups (Public Interest Advocacy Centre, the Canadian Internet Policy and Public Interest Clinic, the Consumers Association of Canada, and the National Anti-Poverty Organization), 2005, https://cippic.ca/sites/default/files/CG_TPR_final_rev.pdf, paragraph 257.

³⁹ Modern telecommunications services – The path forward for Canada’s digital economy, Telecom Regulatory Policy CRTC 2016-496, para 204; CRTC Submission to the Government of Canada’s Innovation Agenda.

Telecommunications Act. The current regime requires that, subject to certain exceptions,⁴⁰ Canadian carriers, in order to be eligible to operate as telecommunications common carriers, must meet the following requirements: in the case of a corporation, not less than 80% of the members of the board of directors are individual Canadians; Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80% of the entity's voting interests; and the entity is not otherwise controlled by persons that are not Canadians.

62. The current Canadian ownership and control regime is no longer justified. In its current form this objective was intended to be a cornerstone requirement of the Government of Canada's ministerial licensing regime for Canadian carriers at the time of the introduction of draft *Telecommunications Act* legislation in the early 1990s. The objective remained in the legislation as passed in 1993 despite the fact that the proposed ministerial licensing regime itself was abandoned.
63. The substantive requirements in section 16 of the *Telecommunications Act* now effectively apply to only a handful of the largest telecommunications entities (e.g., BCE, Rogers and TELUS). The current requirements limit access to foreign capital on the part of these three entities. There are no such limitations for other telecommunications service providers. Limiting access to foreign capital is a potential handicap to companies subject to the regime which is required to invest in new and innovative networks and services.
64. The rationale for the current regime is further called into question by 2014 amendments to section 16 of the *Telecommunications Act* which permitted Canadian carriers to operate if they have annual revenues from the provision of telecommunications services in Canada that represent less than 10% of the total annual revenues, as determined by the CRTC, from the provision of telecommunications services in Canada.⁴¹ The 2014 amendment permits

⁴⁰ Pursuant to sections 16(2) and 16(6), exceptions are provided for: Canadian carriers whose annual revenues from the provision of telecommunications services in Canada represent less than 10% of the total annual revenues, as determined by the CRTC, from the provision of telecommunications services in Canada; international submarine cables, earth stations that provide telecommunications services by means of satellites and satellites.

⁴¹ *Telecommunications Act*, section 16(2)(c).

foreign companies of any size to enter the Canadian telecommunications services marketplace without any restrictions, while the three major Canadian telecommunications providers remain subject to asymmetric Canadian ownership requirements.

65. The Canadian ownerships and control regime entails expensive compliance costs for those subject to it, including maintaining detailed share registry records, ongoing reporting requirements and other activities, whose costs now outweigh the benefits. The regime has been so hollowed out by *ad hoc* exception that it cannot credibly be characterized as a policy objective for the sector.
66. TELUS further notes that the legislative requirements at the time were effectively side-stepped by the Government of Canada in the Globalive case. Despite being found to not meet the Canadian ownership and control requirements at the time by the CRTC,⁴² the Government of Canada nevertheless proceeded to overturn the CRTC's determination by Order in Council,⁴³ effectively undermining the rationale for its own regime.
67. TELUS further notes that in the telecommunications sector, concerns over Canadian ownership and control have been effectively superseded by national security concerns under the *Investment Canada Act*. For example, in 2013, the Government of Canada blocked the former Manitoba Telecom Services Inc (MTS) intention to sell its Allstream fibre optic network for \$520 million to Accelero Capital Holdings, an entity controlled by Egyptian Naguib Sawiris, who ironically held the controlling interest in Globalive, whose entry into the Canadian market the Government had previously supported. The transaction was blocked for unspecified national security concern under the national security provisions of the *Investment Canada Act*.⁴⁴
68. In light of the above, TELUS recommends that the Canadian ownership and control regime be removed. In the alternative, short of abolition of the current regime, further liberalization

⁴² *Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, Telecom Decision CRTC 2009-678.

⁴³ Order in Council P.C. 2009-2008.

⁴⁴ <https://www.newswire.ca/news-releases/government-of-canada-rejects-mts-sale-of-allstream-to-accelero-capital-holdings-513071121.html>

is possible, without undermining whatever remaining rationale may exist for Canadian ownership and control requirements. The Canadian ownership and control regime for telecommunications services can be liberalized as in the Canadian airlines sector. Pursuant to recent amendments under the *Canadian Transportation Act*, direct foreign investment of up to 49% is now permitted in the airlines sector, with a control-in-fact regime still in place. Amending the *Telecommunications Act* to provide for the same regime in place for the airlines sector would go at least some way to achieve liberalization without compromising policy objectives and would encourage further investment and innovation in the telecommunications services sector.

2.6. The Telecommunications Act and Radiocommunication Act Should Be Amended to Facilitate the Deployment of Wireline and Wireless Networks

69. Faster deployment of network infrastructure can be promoted by amending *Telecommunications Act* public access rights to apply to the construction of “transmission facilities” instead of “transmission lines”.
70. “Transmission line” is an undefined term in the current legislation. The above amendment will clarify the scope of the rights by referring to a defined term. Moreover, it will remove any doubt that wireless equipment is included.
71. In order to build the networks required for the services Canadians need and want, carriers require timely and predictable access to public lands and infrastructure. Section 43 of the *Telecommunications Act* today grants carriers the right to access highways and other public places for the purpose of constructing, maintaining and operating their networks. This provision and its predecessors have been crucial to the effective deployment of telecommunications services in Canada. While recognizing the interests of municipalities, these provisions have allowed carriers to build their networks without undue barriers imposed by municipalities and other local authorities. However, deployment has been frustrated by numerous disputes with various municipalities requiring litigation before the CRTC and the courts. TELUS proposes a minor change to this section to ensure it is technologically neutral, preventing potential confusion and consequent disputes with

municipalities, and overcoming the unique deployment challenges associated with 5G networks.

72. Section 43 access rights are expressly in relation to “transmission lines”. Since this term is not defined in the *Telecommunications Act*, there may be questions about its meaning. The reference to “lines” may invite questions about whether Parliament intended these rights to be exclusive to wireline facilities. Since this provision was enacted, wireless services have taken on a central role in Canadian telecommunications. Importantly, wireless services are now substitutable with wireline services. Technologically neutral statutory access rights are necessary for carriers to deploy their networks, whether wireline or wireless (or, most commonly, a mix of both).
73. Accordingly, the *Telecommunications Act* should be amended to state that access rights are provided to carriers in respect of the construction, maintenance, and operation of transmission *facilities*, a term which is defined, and includes both wireline and wireless equipment. Although the current legislation should apply to all types of facilities, the foregoing recommendation will remove any doubt and proactively prevent future disputes.
74. With the coming of 5G technology, the type, size and location of next generation wireless equipment will evolve. These services will require the installation of many small antennae, located in close proximity to each other in dense areas. Timely and effective deployment of such equipment requires access not only to public highways but also to passive public infrastructure such as light standards, viaducts, and similar infrastructure owned by a variety of public authorities. The current legislative provision already subjects this infrastructure to access rights, which apply to highways *and other public places*. There is no need to amend the *Telecommunications Act* to address this type of access. However, with the change to clarify that wireless facilities are covered, the CRTC can more confidently assert its jurisdiction where a carrier cannot gain access on acceptable terms.⁴⁵

⁴⁵ Certainly there will be occasions where safety and other considerations will demand that access rights be restricted. This can be achieved by subjecting the expanded access rights to existing language preventing the undue interference with public use and enjoyment of the public place.

75. The foregoing recommendation is consistent with those proposed in the 2006 final report of the Telecommunications Policy Review Panel, which recommended that “access rights should be defined to encompass the right to install, maintain, repair and operate all ‘transmission facilities’ as defined in the Act”.⁴⁶ In the 12 years since the issuance of that report, the wisdom of those recommendations have been borne out in the experience of carriers and municipalities. The pace of technological change, as described above, have only made the changes more urgent.
76. Apart from the question of accessing public lands, TELUS also recommends several other legislative changes to the *Radiocommunication Act* to facilitate the deployment of wireless infrastructure. In particular, TELUS recommends:
- The amendment of the definition of “radio station” found in the *Radiocommunication Act* to read “**radio station** or **station** means a place in which radio apparatus including any associated antenna systems and any masts, towers and other antenna supporting structures.”
 - The inclusion of a requirement for a new radio authorization for purpose-built antenna supporting structures owned and operated by third parties.
 - The inclusion of a power to prescribe the procedures governing the approval and making of applications for the siting of radio stations and purpose-built antenna supporting structures owned and operated by third parties including the form and manner, and prescribing the processing and disposition of those applications.
 - The inclusion of a power to exempt specified spectrum licensees from the requirement to obtain approval for the siting of radio stations where the radio station meets the requirements of a standard issued by the regulator.
77. These changes can eliminate some impediments to the deployment of infrastructure necessary to support new 5G services, as explained further below.

⁴⁶ TPRP Final Report, Recommendation 5-4.

78. The siting of antenna structures falls entirely within the core of the exclusive federal authority over radiocommunication,⁴⁷ and local land use authorities may not impair this exclusive federal authority. However, under ISED procedures imposed via conditions to spectrum licences, licensees are obliged to contact local land use authorities to “determine the local consultation requirements and to discuss local preferences regarding antenna system siting and/or design.”⁴⁸ While intended to be a reasonable opportunity for the consideration of legitimate local concerns these consultations and discussions all too frequently become mired in seemingly endless process and serve as platforms for opponents convinced of the alleged inadequacy of Health Canada’s radio frequency exposure guidelines which are binding on licensees.⁴⁹ Notwithstanding compliance with these radio frequency exposure limits licensees are compelled to engage in repetitive processes and lengthy debate introducing unnecessary expense and delay.
79. Coverage, capacity and technical considerations demand network topologies having ever smaller and more numerous cell sites. TELUS projects the number of cell sites required to meet capacity the demands of 5G will be at least an order of magnitude increase from tens of thousands to hundreds of thousands nationally. The challenges arising from the current consultation process will consequently be magnified.
80. While ISED procedures do provide for the exclusion from consultation of non-tower existing structures in certain circumstances, the exclusion is accompanied by qualifications

⁴⁷ *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23.

⁴⁸ *Radiocommunication and Broadcasting Antenna Systems*, Client Procedures Circular CPC-2-0-03 Issue 5. This procedure is incorporated by reference into the licence conditions of wireless service providers and non-compliance with its provisions may precipitate licence revocation or the application of substantial administrative monetary penalties. Although the procedures are said to apply to “third party tower owners” who are not licensees and thus not subject to conditions of licence it is not immediately obvious how this is given effect perhaps suggesting a need for attention in subsequent legislative amendments.

⁴⁹ *Ibid*, CPC 2-0-03: “Health Canada has established safety guidelines for exposure to radio frequency fields, in its Safety Code 6 publication, entitled: Limits of Human Exposure to Radiofrequency Electromagnetic Fields in the Frequency Range from 3 kHz to 300 GHz.13. While the responsibility for developing Safety Code 6 rests with Health Canada, Industry Canada has adopted this guideline for the purpose of protecting the general public. Current biomedical studies in Canada and other countries indicate that there is no scientific or medical evidence that a person will experience adverse health effects from exposure to radio frequency fields, provided that the installation complies with Safety Code 6.” In practice cell site parameters and design are such that the resulting radio frequency fields are orders of magnitude less than the Health Canada Limits in virtually all cases.

that call into question its scope. Exclusions are to be exercised “in consideration of local circumstances” and consequentially “it may be prudent for the proponent to consult even though the proposal meets an exclusion.” Further proponents are cautioned that they “may benefit from local knowledge by contacting the land-use authority when planning an antenna system that meets this exclusion criteria.” All parties are thereby left in a situation of uncertainty as to the procedural path to be followed. This uncertainty, delay and expense does not bode well for the deployment of 5G infrastructure involving tens of thousands of new sites.

81. The Broadcasting and Telecommunications Legislative Review Panel may wish then to recommend legislative improvements noting the example of the recent Federal Communications Commission (“FCC”) initiative *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*.⁵⁰ The FCC is taking steps to “remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support” new 5G services by limiting the time consumed by local processes. In part, this is to be accomplished by the introduction of a “shot clock,” the operation of which can be seen in the following extract:

- Establish two new shot clocks for small wireless facilities (60 days for collocation on pre-existing structures and 90 days for new builds) and codify the existing 90 and 150 day shot clocks for non-small wireless facility deployments that were established in the 2009 Declaratory Ruling.
- Make clear that all state and local government authorizations necessary for the deployment of personal wireless service infrastructure are subject to those shot clocks.

⁵⁰ Declaratory Ruling and Third Report and Order, WT Docket No. 17-79; WC Docket No. 17-84, FCC, September 5, 2018. “To meet rapidly increasing demand for wireless services and prepare our national infrastructure for 5G, providers must deploy infrastructure at significantly more locations using new, small cell facilities. Building upon streamlining actions already taken by state and local governments, this Declaratory Ruling and Third Report and Order is part of a national strategy to promote the timely buildout of this new infrastructure across the country by eliminating regulatory impediments that unnecessarily add delays and costs to bringing advanced wireless services to the public.”

- Conclude that a failure to act within the new small wireless facility shot clock constitutes a presumptive prohibition on the provision of services. Accordingly, we would expect local governments to provide all required authorizations without further delay.
82. In summary, the imminent deployment of tens of thousands of new small cell sites for the radio apparatus and associated antennas required for the delivery of 5G services to Canadians will be unnecessarily delayed and will incur undue extraordinary costs due to current burdensome site approval processes under the existing provisions of the *Radiocommunication Act*. These processes require simplification and streamlining and the imposition of greater discipline to avoid prolonged and unreasonable delays at the hands of local land use authorities. Also, it is not at all apparent that current legislation and approval processes adequately capture operators employing licence-exempt radio apparatus and third-party tower operators. These recommendations are intended to better position the regulator to effectively assert federal jurisdiction in the area and to develop new site approval processes that avoid unnecessary delay and burden and expedite the delivery of wireless services to Canadians.
83. Finally, TELUS also recommends facilitating the faster deployment of wireline and wireless networks by its enshrinement as a Canadian telecommunications policy objective in section 7 of the *Telecommunications Act*, as detailed in Section 5.1. It is crucial for Canada to be at forefront of the deployment of new telecommunications networks to facilitate future innovation in the digital economy.

3.0 Theme B – Supporting creation, production and discoverability of Canadian content

84. The global digital market place for programming content has fundamentally disrupted the traditional Canadian broadcasting system and, as a result, its foundational pillars are crumbling. First, the “walled-garden” in which consumers had no choice but to obtain programming through the regulated system is now a thing of the past. Consumers are moving to alternatives outside the regulated system. The CRTC Communications Monitoring Report shows four consecutive years of decline in subscriptions to broadcasting distribution undertakings [“BDUs”].⁵¹ This downward trend is disconcerting, and complacency over the relatively slow pace of this market reduction is inadvisable. This trend is likely to continue as younger generations eschew the traditional broadcasting system. Indeed, a recent report by Communications Management Inc., using data from Statistics Canada, finds that 44.5% of Canadian households which are headed by individuals under 30 years of age don’t subscribe to the traditional TV service.⁵²
85. The second factor contributing to the demise of the foundational pillars of the Canadian broadcasting system is the erosion of the distinct Canadian program rights market, which has allowed Canadian media companies to build business models based on reselling foreign content (rather than relying on their own home grown productions). This is confirmed in a report by Mario Mota of Boon Dog Professional Services Inc., commissioned by TELUS in November 2017⁵³ and included as Appendix 5 to this submission. As noted in Mota’s report “The traditional business model of Canadian broadcasters/media companies is contingent on having a separate rights market for Canada. In today’s evolving program rights market, this can no longer be assured.”⁵⁴ Mota notes that “[w]ith the growth of global behemoth video streaming players such as Netflix and Amazon, selling rights on a global

⁵¹ CRTC Communications Monitoring Report 2017, section 4.3 ii) at pp. 194: <https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2017/cmr2017.pdf> [“CRTC CMR”].

⁵² “44.5% of under-30 households don’t have TV: report”, The Wire Report, January 7, 2019: https://thewirereport.ca/2019/01/07/44-5-of-under-30-households-dont-have-tv-report/?utm_source=The+Wire+Report+-+Paid+Subscribers&utm_campaign=6d5e9e1211-EMAIL_CAMPAIGN_2019_01_08_10_00&utm_medium=email&utm_term=0_762d18fda1-6d5e9e1211-91111325&mc_cid=6d5e9e1211&mc_eid=60571c9861.

⁵³ Mota, Mario, Recent Developments in Television Program Rights in the Canadian Market: A Snapshot of Legal Options Available to Canadians to Access Television Content, November 2017 [“Mota”].

⁵⁴ *Mota*, at p. 1.

basis, rather than by country or territory, is a new option available to rights holders and increasingly seen as a viable and lucrative one.”⁵⁵ Some content suppliers are also choosing to enter the Canadian market on a direct-to-consumer basis, as the U.S. television network CBS recently did with its CBS All Access video streaming service that launched in Canada in early 2018.⁵⁶

86. Whether or not the broadcasting regulatory framework has been successful in meeting the objectives of the *Broadcasting Act* in the past,⁵⁷ there can be little doubt that continued reliance on a crumbling regulatory framework will not prove successful in the future. Attempting to maintain all the constructs which have supported a myriad of cultural and social objectives in the past is likely to precipitate the exodus of consumers from the “regulated system” in favour of other alternatives in the global digital marketplace for programming content. Expectations for a new framework must be adapted to the new realities which make former support mechanisms unsustainable in the future.
87. However, not all new developments relating to how programming is distributed spell doom and gloom for the Canadian cultural industries and policy makers. The good news is that the global digital environment is ripe with opportunities for Canadian content creators and producers. There are innumerable success stories, such as the CBC’s hit show *Kim’s Convenience* which reports that it has found a new broadcast window for its first three seasons in Asia, and also that “Netflix already snapped up the global streaming rights to the show, and Amazon holds its VoD rights in the United States and United Kingdom.”⁵⁸

⁵⁵ Mota, p. 1.

⁵⁶ CBS.com, *CBS All Access launches in Canada*, April 23, 2018: <https://www.cbs.com/recommended/news/1008474/cbs-all-access-launches-in-canada/>

⁵⁷ This is something that has been hotly debated by experts over the years and has been a livewire of consumer discontent. It is therefore not surprising that the CRTC’s own survey as part of the Let’s Talk TV consultation resulted in Canadians boldly stating as their #1 suggestion to get rid of the CRTC: Broadcasting Regulatory Policy CRTC 2015-86, *Let’s Talk TV - The way forward - Creating compelling and diverse Canadian programming*, March 12 2015 and Broadcasting Regulatory Policy CRTC 2015-96, *Let’s Talk TV - A World of Choice - A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, March 19, 2015.

⁵⁸ “Thunderbird Entertainment’s ‘Kim’s Convenience’ heads to Asia”, Cartt.ca, January 4, 2019: <https://cartt.ca/article/thunderbird-entertainments-%E2%80%98kims-convenience%E2%80%99-heads-asia>.

88. It is abundantly clear that the broadcasting sector will continue to see many new challenges and opportunities in the future. A fundamentally revamped broadcasting legislative framework is needed to capitalize on the opportunities and take into account the challenges presented by the new global digital environment for programming content.

3.1. New Definitions and Concepts Are Needed to Make a Revised Broadcasting Act Applicable to the Global Digital Programming Marketplace

89. It is clear that new forms of expression are challenging what constitutes “broadcasting”. Many definitional lines that underpin the existing *Broadcasting Act* are being blurred as a result of technological advancement and the emergence of new business models.

3.1.1. *What Is “Broadcasting”*

90. The current definition of “broadcasting” in the *Broadcasting Act* provides that:

broadcasting means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

91. This definition of broadcasting is intimately tied to the definition of “program” which is defined as follows:

program means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;

92. The exclusion from the definition of “program” of any visual images that “consist predominantly of alphanumeric text” arguably creates incongruous distinctions among various programming services, especially news services which increasingly use video content to communicate with Canadians. When a video is the predominant form of communication for a particular news story, the current framework would, at least notionally, treat that story as a “program”, and its transmission to the public as “broadcasting”. Yet other news stories where a video is accompanied by alphanumeric text

may not reach the threshold to be considered “programs” at all. These incongruous distinctions stand in the way of good public policy. This appears to have been recognized by the Government when it recently chose to support journalism generally and without restricting its form.⁵⁹

93. There are many other considerations relating to the definition of “broadcasting” and “programs” which can and should be examined. These include whether a distinction should be made for the purposes of the *Broadcasting Act* between streaming and downloading programs, and to what degree should personalization of content, *e.g.*, through viewer-directed storyline outcomes, affect whether audio-visual content is considered a program under the *Broadcasting Act*.
94. TELUS has not examined these issues at length in this submission because in its view, any determination to broaden the scope of the new *Broadcasting Act*, or alternatively to marginally limit its scope, would have no bearing on the need for other reforms which are the focus of the sections below.
95. The outcome of deliberations on what should constitute “broadcasting” may in fact lead to a renaming of the *Broadcasting Act*. For example, the emergence of new audiovisual service models 20 years ago, enabled by advances in broadband technology, created significant uncertainty about the scope of the term “broadcasting”.⁶⁰ Thus, the *Broadcasting Act* may be more aptly named the “Audiovisual Media Services Act”, or “Audiovisual Communications Act”. However, since we make no proposals in this submission regarding the appropriate definition of broadcasting, we have continued to reference the *Broadcasting Act* when speaking of new legislation and to reference

⁵⁹ In the 2018 Fall Economic Statement, the Government committed close to \$600M over five years to support Canadian journalism in all its forms. The measures to support Canadian journalism consist of three initiatives: allowing non-profit news organizations to act as registered charities, introducing a new refundable tax credit to support original news content creation, and introducing a new temporary non-refundable tax credit to support subscriptions to Canadian digital news media. See *2018 Fall Economic Statement*, November 21, 2018, at pp. 40-41: <https://budget.gc.ca/fes-eea/2018/docs/statement-enonce/fes-eea-2018-eng.pdf>

⁶⁰ See, for example, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, *Report on New Media*, May 17, 1999, in which the CRTC considered the scope of the definition of “broadcasting” in light of uncertainty at the time about whether so-called “new media services” were engaged in broadcasting.

“broadcasting” and “programs” to mean whatever these terms may encompass in the new legislation.

3.1.2. A New Terminology Focusing on “Programming Services” and “Content Aggregators”

96. The current regulatory framework, enacted pursuant to the legislative structure and objectives of the existing *Broadcasting Act*, has resulted in a highly asymmetric application of rules and obligations for those who provide programs to Canadians. When such programs are provided by the traditional players of the former “walled-garden” broadcasting system, there is a burdensome and complex regulatory scheme that applies and that adds costs and takes away choice for consumers. But when programs are delivered by non-traditional providers of programming, notably large foreign services such as Netflix or Amazon Prime, few or no rules apply, enabling them to offer consumers more choice at lower cost.
97. This lack of symmetry in the treatment of similar services (at least in the eyes of the consumer) puts regulated Canadian companies at a serious disadvantage when competing with content services that offer programming to Canadians on an exempt basis.⁶¹ These disadvantages are resulting in less innovative yet more costly regulated services, and will ultimately lead to further decline in subscriptions to the regulated broadcasting system, putting at risk Canada’s ability to meet the cultural objectives underlying the *Broadcasting Act*.
98. The asymmetrical treatment described above is largely attributable to artificial distinctions within the *Broadcasting Act* and in the existing regulatory framework. Companies that perform a similar function within the broadcasting ecosystem, and are therefore in direct competition, must be put on a level competitive footing regardless of what platforms or business models they may use to perform that function.

⁶¹ The CRTC, through Broadcasting Order CRTC 2012-409, *Exemption order for digital media broadcasting undertakings*, July 26, 2012, exempts services that are “delivered and accessed over the Internet”.

99. An important first step to achieve that much-needed parity is to update our nomenclature to more accurately reflect how broadcasting services are operating in today's environment. This must start by re-examining the constituent elements of the broadcasting sector.
100. The existing terminology of the *Broadcasting Act* contemplates the following categories of "broadcasting undertaking":⁶²
- a "distribution undertaking", which is defined as an undertaking "for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking";
 - a "programming undertaking", which is defined as an undertaking "for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus."; or
 - a "network", which is defined as "any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person".
101. In today's environment, these definitions fall short of adequately distinguishing between the different roles fulfilled by the service providers that form part of the Canadian broadcasting system. The simple functions of transmission and retransmission/distribution that allowed us to categorize traditional broadcasters and distributors no longer apply, as advances in technologies, and the shifting business models that accompany them, have rendered such distinctions obsolete.
102. In an attempt to provide a more evergreen concept for the definitional underpinnings of a new *Broadcasting Act*, TELUS proposes that the new "players" in the broadcasting sector be defined by whether or not they exercise control over programs, *e.g.*, whether they offer exclusive programming that is only available on their services. The concept of control

⁶² *Broadcasting Act* (S.C. 1991, c. 11), section 2.

over the availability of programs to Canadians is not tied to technology or specific business models and hence would more likely withstand the test of time.

103. Accordingly, TELUS proposes that a new *Broadcasting Act* be anchored by the following two definitions:

- “programming services” which are undertakings that exercise control over the availability of programs in Canada; and
- “content aggregators” which are undertakings that aggregate and curate content by licensing it on a non-exclusive basis and making it available to Canadians.

104. The concept of the exercise of control over programming in Canada goes to the heart of the purpose of the *Broadcasting Act*, namely to protect our cultural sovereignty. One of the central concerns that has underpinned Canadian broadcasting policies since the earliest days of television broadcasting has been the importance of programming to Canadian culture, identity, and sovereignty. This concern is well captured by the opening sentence of the Fowler Committee’s report in 1965: “The only thing that really matters in broadcasting is program content: all the rest is housekeeping.”⁶³

105. Programming services exercise control over programming in a variety of ways, such as decision-making power over what programs to create or make available and how to make these available to the public. That control is exercised through the ownership of exclusive rights in programming, *e.g.*, the exclusive right to authorize distribution of the programming within the Canadian market. These rights allow programming services to control the extent and terms of access to programming for Canadians, and therefore directly affect the implementation of Canada’s broadcasting policies.

106. When defined in this way, it is clear that the fundamental role of programming services has not changed in the global digital environment. Traditional broadcasters are merely taking advantage of advances in technology and the ubiquity of broadband networks to make

⁶³ Report of the Committee on Broadcasting, (Ottawa: Queen’s Printer, 1965).

available the programming they control in new ways. Broadcaster business models now include providing subscribers access to programs through websites, or app-based offerings such as Crave which provides access to programs controlled by Canadian media behemoth Bell Media.

107. Accordingly, programming services would continue to be expected to meet more significant objectives of the *Broadcasting Act* through a licensing regime when a minimum threshold of subscribers or revenue generation is met.⁶⁴
108. Under TELUS' proposed terminology, foreign services such as Netflix, Amazon Prime or Facebook Watch would qualify as "programming services", as they exercise control over programming that is distributed in Canada, *i.e.*, they offer exclusive programming that is only available through their services. TELUS makes some recommendations regarding the treatment of these foreign programming services below in section 3.2.3 recommending that a "foreign element" be recognized in the Canadian broadcasting system and that foreign entities be subject to meeting some objectives of the Act commensurate with their access to the Canadian market.
109. TELUS further notes that the exclusivity, or control over the program, may be short lived in some instances, *e.g.*, where a broadcast program becomes available for purchase shortly after release on other services such as iTunes. The length of the exclusive "window" is irrelevant under this new definition. It would matter only that the program was initially only available through a specific programming service.
110. In contrast to programming services, content aggregators would be defined as having no control over programming in Canada. Not only do they not hold exclusive programming distribution rights, they also no longer have the *de facto* control they once had over the ability of programming services to reach a wide range of Canadian consumers with their content. The fact is that traditional distribution undertakings [commonly referred to as

⁶⁴ In this regard, TELUS notes that the CRTC no longer requires licensing of niche programming services with fewer than 200,000 subscribers. See Broadcasting Order CRTC 2015-88, *Exemption order respecting discretionary television programming undertakings serving fewer than 200,000 subscribers*, March 12, 2015.

“BDUs”] are no longer “gatekeepers” standing between programming services and consumers, as broadcasters today can reach consumers directly over the Internet. These facts support a significantly different treatment under a new Act.

3.1.3. *Other Concepts Which Should Be Updated or Deleted from a New Broadcasting Act*

111. If history serves as a guide, the new legislation that results from this review process will likely be in place for decades. Thus, in addition to eliminating artificial distinctions that are keeping the statute mired in the past, we should also be discarding other out-dated concepts and making amendments aimed at ensuring that the statute is as resilient to future changes in technology as possible, even those that can’t be envisioned today.
112. For example, characterizing the “transmission of programs” as being via radio waves “or other means of telecommunication” is unnecessarily redundant. So long as any means of telecommunication has been used, that is sufficient. Thus, we should discard the definition for “radio waves” entirely, and broaden the language relating to transmission of programs to apply if transmitted “by any means of telecommunication”.
113. Similarly, the means by which the public receives the transmission of programs is irrelevant. The *Broadcasting Act* currently specifies that the public must receive the broadcasting by way of a “broadcasting receiving apparatus”, however what really matters is the fact that the public is capable of receiving a broadcast, not the means of reception. Although the term is arguably broad enough at present to capture most means of reception for broadcasting, leaving it in the statute only invites future uncertainty when a technology is invented that arguably falls outside its bounds. In TELUS’ view, so long as the public receives a transmission of programs intended for public reception, broadcasting has occurred.
114. Some additional proposed amendments are a consequence of the redefinition of the constituents of the broadcasting system into programming services and content aggregators, and the proposed licensing framework applicable to them. For example, the term “broadcasting undertaking” is no longer required in a statute that defines

“programming services” and “content aggregators” quite differently, *i.e.* based on the role they fulfill in the broadcasting system, and also regulates them differently to reflect the different functions they can fulfill in achieving Canada’s cultural goals. Similarly, the term “licence” would need to be amended to reflect the fact that only programming services should continue to be licensed under the proposed framework.

115. The examples discussed above are not intended to be exhaustive, as any significant overhaul of a statutory framework will no doubt lead to many consequential amendments.

3.1.4. *Recommended Legislative Changes to the Definitions of the Broadcasting Act*

116. TELUS proposes the following specific legislative changes to section 2 of the *Broadcasting Act* (changes are shown in bold, with additions underlined and deletions in strikethrough text):

2 (1) In this Act,

broadcasting means any transmission of programs, whether or not encrypted, by ~~radio waves or other~~ **any** means of telecommunication for reception by the public ~~by means of broadcasting receiving apparatus~~, but does not include any such transmission of programs that is made solely for performance or display in a public place;

...

~~*distribution—undertaking*~~ **content aggregator** means an undertaking **engaged in the aggregation and distribution of programs over which it exercises no exclusive broadcasting rights, by any means of telecommunication, for reception by the public;** ~~for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication, to more than one permanent or temporary residence or dwelling unit or to another such undertaking;~~

...

licence means a licence to carry on a ~~broadcasting undertaking~~ programming service issued by the Commission under this Act;

...

~~*network* includes any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person;~~

...

~~*programming undertaking*~~ programming service means

- (a) any undertaking that exercises exclusive broadcasting rights in one or more programs which it makes available the transmission of programs, either directly by ~~radio waves or other~~ any means of telecommunication or indirectly through a ~~distribution undertaking~~ content aggregator, for reception by the public ~~by means of broadcasting receiving apparatus;~~
- (b) any delegate of a programming service as defined in subsection (a);
- (c) any undertaking that makes use of radio waves as defined by the Radiocommunication Act [or Telecommunications Act]

...

telecommunication has the same meaning as in section 2 of the Telecommunications Act;

~~*temporary network operation* means a network operation with respect to a particular program or a series of programs that extends over a period not exceeding sixty days.~~

~~(2) For the purposes of this Act, other means of telecommunication means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.~~

(2) For greater certainty, *broadcasting* includes making programs available to the public in a way that allows a member of the public to have access to them from a place and at a time individually chosen by that member of the public.

3.2. Redefining the “Elements” of the Canadian Broadcasting System

117. TELUS believes that the health and future success of Canadian content creation and Canadian programming distribution models requires a fundamental shift in paradigms to help Canadian content creators and business model innovators take advantage of the opportunities created by a global marketplace.
118. As Government develops new cultural policies and a new *Broadcasting Act*, it should consider the threat and opportunity that a global digital marketplace presents for Canadian content creators. While on the one hand, the business model of leveraging foreign programming to subsidize Canadian content creation may be rendered more difficult; on the other hand, Canadian content creators also have easier access to global markets for the distribution of their creations, which provides new commercial funding opportunities. Embracing the global marketplace may provide the right incentives for Canadian content creators to adopt a more entrepreneurial spirit with respect to marketing their creations. To foster this, Government should be looking at removing many of the asymmetries between the current regulated broadcasting system and other services currently providing programming on an exempt basis pursuant to the Digital Media Exemption Order [“DMEO”].⁶⁵

⁶⁵ Broadcasting Order CRTC 2012-409, *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, July 26, 2012 [“DMEO”].

119. A re-imagined regulatory framework should be focused on empowering Canadian creators to thrive on the global stage and on fostering an environment for innovation in content delivery models.
120. The current *Broadcasting Act* declares that:
- 3(1) b) the Canadian broadcasting system, [...] **comprising public, private and community elements**, [...] provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty; [Emphasis added.]⁶⁶
121. These elements, namely public, private and community, have all been granted various forms of support over the years. Since the enactment of the *Broadcasting Act* in 1991, however, the state of Canada’s broadcasting industry has changed significantly. In the new global environment, it is no longer sustainable to ignore foreign competition, nor advisable to attempt to make the private element responsible for the “maintenance and enhancement of national identity and cultural sovereignty” on par with public broadcasters. Also, the community element has morphed over the years, its role being somewhat overtaken on the one hand by local programming and on the other by social media.
122. The current statement of “elements” wholly ignores the proverbial elephant in the room, namely, the proliferation and increasing dominance of foreign content providers operating in a global market. The time has come to acknowledge the existence of a foreign element in the Canadian broadcasting system and not merely exempt these providers from nearly all regulatory obligations.⁶⁷
123. TELUS submits, that, to reflect the evolution of Canada’s broadcasting system, the three elements identified in section 3(1)(b) of the *Broadcasting Act* should now be “private”, “public” and “foreign”.

⁶⁶ *Broadcasting Act*, (S.C. 1991, c. 11) at s. 3(1)(b).

⁶⁷ As a result of the DMEQ, *supra* note 64.

3.2.1. *The “Private” and “Public” Elements Continue to be Relevant Today and in the Future*

124. There is no doubt that the Canadian broadcasting system continues to have a private and public element. What has changed, as discussed below, is the competitive landscape in which they operate, which requires a fundamental shift in the treatment of each of these elements such that their functions no longer overlap.
125. While TELUS advocates for a more flexible regulatory framework governing private/commercial players, TELUS submits that many policy objectives currently found in the *Broadcasting Act* that cannot be fulfilled via market forces alone should be conferred upon our publicly funded institutions and services.

3.2.2. *The “Community” Element Is No Longer Necessary, Nor Sustainable*

126. Whereas the private and public elements have withstood the test of time, the reference to “community” as an element of the Canadian broadcasting system has lost its meaning and purpose over the years.

3.2.2.1. *The Genesis of the Community Element*

127. Canadian BDUs have been offering community television programming services since the early 1970s, well prior to prior to the inclusion of the “community” as an element of the Canadian broadcasting system in the current *Broadcasting Act*. In a 1975 document “Policies Respecting Broadcasting Receiving Undertakings (Cable Television)”,⁶⁸ the Canadian Radio-Television Commission, predecessor of the current CRTC, stated that “the community channel must become a primary social commitment of the cable television licensee.”⁶⁹ Accordingly, the provision of a community channel was an obligation on the cable licensee in return for the privilege of holding a cable licence.
128. In that original 1975 policy, the CRTC set out expectations for community cable channels to “... identify communities ... such as neighbourhoods, wards, boroughs and, where

⁶⁸ Canadian Radio-Television Commission, *Policies respecting broadcasting receiving undertakings (cable television)*, December 16, 1975.

⁶⁹ Public Notice CRTC 1990-57, *Community Channel Policy Review*, June 5, 1990.

appropriate, municipalities, and give opportunities to individuals and groups in these communities to express their ideas and aspirations; cover the activities of municipal councils and school boards; search out and give opportunity for expression to individuals and groups with ‘communities of interest’; reflect where appropriate the bilingual nature of the communities they serve.”⁷⁰

129. In 1986, the Report of the Task Force on Broadcasting argued that community broadcasting "must be seen as an essential third sector of broadcasting if we are to realize the objective of reasonable access to the system."⁷¹ In 1991, in the revised *Broadcasting Act*, government made "community" one of the three elements of the system, rather than an adjunct to public and private services.⁷²

3.2.2.2. *The Community Element Was Intrinsically Tied to BDUs*

130. In its 1991 revised Community Channel Policy, the Commission noted that “...the provision of adequate financial resources to support the community channel remains the cable licensee's principal contribution to the public in exchange for the privilege of holding a cable television licence.”⁷³
131. By 1997, the new entrants had started to emerge in the broadcasting distribution industry and the Commission sought to encourage such new entrance by alleviating the obligation for distributors to provide a community channel, recognizing that new entrants would have limited opportunity to provide sufficient programming, and in any case, multiple community channels in one serving area would not necessarily provide increased benefit.⁷⁴

⁷⁰ Canadian Radio-television and Telecommunications Commission, *Policies Respecting Broadcasting Receiving Undertakings (Cable Television)*, December 16, 1975, p. 4.

⁷¹ Report of the Task Force on Broadcasting Policy (Caplan-Sauvageau) (Ottawa: Minister of Supply and Services Canada, 1986), p. 491.

⁷² As noted in June 2003 report by Standing Committee on Canadian Heritage entitled “*Our Cultural Sovereignty, The Second Century of Canadian Broadcasting*” available online at: <http://www.ourcommons.ca/DocumentViewer/en/37-2/HERI/report-2/page-165#ftn2>.

⁷³ Public Notice CRTC 1991-59, *Community Channel Policy*, June 5, 1991.

⁷⁴ Public Notice CRTC 1997-25, *New regulatory framework for Broadcasting Distribution Undertakings*, March 11, 1997.

132. The new revised regulatory framework for broadcasting distribution undertakings opened the door to increased competition in the distribution market, putting an end to the monopoly conditions under which community television was born. It could no longer be said to be a “privilege” to hold a broadcasting distribution licence given that anyone could launch their own service.
133. In an evolving global digital marketplace, traditional BDUs are losing subscribers, making it increasingly difficult to sustain the support traditionally provided to the operation of a community channel.

3.2.2.3. *The Morphing of the Community Element into Local Programming*

134. Over the course of many years, the Commission reviewed its community programming policy many times.⁷⁵ In 2001, when the Commission undertook yet another review of its community channel policy,⁷⁶ the objectives of the policy increasingly leaned towards what was considered the more important requirement of ensuring more local programming and a greater diversity of voices. The Commission noted that the communications environment had evolved at a rapid pace, and led to a high degree of media consolidation and cross-media ownership. With fewer players in the conventional system, the Commission noted a reduction in programming reflecting local and community concerns.
135. Within this context, the Commission established the following as the objectives of its proposed new policies:
- a. To ensure the creation and exhibition of more locally-produced, locally-reflective community programming.

⁷⁵ See: *Policies respecting broadcasting receiving undertakings (cable television)*, December 16, 1975, Public Notice CRTC 1991-59, *Community Channel Policy*, 5 June 1991, Public Notice CRTC 2002-61, *Policy framework for community-based media*, October 10, 2002, Broadcasting Regulatory Policy CRTC 2010-622, *Community television policy*, August 26, 2010, and Broadcasting Regulatory Policy CRTC 2016-224, *Policy framework for local and community television*, June 15, 2016.

⁷⁶ Public Notice CRTC 2001-129, *Proposed policy framework for community-based media*, December 21, 2001.

- b. To foster a greater diversity of voices and alternative choices by facilitating new entrants at the local level.⁷⁷

136. In order to ensure that the programming of the community channel was truly local and reflective of the community it is serving, and given that the *Broadcasting Distribution Regulations* defined the term community programming, but not local community television programming, in 2002 the Commission adopted the following definition of local programming, for the purpose of community-based television programming undertakings:

Local programming means station productions or programming produced by community-based independent producers that reflects the particular needs and interests of residents of the area that the community-based television programming undertaking is licensed to serve.⁷⁸

137. With each review of the community channel policy, the Commission became more focused on defining the “local” nature of community channel programming, and continued to blur the lines between the local programming provided by conventional television services and locally-reflective programming provided by community programming services.
138. By the next review of the community channel policy in 2010, the lines had been blurred enough that the Commission considered allowing the newly created Local Programming Improvement Fund (LPIF) regime to be allocated in part to community programming.⁷⁹
139. Though considered, the Commission ultimately rejected the idea because it did not consider that the funds in the LPIF⁸⁰ would be sufficient to provide funding to each of the public, private and community elements. While the Commission recognized the important role community programming played in delivering locally relevant content to communities

⁷⁷ Public Notice CRTC 2001-129, *Proposed policy framework for community-based media*, December 21, 2001, paras 41-44.

⁷⁸ Public Notice CRTC 2002-61, *Policy framework for community-based media*, October 10, 2002, para 115.

⁷⁹ Broadcasting Regulatory Policy CRTC 2010-622, *Community television policy*, August 26, 2010, paras 51-54.

⁸⁰ The LPIF was funded through an additional contribution levy of 1.5% of the gross revenues of broadcasting distribution undertakings. See Broadcasting Regulatory Policy 2009-406, *Policy determinations resulting from the 27 April 2009 public hearing*, July 6, 2009.

across Canada, it found that the financial realities of the BDU-funded community channel were not the same as that being faced by the local conventional television market, and allocating LPIF funding to the community channel would dilute the amount of support available to local conventional television.

140. In 2015, the Commission expressed further concern over the increasing difficulties of conventional television stations in financing local news programming. To address this concern, the Commission undertook a review “of the overall state and funding of locally relevant and locally reflective television programming including community access programming.”⁸¹
141. In the resulting 2016 Local and Community Television Policy,⁸² rather than maintaining separate regulation requiring contribution to community channel programming, the Commission implemented a policy allowing a percentage of contribution traditionally earmarked for community programming to be allocated to conventional television services for the purposes of creating local news programming. Distributors are now permitted to offer a local community programming outlet, or direct all or a portion of those funds to the creation of local programming on conventional outlets throughout the country.

3.2.2.4. Digital Platforms Have Made Community Television Unnecessary

142. The reality today is that new technologies and high-speed broadband networks have dramatically lowered barriers to citizen access to the broadcasting system, both by providing Canadians with the tools to produce programming content and the means to widely distribute it to viewers across the globe, all at very low cost compared to more traditional broadcasting technologies. As a result, BDUs can no longer be considered gatekeepers who control access to the broadcasting system, or who exercise control over the production of community programming.

⁸¹ Broadcasting Notice of Consultation CRTC 2015-421, A review of the policy framework for local and community television programming, Sept 14, 2015.

⁸² Broadcasting Regulatory Policy CRTC 2016-224, *Policy framework for local and community television*, June 15, 2016, at para 111.

143. On the contrary, digital platforms, including social media platforms such as YouTube or Facebook, now provide Canadians with ample means and opportunity to share their stories directly with one another. The CRTC has acknowledged the role and impact of these new platforms on the ability of Canadians to access the broadcasting system:

...ubiquitous online video sharing sites form part of the broadcasting system and now allow Canadians to share their stories more easily than ever...the Commission is of the view that many Canadians can use these tools to obtain immediate and individual access to the broadcasting system.⁸³

144. In this environment, a regulatory framework that is built around providing citizen access to a single specific platform – namely, linear television – is anachronistic, unnecessary, and inefficient. Indeed, the CRTC has concluded that the dual objectives traditionally fulfilled by the community element of the broadcasting system are currently being met through a number of new platforms:

...many objectives traditionally fulfilled by the community element are now being met through other means, such as the use of online platforms and other technological and social trends to access the broadcasting system. The objective of reflecting communities, and particularly underrepresented communities, in the broadcasting system is being met on a number of platforms: Canadians have access to countless media sources providing community reflection and forums for community discussion, be it in the form of television and radio stations, community newspapers or online social media groups.⁸⁴

145. TELUS submits it is time to acknowledge these new realities by recognizing that the “community” element is no longer sustainable or a necessary under the Act.

3.2.3. *A “Foreign” Element to the Broadcasting System Is Missing in the Act*

146. As noted above, foreign content services operating online are the proverbial elephant in the room which should no longer be ignored in Canada’s broadcasting legislative context. TELUS believes that it is high time for Canada’s broadcasting legislation to acknowledge

⁸³ *Ibid.* at para 102.

⁸⁴ *Ibid.* at para 116.

the existence of a foreign element in the Canadian broadcasting system. It is only through such legislative acknowledgement that steps can be taken to address the detrimental regulatory asymmetry that permeates the existing regulatory framework.

3.3. Different Policy Objectives Should Apply to Each Element of Canada's Broadcasting System

147. As noted above, private commercial Canadian companies now compete with global content providers operating within the broadcasting system. It is unsustainable to expect Canadian private companies to continue to contribute in the same manner to the Canadian broadcasting system as they did when they operated in a “walled-garden” protected from external competition.
148. In order to stop putting Canadian companies at a disadvantage, and thus risk destroying Canada's prospects of meeting any broadcasting policy objectives, expectations for private Canadian companies in regards to the objectives of the Act should be more realistically tied to the pursuit of commercial success.
149. Other more specific social and cultural goals should be ascribed to the public element of the Canadian broadcasting system.
150. Moreover, the foreign element should also be held accountable for making some contributions to the Canadian broadcasting system commensurate with their access to the Canadian market.

3.3.1. Objectives That Should Apply to Private Programming Services

151. As noted in section 3.1.2 above, whether public or private, Canadian or non-Canadian, programming services are the most important component of the broadcasting system because they control the programs that are made available to Canadians.
152. It is therefore appropriate that private programming services be given objectives which match the importance of their role.

3.3.1.1. Requirements in Relation to the Creation and Production of Canadian Content

153. The creation and production of Canadian content must remain a requirement for private Canadian programming services. The requirement to invest in Canadian content (Canadian programming expenditure requirements) should remain in place, as the *quid quo pro* for the control they exercise over the availability of programs in Canada.
154. However, a more open and flexible regulatory approach is needed to ensure that the pursuit of commercial success, domestically and globally, is a priority for private broadcasters. A new regulatory approach must empower private programming services to innovate and take risks, whether in the types of programs they create, the business models they pursue, or otherwise.
155. Accordingly, private broadcasters should not be burdened by obligations to meet extensive social and cultural objectives which may hinder the pursuit of commercial success. They should merely be required to produce home grown content using a percentage of their revenues. There should be no qualitative requirements as to the Canadian-ness of the programming created, nor any prescriptions as to the type of programming to be created.
156. In exchange for this relief, private programming services should no longer expect the support, financial or otherwise, of the rest of the broadcasting system. This would ensure that they are wholly committed to the success of the programming they create. Moreover, as discussed below, the insular contribution regime which exists within the Canadian broadcasting system is no longer sustainable in the global digital competitive environment. Further, the high degree of vertical integration in the domestic market, as discussed below, means that contribution merely results in BDUs having to fund the business models of their vertically integrated competitors.
157. In any event, the loss of subsidies may well spur great innovation to achieve commercial success. Excessive reliance on support mechanisms such as subsidies can often hinder innovation – “necessity is the mother of all invention”, as the saying goes.

3.3.1.2. Requirement to Remain Canadian Owned and Controlled

158. The addition of a foreign element as a constituent element of the Canadian broadcasting system as proposed above stands in the way of the current overarching statement in section 3(1)(a) of the *Broadcasting Act* that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians”. Accordingly, the Canadian ownership and control requirements need to be applied more discretely within the Canadian broadcasting system. To the extent that such a requirement continues to remain relevant today, and TELUS is mindful of the very clear guidance from Government that it will not entertain any recommendations to alter foreign ownership restrictions for broadcasting undertakings,⁸⁵ they should apply only to licensed programming services and not content aggregators (the current BDUs).
159. It has long been recognized that what matters most to Canada’s cultural identity and sovereignty is “programming decisions”. For example, the Government’s *Direction to the CRTC (Ineligibility of Non-Canadians)*⁸⁶ requires that a holder of a broadcasting licence be controlled by Canadians and that the parent company of a licensee, or the directors of that parent company, not exercise control over any of the licensee’s programming decisions unless the parent company satisfies specific Canadian control requirements.⁸⁷ In the event these control requirements are not met, the CRTC requires that licensees establish an independent programming committee to act as a buffer against any foreign influence over programming decisions.⁸⁸ Thus, the fundamental concern behind Canada’s ownership restrictions for broadcasting licences is that of control over the programming that is aired in Canada.
160. The 2006 TPRP report had rightly pointed out the challenges associated with asymmetrical foreign investment rules in the telecommunications and broadcasting sectors, and had recommended – as TELUS is recommending in this submission – that there be a separation

⁸⁵ Broadcasting and Telecommunications Legislative Review – Terms of Reference, at p. 5.

⁸⁶ Direction to the CRTC (Ineligibility of Non-Canadians), SOR/97-192.

⁸⁷ *Ibid.*

⁸⁸ See, for example, Broadcasting Decision CRTC 2018-26 - *Vintage TV Canada – Licensing of discretionary service*, January 23, 2018, at para 6.

of Canadian broadcasting “content” policy from policies for the “carriage” of telecommunications.⁸⁹ Such a separation would allow for the “creation of symmetrical foreign investment rules for traditional telecommunications carriers as well as the cable and satellite undertakings that now operate in the same telecommunications markets.”⁹⁰

3.3.2. *Objectives That Should Apply to Private Content Aggregators*

161. Content aggregators as defined and described above do not exercise control over the availability of programming in Canada. They merely aggregate non-exclusive program rights and package this programming with a focus on the user experience. Programming decisions are not at the core of the business of a content aggregator and therefore they should not be treated on par with programming services.

3.3.2.1. *An Incentive-based Framework Should Replace Burdensome Licensing*

162. As discussed in the preceding sections, the Canadian broadcasting system is no longer a closed system. Broadband networks now provide a direct conduit to reach Canadians from across the globe. This has not only changed the *status quo* in the Canadian market, it has redefined the roles of traditional players. Thus, in an open system, it no longer makes sense (and indeed may no longer be possible) to impose uniform requirements on all elements of the system. Traditional distribution undertakings that fall under the term “content aggregators” are one of the elements where licensing no longer works, and ought to be changed.
163. The key to achieving the right balance for content aggregators lies in abandoning the prescriptive and highly burdensome licensing framework in favour of a permissive framework that offers the right incentives which encourage content aggregators, whether Canadian and foreign, to engage with the regulatory framework to support *Broadcasting Act* objectives, while also providing the flexibility for different companies to adopt

⁸⁹ Telecommunications Policy Review Panel – Final Report 2006, at p. 11-25.

⁹⁰ *Ibid.*

whichever business model will best enable them to serve the Canadian market in a competitive manner.

164. Under a new incentive-based regime, content aggregators would be able to register with the CRTC their commitment, for example by way of a service agreement as has already been contemplated by the Commission,⁹¹ to meet a number of obligations, such as agreeing to distribute culturally important programming services such as the public broadcasters.
165. In exchange, those content aggregators would be permitted to access certain privileges that help offset the effect of those obligations on their ability to compete. The privileges of registered content aggregators would include, for example, the right to access the *Copyright Act*'s compulsory licensing regime for retransmission of over-the-air radio and television signals, and access rights to programming controlled by licensed Canadian programming services, on commercially reasonable terms.
166. The current regulatory system has shackled Canadian aggregators with regulatory requirements, and diminished their ability to meet consumer expectations at a time when unregulated foreign sources are offering them more viewing options than ever before.
167. TELUS firmly believes that letting market forces play a prominent role the development of a content aggregation industry will allow Canada to have the best of both worlds – a robust market that offers Canadians ample choice in terms of services or business models that meet their preferences, and support for the Canadian broadcasting objectives.

3.3.2.2. Licensing Fees Are Not Commensurate with Any Value in Holding a Licence

168. BDUs are currently licensed by the CRTC in an extremely asymmetrical fashion. Moreover, there are no special privileges associated with holding a licence as it is a completely open competitive entry framework. The days of the cable and satellite monopolies are over.

⁹¹ CRTC, *Harnessing Change: The Future of Programming Distribution in Canada*, May 31, 2018.

169. Despite this, the broadcasting industry continues to be required to pay two sets of licensing fees. While there is some rationale to the requirement to pay Part I licence fees, as those fees recover the costs of the CRTC's administration of the *Broadcasting Act* and associated regulations, Part II licence fees are an unreasonable charge on the industry that do not fund any specific activity related the fees in question.

170. Part II fees were not introduced to recover the CRTC costs of administrating the broadcasting system. Instead, it is stated that

The CRTC collects the Part II fees on behalf of the government, with all revenues collected being deposited to the Government of Canada's Consolidated Revenue Fund. Consistent with the policy objectives outlined in the government's External Charging Policy and as explained in the 1999 roundtable consultation with broadcasting fee payers, the rationale for assessing this fee is three-fold:

- to earn a fair return for the Canadian public for access to, or exploitation of, a publicly owned or controlled resource (i.e. broadcasters' use of the broadcasting spectrum);
- to recover Industry Canada costs associated with the management of the broadcasting spectrum; and
- to represent the privilege of holding a broadcasting licence for commercial benefit.⁹²

171. BDUs do not make use of spectrum and therefore only the last bullet of the above statement would apply to them. However, as noted in the introductory paragraph to this section, there is little privilege left for BDUs in holding a broadcasting licence.

172. The collection of Part II fees to the benefit of the general coffers of the government has a long history of dispute.

173. The *Broadcasting Act* allows the CRTC to make regulations with respect to broadcasting licence fees, but does not provide it with the authority to impose a tax. In 2003 and 2004,

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See: http://publications.gc.ca/collections/collection_2015/crtc/BC9-22-2005-eng.pdf.

the Canadian Association of Broadcasters and Videotron (respectively) filed lawsuits in the Federal Court, arguing that Part II licence fees are taxes rather than fees that the CRTC is authorized to levy.

174. On December 14, 2006, the Federal Court found that the Part II licence fees were indeed a tax and outside the CRTC's jurisdiction. However, on April 28, 2008, the Federal Court of Appeal overturned the Federal Court, ruling that Part II fees were valid regulatory charges, finding that "the Federal Court judge erred by mischaracterizing the legal test to be applied in distinguishing a tax from a regulatory charge and concluded that the fees were, in pith and substance, a regulatory charge and not a tax".⁹³
175. Leave to appeal the Federal Court of Appeal decision was granted by the Supreme Court on December 18, 2008, however, on October 7, 2009, a settlement was reached and in exchange for government forgiveness of Part II fees that were not paid while the issue was being appealed (approximately \$450 million industry wide), the Canadian Association of Broadcasters agreed to drop its appeal at the Supreme Court. As part of that settlement, the government also recommended that the CRTC cap the annual Part II licence fees at \$100 million per year, which it did starting in November 2010.
176. In 2018, Part II fees were \$113,973,360.
177. These fees are not trivial. They add to the increasing burden which is no longer sustainable in global digital marketplace and they are putting Canadian aggregators at a disadvantage to foreign competitors, upon which none of these considerable obligations are imposed. Such general fees cannot be maintained by Canadian companies in an increasingly global broadcasting environment.

3.3.2.3. *If a Contribution Regime Is Maintained, Content Aggregators Should Be Entitled to Determine How Best to Contribute*

178. As noted above, TELUS proposes an incentive-based regime for content aggregators whereby content aggregators may choose to register and accept obligations in return for

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See: <https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=32703>.

privileges. Such a regime does not contemplate a continued contribution requirement because it has become increasingly unsustainable in the global digital environment, and because the extent of concentration in the media market means that a contribution requirement amounts to funding the business model of vertically integrated competitors.

179. In a re-imagined framework, a contribution regime would no longer be necessary because private programming services would be given free rein to pursue commercial success, and the absence of subsidies is more likely to incentivize the achievement of that success.
180. However, if it is deemed necessary to maintain a contribution requirement for content aggregators in exchange for regulatory privileges, then it should be structured in a way that will fully maximize the potential for increasing diversity and innovation in the production of Canadian programming.
181. The current model for BDU (*i.e.* content aggregator) contributions to Canadian programming requires each licensed terrestrial BDU to contribute 5% of its gross revenues from broadcasting activities in each broadcast year to Canadian programming, less any allowable contribution to local expression (*i.e.* up to 1.5% of the previous year's gross revenues) it made in that broadcast year. At least 80% of the resulting contribution to Canadian programming must be allocated to the CMF, a single entity that is responsible for all decisions regarding the subsequent allocation of those funds to broadcasters.
182. Exacerbating this lack of diversity is that fact that the broadcasters to whom CMF funds are allocated operate in the most concentrated media sector in the developed world, due to the high degree of vertical integration that has been permitted to occur in the Canadian broadcasting industry over the past few decades (as discussed in detail throughout section 3.4). Thus, the majority of broadcasters receiving funding from the CMF, and making editorial decisions in the production of Canadian programming using those funds, are owned by a small number of vertically integrated companies. As a result, for content aggregators who are not vertically integrated, the current framework effectively (and inequitably) requires them to fund the media arms of their vertically integrated competitors.

183. Accordingly, TELUS recommends that if a contribution requirement is maintained, its spending shouldn't be so heavily prescribed. Content aggregators should be allowed to choose how to contribute to Canadian broadcasting objectives. It may be through maintaining an outlet for community expression, or it may be through creating content in keeping with its own vision and making it available to the public on a non-exclusive basis.
184. Providing such flexibility to content aggregators in choosing how to contribute to broadcasting policy objectives may well provide an important new source for a diversity of voices.

3.3.3. *Objectives That Should Apply to the "Public" Element of the Broadcasting System*

185. As detailed above, a re-imagined framework for the Canadian broadcasting system must provide greater flexibility to the private sector to pursue commercial success, domestically and globally, with its Canadian content creations and production. This means that the achievement of other important social and cultural goals will necessarily need to be met through the public broadcasting element.
186. This will require some reimagining of how the public sector is funded given that it would share the greater burden of non-commercially viable broadcasting policy objectives. The model in which the public broadcaster competes with private broadcasters for advertising revenues is broken in any event.⁹⁴ For example, over the last decade, the CBC has been unable to compete with large vertically integrated commercial broadcasters for sports rights associated with CFL and NHL. Though the CBC had been airing CFL games since 1952, it was not provided an opportunity to present a bid in 2006. "League commissioner Tom Wright said the CFL did not solicit a bid from the CBC because the league was satisfied with the rights fee that TSN was willing to pay." Although "Brace said the idea of putting

⁹⁴ See Globe and Mail article by William Houston entitled "Grey Cup moves to TSN in new deal", December 20, 2006 at: <https://web.archive.org/web/20070930064843/http://www.theglobeandmail.com/servlet/story/RTGAM.20061220.wsptcfl20/TPStory/Sports/columnists>.

the Grey Cup on CTV was discussed internally, but the main objective was to "build the profile" of TSN."

187. Similarly, after more than 60 years of holding rights to NHL hockey games and broadcasting *Hockey Night in Canada*, CBC lost control of those broadcast rights to Rogers Sportsnet starting in 2014. As the smallest player competing for these rights, "[T]he cash-strapped national broadcaster may have lost a Canadian institution it held for 62 years because it could not hope to match the money Rogers threw at the NHL".⁹⁵

188. The role of the public broadcaster was initially set out by the Baird Commission in 1929:

The potentialities of broadcasting as an instrument of education have been impressed upon us; education in the broad sense, not only as it is conducted in the schools and colleges, but in providing entertainment and of informing the public on questions of national interest. Many persons appearing before us have expressed the view that they would like to have an exchange of programs with the different parts of the country.

At present the majority of programs heard are from sources outside of Canada. It has been emphasized to us that the continued reception of these has a tendency to mould the minds of the young people in the home to ideals and opinions that are not Canadian. In a country of the vast geographical dimensions of Canada, broadcasting will undoubtedly become a great force in fostering a national spirit and interpreting national citizenship.⁹⁶

189. This initial view of the need for a Canadian public broadcaster has not changed. In the 1987 renewal of CBC's licences, with regard to the role of the public broadcaster, the Chairman of the Commission noted that:

⁹⁵ See Globe and Mail article by David Shoalts entitled "Hockey Night in Canada: How CBC lost it all", October 10, 2015 at: <https://www.theglobeandmail.com/sports/hockey/hockey-night-in-canada-how-cbc-lost-it-all/article21072643/>.

⁹⁶ Aird, John (1929). "Report of the Royal Commission on Radio Broadcasting". Available at: http://publications.gc.ca/collections/collection_2014/bcp-pco/CP32-104-1929-eng.pdf.

Our best bet for the protection, advancement and fostering of a distinctive Canadian broadcasting system is still [the CBC].⁹⁷

190. Similarly, in that decision the CRTC noted:

The CBC, above other broadcasters, is expected to be an instrument of public policy and to shoulder a special responsibility for safeguarding, enriching and strengthening the cultural, political, social and economic fabric of Canada.

...

The Commission in 1987 reiterates its view that the role of the CBC has become pivotal for the distinctiveness of the system, and even more essential than it was previously now that there is such an abundance of viewing choices.⁹⁸

191. With regard to the increasing availability of foreign programming in Canada, in the CBC's 1994 licence renewal, it was similarly noted that:

Considering the impact that satellite-delivered foreign signals are expected to have in Canada, the need may be greater than ever for an outlet to express truly Canadian stories, ideas and values amid these foreign voices. A strong Canadian national public broadcaster is indispensable in this context. What Canadians require and expect of their CBC, more than of any other Canadian broadcaster, is that it provide the means for them to talk to one another about things Canadian, both formally and informally, that it be a place where they can meet, a place where they can feel at home.⁹⁹

192. What is clear is that public broadcasting is a public service, and should be distinct and serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada. As Canada's public broadcaster, the CBC remains capable and uniquely staged to fulfil the cultural and public interest objectives in the Canadian broadcasting system.

⁹⁷ Decision CRTC 87-140, *Canadian Broadcasting Corporation/Société Radio-Canada Applications for the Renewal of the English and French Television Network Licences*, February 23, 1987.

⁹⁸ Decision CRTC 87-140, *Canadian Broadcasting Corporation/Société Radio-Canada Applications for the Renewal of the English and French Television Network Licences*, February 23, 1987.

⁹⁹ Decision CRTC 94-437, *Canadian Broadcasting Corporation - Renewal of the English-language and French-language television network licences*, July 27, 1994.

193. With a lessening of cultural regulatory obligation on commercial programming services, and a shift to a more natural competitive environment, the CBC's role as Canada's public environment can be reinvigorated, such that many of the cultural objectives currently strewn across so many parts of the industry can be focussed more justly to the CBC.
194. Canada's cultural objectives cannot not be left to be fulfilled by the commercial market. Indeed, as set out in the 2000 World Radio and Television Council paper authored by Pierre Juneau, the public service model, and the role of public broadcasting is based on mistrust of the ability of the market or the State to meet the public-service objectives of broadcasting and act in the public interest.¹⁰⁰
195. With the objectives of the private system geared to ensuring ongoing and increased support for the creation, production and discoverability of Canadian content, and the goal of ensuring Canadian creations are competitive on the world stage, objectives relating to cultural goals, reflection of expression, and representation of all Canadians, should be maintained for the public broadcaster.

3.3.3.1. Local Programming, News and Reflecting communities

196. As explained at length above, there should no longer be a separate "community element" in the *Broadcasting Act* as community programming has naturally morphed with local programming support mechanisms.
197. Market forces may indeed result in the private element increasing its support for local programming. Take for instance the words of Elmer Hildebrand, Chairman of Golden West Broadcasting, on the continued success of Golden West radio stations

...We do local and then we do more local. As long as you do that, then you're relevant. If you don't in today's age and the station is just about music, you're not needed. People can get music from

¹⁰⁰ Brochure presented by Pierre Juneau Chairman for World Radio and Television Council, entitled "*Public Broadcasting: Why? How?*" May 2000, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000124058>.

anywhere. The local information, however, you can't get anywhere.¹⁰¹

...you will hear in the media many stories about radio stations having a hard time - losing both listeners and audience. In our case that's the reverse, we're growing both with listeners and with revenue, and basically it has to do with one hundred per-cent local service¹⁰²

198. There is still a viable commercial business to be made with local programming and it would be premature to consider that private programming services will turn their back on this type of programming under a more flexible regime.
199. However, to the extent there remain concerns that commercial programming services will not continue to create sufficient local programming, or locally reflective programming, this responsibility should fall on the public broadcaster.
200. The CBC is uniquely qualified for this responsibility. As noted in a 2017 Innisherald article entitled "Examining the Importance of the CBC",

...public broadcasting has the increased importance of delivering news to isolated communities. The CBC goes where no commercial markets exist and no private company will set up shop. Beginning in 1969, the CBC built transmitters across the Arctic territories and flew tapes into the region by plane to provide four hours of television per day to remote communities. Throughout the 1970s, the CBC made a widespread effort to record Indigenous music artists. The network continues to provide local news in multiple Inuit languages, as well as English and French.¹⁰³

201. Accordingly, to the extent that concerns remain regarding the continued availability of local and community reflection in an increasingly competitive market, the CBC as a national broadcaster should, and can be relied upon to provide programming considered essential to our Canadian democracy.

¹⁰¹ See <http://www.mbfh.ca/laureates/elmer-hildebrand/>.

¹⁰² See <https://www.okotoksonline.com/local/golden-west-broadcasting-turns-60>.

¹⁰³ See <http://theinnisherald.com/examining-the-importance-of-the-cbc>.

3.3.4. *Applying New Objectives to the “Foreign” Element of the Canadian Broadcasting System*

202. Canada has a long history of regulating the entry of foreign services. Being added to the *Revised List of Eligible Satellite Services* [“ESSL”] provides non-Canadian services with privileged access to the Canadian broadcast distribution market where the penetration of BDU services is much higher than in the US. As such, over the years, foreign services have had to meet eligibility specific requirements to be authorized for distribution in Canada.
203. Providers of the non-Canadian pay and/or specialty services must have obtained and must remain in possession of all necessary rights for the distribution of their programming in Canada, and must not hold, nor try to obtain, nor exercise, preferential or exclusive programming rights in relation to the distribution of programming in Canada.
204. Most importantly, services that are deemed to be either totally or partially competitive with Canadian specialty or pay television services whose licence applications have been approved by the Commission have been denied authorization for distribution in Canada.¹⁰⁴ Factors considered in its assessment of the competitiveness of a non-Canadian service include the nature of the service, the language of operation, the genres of programming provided, and the target audience. The Commission continues to provide that it “...won’t authorize non-Canadian English- and French-language services if they compete with Canadian pay and specialty services” as “[t]his helps to ensure that Canadian services have priority.”¹⁰⁵

¹⁰⁴ For example, in October, 2008 the Commission denied Shaw’s request to add the U.S. service “The Sportsman Channel” to the lists of eligible satellite services as it determined the service would be competitive with both Wild TV and the World Fishing Network. See Broadcasting Public Notice CRTC 2008-96, *Request to add The Sportsman Channel to the lists of eligible satellite services for distribution on a digital basis*, October 20, 2008. Similarly, in 2016, the Commission denied adding the U.S.-based cable television shopping service QVC to the list as it could not be approved for a Canadian programming service licence, though it clearly intended to do business with Canadians, and the sale of products, as an integral component of the service could not be separated from the programming. See Broadcasting Decision 2016-122, the Commission denied that application.

¹⁰⁵ https://crtc.gc.ca/eng/INFO_SHT/b311.htm.

205. However, over the years, to facilitate Canadian subscribers' access to more ethnic and multicultural programming, the Commission has taken an increasingly relaxed approach to the authorization of non-Canadian third-language services, instead relying on regulation governing the packaging of these non-Canadian services with Canadian third-language services in order to ensure maximum exposure for Canadian services.
206. Most recently, when the Commission was reviewing the applicability of its proposed Wholesale Code,¹⁰⁶ TELUS proposed that it was essential that the Wholesale Code be made applicable and enforceable against non-Canadian programming services. TELUS further argued that:

There is no reason to avoid subjecting non-Canadian services to the same standards and rules as Canadian programming services regarding commercial practices which will ensure that choice and flexibility is provided to Canadian consumers in the broadcasting market. Making compliance with the Wholesale Code an explicit condition of authorization for distribution of non-Canadian services in Canada is also consistent with the Commission's expectation that "non-Canadian parties that have a presence in Canada will conduct their negotiations and enter into agreements in a manner that is consistent with the intent and spirit of the Code if they wish to continue to have their programming services available in Canada".¹⁰⁷

207. The Commission agreed, and authorization for the services and stations on the ESSL is now subject to the following provision:

The Wholesale Code, set out in the appendix to *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015, applies as a set of guidelines for non-Canadian pay and/or specialty services. The Commission expects these services to conduct their negotiations and enter into agreements with their Canadian partners in a manner that is consistent with the intent and spirit of the Wholesale Code. In particular, non-Canadian services may not include terms in their affiliation agreements that

¹⁰⁶ Broadcasting Notice of Consultation CRTC 2015-97, *Call for comments on a Wholesale Code*, March 19, 2015.

¹⁰⁷ TELUS' Reply Comments dated May 14, 2015.

prohibit the distribution of their services on a stand-alone, build-your-own-package or small package basis.¹⁰⁸

208. These are the rules that have been applied and continue to apply in the out-dated walled-garden model that is our current broadcasting system. When it comes to acknowledging the much greater threat to the Canadian broadcasting system, namely, foreign content providers operating online and entering the Canadian market via the Internet, the CRTC and the Canadian government have turned a blind eye.
209. Similar to the means the Commission employed in imposing the Wholesale Code on foreign services in exchange for authorization to be distributed in Canada, it would not be an undue burden to impose some broadcasting policy objectives on foreign services choosing to enter the Canadian market and provide services to Canadians using alternative distribution models, including direct to consumer digital media services. As such, TELUS recommends that, in exchange for the authority to access the Canadian market when a certain subscriber and revenue threshold is met, non-Canadian services be held responsible for the achievement of some policy objectives, specifically supporting the creation and production of Canadian content.
210. Regulatory parity between domestic and foreign programming services is not only a matter of fairness, it is essential to successfully implementing Canada's broadcasting policies, in which control over programming is a fundamental concern that impacts Canadian culture, identity, and sovereignty.
211. Further, regulating foreign broadcasters does not conflict with the Government's desire to avoid reducing Canadian ownership of broadcasting. It simply accounts for the real and fundamental shift that the presence of foreign broadcasting services has created in the Canadian broadcasting sector. Without some form of oversight of these services, it will not be possible to successfully implement Canada's broadcasting policies.

¹⁰⁸ See <https://crtc.gc.ca/eng/publications/satlist.htm>.

212. TELUS believes that foreign programming services should have obligations commensurate to their access to the Canadian market. It is envisioned that only the largest foreign programming services would require authorization to continue to operate in the Canadian market and that authorization would come with requirements relating to Canada's broadcasting policy objectives and potentially also with opportunities to access industrial policy tools supporting the cultural sector.
213. The Commission's existing practice of exempting discretionary television programming undertakings serving fewer than 200,000 subscribers¹⁰⁹ offers a useful precedent for setting the appropriate demarcation point for an authorization requirement for foreign services, and TELUS therefore recommends using that same subscriber threshold for this purpose.
214. Promoting investment by foreign services into the Canadian independent production sector by providing access to industrial policy benefits (*e.g.*, tax credits) will benefit Canadian content creation, by providing independent producers with greater opportunity to obtain funding. This is especially needed in a sector where high levels of concentration has greatly reduced the number of options available for funding. The Writer's Guild of Canada has recently described the difficulties faced by Canadian screenwriters in having their creative content produced as a result of these high levels of vertical integration, as follows:

As the Commission is aware, a number of broadcasting mergers and acquisitions...have played out over the past two decades...The result is that three large private English-language corporate groups—Bell Media, Corus Entertainment, and Rogers Media—collectively control 83.1% of audience viewing in the English market, and their contribution to PNI counted for close to 80% of the total PNI expenditures reported for all of the English-language services during that period. This means that English-language Canadian screenwriters pitching many kinds of medium-to-big-budget projects only have four “doors to knock on”—i.e. the three large private broadcast groups and the CBC. The list gets even smaller when you consider that some groups tend to specialize in certain types of content...this is crucial when you consider that hit television shows are high-risk, and cannot be easily predicted.

¹⁰⁹ Broadcasting Order CRTC 2015-88 – *Exemption order respecting discretionary television programming undertakings serving fewer than 200,000 subscribers*, March 12, 2015.

Stranger Things was reportedly rejected by other networks 15 to 20 times before getting a green light from Netflix. Canadian screenwriters would actually appreciate the opportunity to get 15 to 20 rejections, because it would mean they had 15 to 20 doors to knock on—and a chance that the person behind the 21st door could say yes.¹¹⁰

3.3.5. Recommendation for Legislative Change to the Broadcasting Policy Objectives

215. TELUS recommends that the declaration at section 3 of the *Broadcasting Act* be deleted and replaced with the following declaration redefining the elements of the broadcasting system, and setting out policy objectives for each element of the system.

3 (1) It is hereby declared that the Canadian broadcasting system is comprised of a private element, a public element, and a foreign element.

(2) It is hereby declared as the broadcasting policy for the private element of the Canadian broadcasting system that it shall:

- (a) facilitate the provision of a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, to consumers,**
- (b) be responsive to the evolving demands of the public,**
- (c) be readily adaptable to scientific and technological change,**
- (d) provide access to programming at affordable rates, using the most effective technologies available at reasonable cost,**
- (e) ensure that programming services:**
 - (i) are effectively owned and controlled by Canadians,**
 - (ii) contribute to the creation and presentation of Canadian programs, and facilitate the provision of such Canadian programs to the world, and**
 - (iii) have a responsibility for the programs they broadcast;**

¹¹⁰ Writers Guild of Canada, “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*”, December 1, 2017 at para 24.

(3) It is hereby declared as the broadcasting policy for the regulation of the public element, consisting of the Corporation, that it shall:

- (a) be effectively owned and controlled by Canadians;**
- (b) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,**
- (c) provide, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty,**
- (d) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,**
- (e) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and**
- (f) be readily adaptable to scientific and technological change;**
- (g) originate programming that:**
 - (i) is predominantly and distinctively Canadian,**
 - (ii) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern,**
 - (iii) reflects Canada and its regions to national and regional audiences, while serving the special needs of those regions,**
 - (iv) actively contributes to the flow and exchange of cultural expression,**
 - (v) is in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,**
 - (vi) strives to be of equivalent quality in English and in French,**
 - (vii) contributes to shared national consciousness and identity,**
 - (viii) is made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and**
 - (ix) reflects the multicultural and multiracial nature of Canada,**

- (h) extend a range of broadcasting services in English and in French to all Canadians as resources become available;**
- (i) provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;**
- (j) provide programming that reflects the aboriginal cultures of Canada as resources become available for the purpose;**
- (k) provide programming accessible by disabled persons as resources become available for the purpose;**
- (l) provide alternative television programming services in English and in French where necessary to ensure that the full range of programming contemplated by that paragraph is made available through the Canadian broadcasting system.**

(3) It is hereby declared as the broadcasting policy for the foreign element that it shall contribute in an appropriate manner to the creation and presentation of Canadian programs.

3.4. Addressing Vertical Integration in the Domestic Market

216. Canada has the most concentrated media and entertainment industries in the developed world,¹¹¹ with four vertically integrated companies controlling nearly 80% of the Canadian television market.¹¹² Over the past decade, the Commission has permitted a high degree of vertical integration between programming undertakings and distribution undertakings to take place within the Canadian broadcasting industry. In fact, the Canadian Media Concentration Research Project notes in its November 2017 report that “by 2013, after Shaw and BCE acquired Global TV, CTV and Astral Media, respectively, Canada had the highest levels of vertical integration and cross-media ownership out of the 28 countries studied”.¹¹³ Indeed, in the most recent update of that report, it is noted that “[w]hile there have undoubtedly been changes in many of the countries shown...the direction of change for most countries...is down, not up”.¹¹⁴

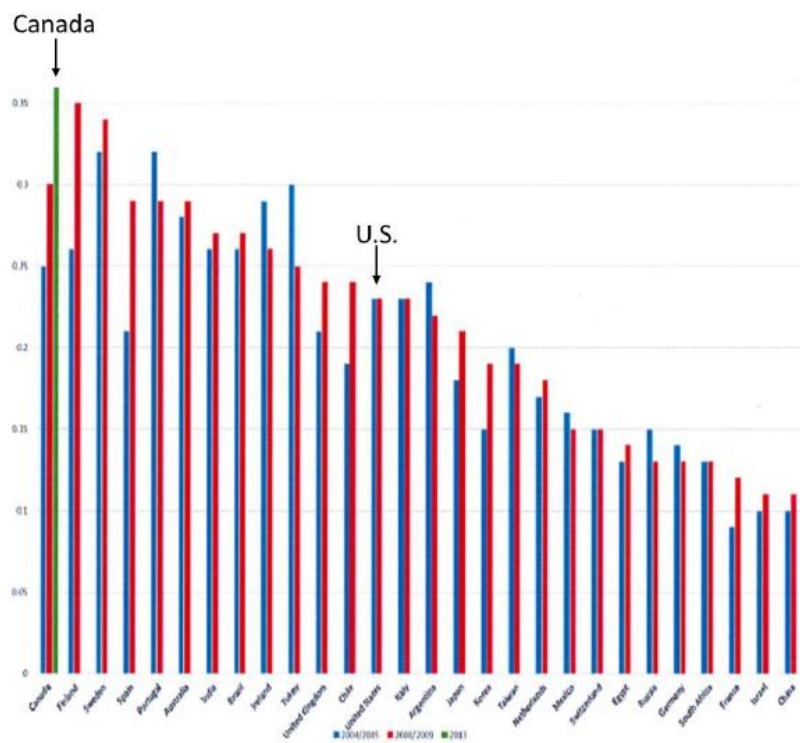
¹¹¹ See Dwayne Winseck, “*Canadian Media Concentration Research Project: Media and Internet Concentration, 1984-2016*”, November 28, 2017, which states, notably: “by 2013, after Shaw and BCE acquired Global TV, CTV, and Astral Media, respectively, Canada had the highest levels of vertical integration and cross-media ownership out of the 28 countries studied [Winseck], accessible online at: <http://www.cmcrp.org/media-and-internet-concentration-in-canada-results/>.”

¹¹² CRTC Communications Monitoring Report 2017, at Tables 4.3.3 and 4.3.5.

¹¹³ In fact, it has been noted in the November 2017 report from the Canadian Media Concentration Research Project, *Media and Internet Concentration in Canada 1984-2016* (found here: <http://www.cmcrp.org/media-and-internet-concentration-in-canada-results/>), that “by 2013, after Shaw and BCE acquired Global TV, CTV and Astral Media, respectively, Canada had the highest levels of vertical integration and cross-media ownership out of the 28 countries studied” and that, in particular, “vertical integration in the United States is at less than one-quarter what it is in Canada (14% versus 55%, respectively).”

¹¹⁴ See Dwayne Winseck, “*Canadian Media Concentration Research Project: Media and Internet Concentration in Canada, 1984-2017*”, December, 2018.

Vertical Integration and Cross-Media Ownership – Canada in a Global Context, 2004-2013



Source: Windseck, D, “Canadian Media Concentration Research Project: Media and Internet Concentration, 1984-2017, December 2018

217. The concentration of Canada’s media market is not merely about control over what Canadian content is created and produced in Canada, rather it is about all the programming, both domestic and foreign produced, made available to Canadians. These companies already control the vast majority of popular (mostly foreign) programming distributed in Canada. A survey commissioned by TELUS in November 2017 and provided to the Panel as part of this submission found that 88% of the top 100 English-language television programs aired in Canada had been licensed by a vertically integrated media company.¹¹⁵
218. Shortly after the survey was conducted, Bell Media announced that it had signed an exclusive, multi-year agreement with Starz, the No. 2 ranked premium paid U.S. television platform, to bring its content to Canada. As a result of this agreement, Bell Media now

¹¹⁵ See *Rights Ownership of the Top 100 TV Programs in Canada (English Channels) According to AMA* by Mario Mota, Boon Dog Professional Services Inc., November 2017.

owns the Canadian rights to programming for the top three premium U.S. brands (HBO, Starz, and Showtime),¹¹⁶ in addition to the top programming from U.S. network television services. This all further exacerbates the concerns over concentration in media rights ownership in Canada. The chart below illustrates the sheer market power of BCE in Canada by putting it in perspective relative to ownership of these properties in the United States.



219. The Canadian Media Concentration Research Project notes in its December 2018 report that “combined, Bell and Shaw (Corus) accounted for nearly half of the entire television universe (e.g. television distribution and services) by revenue and possessed a total of 130 television stations and services between themselves in 2017”.¹¹⁷
220. The wave of consolidation that has occurred in Canada’s communications sector over the past decades was blessed by the CRTC, based partly on the belief that it would allow Canada’s broadcasters to better compete on the world stage, and lead to the creation of more – and better – Canadian content. However, the reality has not matched the rhetoric.

¹¹⁶ Bell Media Press Release: “Bell Media Brings Starz to Canada”, January 23, 2018, accessible online at: <http://www.bellmedia.ca/pr/press/bell-media-brings-starz-to-canada/>.

¹¹⁷ See Dwayne Winseck, “Canadian Media Concentration Research Project: Media and Internet Concentration in Canada, 1984-2017”, December 2018, Executive Summary, p v.

Vertically integrated broadcasters have yet to fulfill the promises of vertical integration, which has instead resulted in a loss of competitiveness in Canada's broadcasting market.

221. Indeed, vertically integrated entities hardly compete with foreign players when it comes to content production. Canadian broadcasters largely remain intermediaries and, as a result, do not compete directly with U.S. studios and distributors. Rather, they acquire content from them.¹¹⁸ Furthermore, while convergence may have helped these dominant players to better compete against international platforms by allowing them to acquire premium content,¹¹⁹ any such benefit has been achieved at the cost of thwarting the development of new competition within Canada.¹²⁰ Indeed, while Bell, Shaw/Corus, Rogers and Quebecor have been able to assert their dominance in the Canadian market, independent market actors have suffered as a result: in the best case scenario, they have witnessed their bargaining power erode, while in the worst case scenarios, they have been denied market access.
222. Despite its numerous failings, vertical integration is akin to the cowbell in the iconic 2000 *Saturday Night Live* comedy sketch: some always think there needs to be more of it. A December 2017 Scotiabank report recommending that Bell and Corus merge in order to fend off competition by Netflix is a case in point.¹²¹ TELUS believes that any further consolidation of the broadcasting sector would not be in the interest of consumers and Canada's broadcasting ecosystem, and would lead to a further dampening of competition in the domestic market.

¹¹⁸ Brad Danks, "ANALYSIS: Why more mergers may not be the answer for the Canadian broadcasting system (part one)", CARTT, January 31, 2018, accessible online at: <https://cartt.ca/article/analysis-why-more-mergers-may-not-be-answer-canadian-broadcasting-system-part-one>. [Danks]

¹¹⁹ Even such a claim would be questionable, considering the ease with which Netflix was able to enter, and establish a strong presence, in the Canadian market.

¹²⁰ See Danks.

¹²¹ Greg O'Brien, "ANALYSIS: As falling TV viewing levels seek a floor (but not at zero), it's time to think differently, Act differently", December 14, 2017, accessible online at: <https://cartt.ca/article/analysis-falling-tv-viewing-levels-seek-floor-not-zero-its-time-think-differently-act>.

3.4.1. *Vertical Integration Creates Negative Incentives Which May Hamper the Achievement of Objectives of the Broadcasting Act*

223. There is a valid concern that vertically integrated media companies have market power over programming available to Canadians and how Canadians will receive that programming. The concern lies in the fact the most prominent Canadian media companies may not be operating pursuant to the natural incentives of a media company, which under normal circumstances would seek to pursue commercial success of its programming offerings. Instead, a vertically integrated entity may use its media assets as a tool for achieving greater success on the more lucrative network access operations of the entity.
224. The high degree of vertical integration in Canada's communications market has the potential to stifle innovation and harm Canadian content creators and consumers. Indeed, vertical integration in the broadcasting system creates an incentive for vertically integrated entities to foreclose competition from both (1) competing content providers by disadvantaging carriage on their own networks; and (2) competing content aggregators/BDUs by refusing to negotiate commercially reasonable carriage rights for the content they control. This is particularly egregious given that the regulatory framework prevents competitors from seeking out these foreign content rights on their own.
225. While the CRTC has been instrumental in allowing Canada's communications industry to reach astonishingly high levels of concentration, it has also recognized that such a state of affairs can lead to anticompetitive behaviour. In a 2013 decision that authorized the sale of Astral Media to BCE, the CRTC stated that vertical integration:

[...] could impede the efficient delivery of programming at affordable rates and reasonable terms of carriage and ultimately work against a competitive and dynamic marketplace in the Canadian broadcasting system. This could also have consequences on the availability and diversity of programming for Canadians.¹²²

¹²² Broadcasting Decision CRTC 2013-310, *Astral broadcasting undertakings – Change of effective control*, June 27, 2013, at para 64.

226. The following year, in a decision renewing Rogers' broadcasting licence, the regulator recognized that Rogers' acquisition of NHL broadcast rights could create an incentive for the broadcaster to act in an anti-competitive manner:

The acquisition of the NHL broadcast rights by Rogers is similar to the acquisition of premium programming services by BCE and Corus since the acquired broadcast rights are extensive in terms of length of time and broadcast opportunities, and relate to premium content that is very lucrative and attractive to subscribers. The very nature of the content acquired could create a potential for Rogers to use its market power in an anti-competitive manner in its negotiations with parties over the terms and conditions for the distribution of its services, in particular, Sportsnet and Sportsnet 360.¹²³

227. The Commissioner of Competition has also voiced similar concerns. In a submission to the CRTC made in the context of the *Let's Talk TV* proceedings, the Commissioner stated:

The potential for vertically integrated firms in the broadcasting industry to use their market power to engage in anticompetitive acts or to lessen or prevent competition substantially is a concern for the Bureau. In particular, the Bureau is concerned that vertically integrated firms may have the incentive to disadvantage rival downstream BDUs to the benefit of their own distribution offerings in a number of ways, including raising rivals' costs, limiting rivals' consumer offerings and stifling innovation.¹²⁴

228. TELUS agrees with the concerns aired by both regulators, and is in particular agreement with the Commissioner's assertion that vertically integrated firms can use the market power they derive from the ownership of "must-have" discretionary services to disadvantage downstream rivals. This, in turn, can harm consumers in the form of higher subscription fees, less choice and less innovation.

¹²³ Broadcasting Decision CRTC 2014-399, *Rogers Media Inc. – Group-based licence renewal*, July 31, 2014, para 175.

¹²⁴ Submission by the Commissioner of Competition before the Canadian Radio-television and Telecommunications – Broadcasting Notice of Consultation CRTC 2014-190 *Let's Talk TV*, June 27, 2014, accessible online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03753.html>.

229. But TELUS' concerns go beyond the realm of the theoretical. Vertically integrated firms do not only have *incentives* to act in an anti-competitive manner; there are *real-life examples* showing that they have engaged in such behaviour. The following are but a few examples of vertically integrated firms engaging in practices aimed at (i) foreclosing competition; (ii) raising rivals' costs; or (iii) hampering innovation:

3.4.1.1. Foreclosing Competition

230. **Shomi** – Shomi was a joint venture between Rogers and Shaw that provided over-the-top television content service competing with platforms such as Netflix. When it launched in 2014, however, the service was only offered to Shaw and Rogers' internet and cable customers, which circumvented clear CRTC rules prohibiting exclusive content offerings. While the service was later opened up to everyone, it was shut down in November of 2016 due to poor customer take-up, perhaps due to the fact that it wasn't initially made broadly available at launch.
231. **Rogers GamePlus**—Only Rogers' wireless or cable subscribers can access the GamePlus service, which provides access to unique camera angles during NHL hockey games, among other NHL-related content. The CRTC has found that the use by Rogers of its NHL broadcast rights to favour its own services does not violate rules prohibiting content exclusives, as these rules only apply to “television programming” and not to complementary programming.¹²⁵

3.4.1.2. Raising Rivals' Costs

232. **Bell Media vs TELUS arbitration case** – Bell Media sought egregious rate increases for the distribution of its services by TELUS' Optik TV, insisting that TELUS pay a significant premium for offering consumer choice regarding programming services they receive. The

¹²⁵ CRTC, Broadcasting Decision CRTC 2015-89, “*Complaint by Bell Canada against Rogers Media Inc., formerly Rogers Broadcasting Limited, alleging violations of the Digital Media Exemption Order*”, March 16, 2015, accessible online at: <https://crtc.gc.ca/eng/archive/2015/2015-89.htm>.

CRTC sided with TELUS and many of the principles established in that arbitration were later codified in the CRTC's Wholesale Code.¹²⁶

233. ***Rogers preventing the launch of its Sportsnet 4K programming*** – In defiance of a rule that prohibits a vertically integrated provider from giving itself a “head-start” when launching a new programming service, Rogers refused to give access to its 4K programming unless TELUS agreed to pay exorbitant rates. TELUS complained to the CRTC, which issued an expedited ruling ordering Rogers to provide the 4K programming to TELUS in the absence of a commercial agreement.¹²⁷ TELUS has described this issue in further detail below.

3.4.1.3. *Hampering innovation*

234. ***Corus dragged its feet on granting rights until Shaw could catch-up with its own “on the go” service*** – After months of negotiations with TELUS for the rights to an “on the go” service that would include what was then Movie Central as a flagship programming service, Corus abruptly declined to proceed, citing a need to reconsider its strategy for granting rights. A complaint filed with the CRTC failed to provide the sought-after relief. Shortly thereafter, Shaw launched a mobile service called Shaw Go which included Movie Central content.

3.4.1.4. *Lessons from the AT&T/Time Warner merger*

235. Canada is not the only country where a high degree of consolidation has resulted in sub-optimal competitive outcomes – both from a consumer and an industry standpoint. A look at recent developments occurring in the United States – namely the merger of telecom giant

¹²⁶ CRTC, Broadcasting Decision CRTC 2012-393, “*Request for dispute resolution by Bell Media Inc. concerning affiliation agreements with the Canadian Independent Distributors Group and TELUS Communications Company in regard to Bell Media Inc.’s specialty services*”, July 20, 2012, accessible online at: <https://crtc.gc.ca/eng/archive/2012/2012-393.htm>.

¹²⁷ CRTC, “Broadcasting Commission Letter Addressed to Susan Wheeler and Ann Mainville-Neeson (Rogers Media Inc. and TELUS Communications Inc.)”, April 5, 2017, accessible online at: <https://crtc.gc.ca/eng/archive/2017/lb170405a.htm>.

AT&T with Time Warner, a media and entertainment conglomerate – should give pause to advocates of unrestrained vertical integration.

236. In what was dubbed one of the most important antitrust battles of modern times, the U.S. Department of Justice (“DOJ”) sued to prevent AT&T and Time Warner from merging in November 2017, claiming that the merger would result in higher monthly television bills for consumers and stifle innovation.¹²⁸ Specifically, the DOJ claimed that the combined company would force its rivals to pay hundreds of millions of dollars more per year for the right to distribute Time Warner’s networks, and would also use its increased power to slow the industry’s transition to new video distribution models that provide greater choice for consumers.¹²⁹ AT&T countered that the merger would create efficiencies that lead to lower consumer prices and greater innovation, and maintained that owning its own media company was necessary to take on platforms such as Netflix, Facebook, Google.¹³⁰ On June 12, 2018, a U.S. District Court judge rejected the DOJ’s arguments in their entirety, and allowed the merger to proceed without any conditions.¹³¹
237. Yet, only a few months have passed since the merger was approved, and the fears voiced by the DOJ appear to have materialized. On November 1st, AT&T blacked out the HBO and Cinemax networks for both DISH and DISH-Sling, the main competitors of AT&T’s television services, as the parties failed to agree on a new distribution agreement.¹³² These actions vindicate critics of the merger, who claimed that it would provide AT&T with the means and incentive to raise prices on valuable content for cheaper, “unintegrated” telecom

¹²⁸ Cecilia Kang and Michael J. de la Merced, “Justice Department Sues to Block AT&T/Time Warner Merge”, New York Times, November 20, 2017, accessible online at: <https://www.nytimes.com/2017/11/20/business/dealbook/att-time-warner-merger.html>.

¹²⁹ Department of Justice, “Justice Department Challenges AT&T/DirecTV’s Acquisition of Time Warner, November 20, 2017, accessible online at: <https://www.justice.gov/opa/pr/justice-department-challenges-att-directv-s-acquisition-time-warner>.

¹³⁰ Pretrial brief of AT&T Inc., DirecTV Group Holdings, LLC and Time Warner Inc., March 9, 2018, accessible online at: https://about.att.com/content/dam/snrdocs/time_warner_pre_trial_brief.pdf.

¹³¹ United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), accessible online at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv2511-146.

¹³² Reuters, “HBO goes dark on Dish Network in carriage dispute”, accessible online at: <https://www.reuters.com/article/us-dish-at-t/hbo-goes-dark-on-dish-network-in-carriage-dispute-idUSKCN1N6530>.

competitors.¹³³ And, as antitrust expert Tim Wu has indicated, such behaviour on the part of AT&T might become the “new normal”:

238. Unfortunately, there is every reason to think AT&T will keep using HBO and other media properties as weapons in the industry. The more it raises prices or withholds content, the more it either harms its rivals or gains new customers for itself. It’s a win-win situation made possible by the merger’s integration of content and content delivery.¹³⁴
239. The lessons from the AT&T/Time Warner merger should be heeded by the Panel in its assessment of the impact of vertical integration on Canada’s communications sector. That said, the Panel should keep in mind that the negative impacts linked to vertical integration are likely worse in Canada than in the United States, considering the higher degree of concentration north of the border. Indeed, even when factoring in the AT&T/Time Warner merger, vertical integration in the United State is just over half the Canadian levels.¹³⁵

3.4.2. Measures Are Needed to Address Vertical Integration in the Canadian Broadcasting System

240. While TELUS generally favours deregulating the Canadian broadcasting market, it also believes that the CRTC should be able to address anti-competitive concerns stemming from vertical integration, and conferred express legislative powers to do so. Implementing measures to address the harmful effects of vertical integration is not antithetical to the deregulation advocated in other sections of this submission. On the contrary, both stances are consistent with the need to ensure competitiveness. Targeted deregulation is needed to ensure competitiveness in the global market against foreign and other unregulated competitors, while measures to address vertical integration are about ensuring competitiveness and innovation within the domestic market.

¹³³ Tim Wu, “How AT&T Fooled the Federal Judiciary”, New York Times, November 7, 2018, accessible online at: <https://www.nytimes.com/2018/11/07/opinion/att-hbo-antitrust.html>.

¹³⁴ *Ibid.*

¹³⁵ See *Winseck*.

241. As described in ample detail above, the anti-competitive consequences of a highly consolidated broadcasting sector are not issues to which regulators and government can afford to turn a blind eye. Given free rein, vertically integrated entities will continue to exploit their significant advantages of scale and integration to their benefit, and to the detriment of innovation and the interests of consumers. Measures are therefore needed to address this threat to the long-term health of the domestic market.
242. New regulatory powers proposed should not be seen as merely addressing anti-competitive behaviour, but addressing all the potential negative impacts that vertical integration can have on Canada's broadcasting system, and allow the CRTC to set expectations on how vertically-integrated firms are expected to mitigate these impacts while conducting their business activities. Notably, access to programming – which is one of the themes the Panel is focusing on as part of the Review – should be a key rationale for adding this new regulatory power.
243. The CRTC has expressed concerns that vertically integrated players would limit access to their programming. In its decision approving Bell's acquisition of Astral Media, the Commission was expressly concerned with Bell acting "as a 'gatekeeper', effectively preventing other distributors from offering services to their customers until Bell's BDU has decided to offer such services on its own platforms."¹³⁶
244. In fact, regarding the safeguards the Commission established to deal with the anticompetitive opportunities and incentives that come part and parcel with vertical integration, the Commission noted when it approved Bell's acquisition of Astral Media that: "...**but for these safeguards** it would not have been persuaded that the present transaction is in the public interest and **would not have approved it.**"¹³⁷ [Emphasis added.]

¹³⁶ Broadcasting Decision CRTC 2013-310, *Astral broadcasting undertakings – Change of effective control*, 27 June 2013, at para 75 ["the Astral Decision"].

¹³⁷ *The Astral Decision*, opening paragraphs.

245. The Commission echoed this notion in the Wholesale Code, where it noted that “...access to programming for distribution on a multiplatform basis on reasonable terms is an increasingly essential strategy for gaining and keeping customers.”¹³⁸
246. The addition of this regulatory power would be particularly useful, considering that the CRTC’s expectations in allowing consolidation in the broadcasting sector have not entirely been met, as argued earlier in this submission. Indeed, as Brad Danks, the CEO of OutTV, pointed out, “[t]he real problem for Canada is that the vertically integrated companies may be both unwilling and unable to play the role that the policy makers assumed they would.”¹³⁹ A new regulatory power would allow the CRTC to clarify what this role ought to be, and ensure that some of the benefits vertically-integrated firms have been able to reap through vertical-integration should accrue to Canada’s broadcasting ecosystem.

3.4.2.1. Conferring Specific Powers to the CRTC to Regulate the Wholesale Relationship between Programming Services and Content Aggregators

247. The CRTC has, over the years, imposed various safeguards on vertically integrated firms. It has done so within their broadcasting licences,¹⁴⁰ as part of regulations,¹⁴¹ in the form of the 2011 Vertical Integration Framework,¹⁴² and the 2015 Wholesale Code [collectively, the “VI Framework”].¹⁴³
248. The Wholesale Code is by far the most important component of the CRTC’s VI Framework, as it set out a number of new rules that broadcasters and content aggregators/BDUs had to follow. Notably, under the Code, affiliation agreements could not prohibit the distribution of programming services on a stand-alone basis, or prohibit the offering of programming services on a build-your-own-package or small package basis,

¹³⁸ Broadcasting Regulatory Policy CRTC 2015-438, *The Wholesale Code*, September 24, 2015, at para 115, [“The Wholesale Code”].

¹³⁹ *Danks*.

¹⁴⁰ Such as those included in *The Astral Decision*.

¹⁴¹ Such as those included in Sections 12 through 15 of the *Broadcasting Distribution Regulation*.

¹⁴² Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration*, September 21, 2011.

¹⁴³ *The Wholesale Code*, starting at para 97.

or talk about minimum penetration, revenue or subscription levels.¹⁴⁴ The Code also listed a number of practices that the CRTC considered to be commercially unreasonable, and provided for a dispute resolution mechanism if a BDU had not renewed an affiliation agreement with a programming service by 120 days preceding its expiry.¹⁴⁵ The CRTC recognized that the Code was a necessary tool to address problems created by industry consolidation and vertical integration, and to ensure that negotiations between programming services and BDUs are conducted in a fair manner.¹⁴⁶

249. Unfortunately, many of the safeguards found in the VI Framework have been under attack – most notably the Wholesale Code, which the Federal Court of Appeal recently deemed could not be implemented via an order pursuant to section 9(1)(h) of the *Broadcasting Act*.¹⁴⁷ Vertically-integrated firms are also challenging as a group the notion that negotiations for the distribution of content on video-on-demand services can be subject to dispute resolution.¹⁴⁸ Finally, some are also challenging the requirement to offer programming services once they are no longer subject to mandatory carriage requirements.¹⁴⁹
250. TELUS believes it is more important than ever for the CRTC to enforce the safeguards that seek to protect the accessible, affordable and competitive distribution of diverse programming in Canada. At a time when innovation and creativity is most needed in order to compete on the world stage, competition should not be foreclosed. Strong-arm tactics that fly in the face of clear rules established as part of the VI Framework must continue to

¹⁴⁴ *The Wholesale Code*, s.4.

¹⁴⁵ *The Wholesale Code*, s. 5 and 13.

¹⁴⁶ See *The Wholesale Code*.

¹⁴⁷ *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 74. The Code, however, is incorporated into Bell Media's conditions of licence, and therefore remains in place until Bell's broadcasting licence comes up for renewal, in 2022.

¹⁴⁸ Rogers Media, Corus Entertainment and Bell Media filed joint comments in response to Broadcasting Notice of Consultation CRTC 2017-280, *Call for Comments on measures to provide for dispute resolution between video-on-demand operators and discretionary services*, which included a legal opinion challenging the CRTC's jurisdiction over the licensing of video-on-demand programming rights.

¹⁴⁹ Rogers Media, in particular, has argued that where a service no longer benefits from mandatory carriage, the broadcaster should no longer be obligated to make the service available to a distributor. See para 34 of Rogers' January 6, 2017 final reply in Broadcasting Notice of Consultation CRTC 2016-225, *Renewal of television licences held by large English- and French-language ownership groups*.

be dealt with swiftly and decisively by the Commission. Consumers should not be deprived of content because of the unwillingness of vertically-integrated firms to compete fairly.

251. TELUS believes it is crucial for the *Broadcasting Act* to be amended to remove any ambiguity regarding the CRTC's power to regulate commercial arrangements between programming undertakings and content aggregators/BDUs. Bell's successful challenge of the Wholesale Code before the Federal Court of Appeal makes such a legislative amendment even more relevant: it would ensure that the CRTC's vertical integration framework – including the Wholesale Code – could be enforced without fear of a successful legal challenge.
252. Given the high degree of vertical integration and concentration that exists in today's broadcasting industry, it is reasonable and necessary for the Commission to have the clear authority to establish enforceable safeguards to ensure that wholesale negotiations and agreements do not stand in the way of the Commission's ability to meet the objectives of the *Broadcasting Act*.
253. As such, TELUS recommends that sections 9 and 10 of the *Broadcasting Act* be amended to include the authorization for the CRTC to both issue conditions of licence and make regulations generally which govern the wholesale relationship between programming services and content aggregators.

3.4.2.2. Ensuring Timeliness of Relief Against Anti-competitive Conduct

254. Providing additional powers to the CRTC to sanction anti-competitive behaviour is not sufficient; processes are needed to ensure that anti-competitive practices can be dealt with in a time-sensitive manner by the regulator. Under the *Broadcasting Act*, the CRTC is required to conduct a public hearing as a pre-condition to issuing a mandatory order under section 12(2) of the Act, which reads as follows:

The Commission may, by order, require any person to do, without delay or within or at any time and in any manner specified by the Commission, any act or thing that the person is or may be required to do under this Part or any regulation, licence, decision or order

made or issued by the Commission under this Part and may, by order, forbid the doing or continuing of any act or thing that is contrary to this Part, to any such regulation, licence, decision or order or to section 34.1.

255. The requirement, which is codified in section 18(d) of the *Broadcasting Act*, often results in the regulator being incapable to respond in a timely and meaningful way to anti-competitive abuses. In order to remedy this state of affairs, TELUS recommends that section 18(d) of the *Broadcasting Act* be repealed.
256. TELUS believes that the repeal of section 18(d) would substantially enhance the CRTC's ability to effectively respond to violations of Act, regulations, licence conditions or orders of the CRTC. Furthermore, removing the public hearing requirement would not impose an unfair or unrecoverable risk on an affected party, as section 12(3) of the Act provides a mechanism for a person affected by a mandatory order to apply for reconsideration and empowers the Commission to rescind or vary any order made under section 12(2).
257. An example of why it must be that the Commission can respond in a timely fashion arose in early 2017, just prior to the start of the Major League Baseball (MLB) season. Rogers Media, owner of the service Sportsnet, was denying TELUS access to 4K content, claiming that section 10.3 of the *Specialty Services Regulation* did not cover this programming, as the new high definition content was not a "new service". This argument had no legal footing given that the term "new programming service" is a defined term in the Regulations and that this definition "includes, but is not limited to, a high definition version [...] of an existing programming service". It was a delay tactic on the part of Rogers in its attempt to strong arm higher wholesale fees.
258. On March 27th, 2017, just two weeks before the Blue Jays' home opener in 4K on April 11th, TELUS applied to the Commission for a quick resolution of this denial of service, noting that if the Commission did not act quickly, TELUS subscribers who had invested in 4K television sets would miss out on viewing this upcoming programming.

259. Rogers attempted to further stall the provision of the service, arguing that, not only was the 4K programming not a new programming service to which s. 10.3 would apply, but that TELUS' request involved policy issues and matters for regulatory compliance that should be subject to the procedures under Part 1 of the *CRTC Rules of Practice and Procedure*.
260. This was not the case, as the regulations did indeed apply to this new 4K programming service, and in a letter dated April 5, 2017, the Commission directed Rogers Media to provide its 4K content to TELUS immediately, despite the absence of a commercial agreement. This was a blatant attempt at delaying access to Rogers' 4K programming which was clearly non-compliant with the Regulations.
261. However, not all instances are so clearly defined that the Commission can make an expedited decision as in the example above, and given the lack of any punitive measures available to the Commission to address such cavalier disregard for the CRTC, only the power to make expedited orders will send a clear message to those engaged in anti-competitive behaviour that such conduct will not be tolerated.
262. To provide clear power for the CRTC to issue mandatory orders, and to ensure that this can be done on a timely basis, TELUS recommends changes be made to the CRTC's powers to issues mandatory orders. Specifically, TELUS recommends that the requirement to hold a public hearing as a pre-condition to issuing mandatory orders under s. 12(2) of the *Broadcasting Act* be repealed, in order to allow for the timely treatment of complaints dealing with anticompetitive behaviour.

3.4.2.3. *Additional Powers to Address Other Concerns Arising From Vertical Integration*

263. TELUS also believes that high degree of vertical integration can negatively affect other aspects of the broadcasting ecosystem. In particular, TELUS has previous raised concern relating to the use of news and information programming by vertically integrated entities.

264. The Commission has long been concerned over the impact that increased consolidation in the media industry would have on news reporting. As far back as 1997,¹⁵⁰ the Commission sought assurances from licensees in response to concerns raised by cross-media ownership when assessing applications for changes in control of licences.
265. In 2001, in its renewal of the licences for the television stations controlled by CTV, the Commission indicated that it “considers that it has a responsibility to ensure that a sufficient diversity of broadcasting news and information voices remains as convergence continues to take place between broadcasters and related industries.”¹⁵¹
266. In the course of that hearing, the Commission adopted extensive conditions of licence for CTV which incorporated a Statement of Principles and Practices relating to journalistic integrity and which instituted a Monitoring Committee which would be an “impartial, neutral body charged with receiving all complaints concerning the compliance of CTV with the Statement of Principles and Practices”.¹⁵² The requirements further stated that the “Committee members shall be individuals of unquestioned impartiality and credibility who have no existing relationship with Bell Globemedia or its affiliates and subsidiaries.”¹⁵³
267. A similar Monitoring Committee requirement was imposed on Global in its licence renewal decision in 2001.¹⁵⁴ In that decision, the Commission expressed its concerns as follows:

The Commission is concerned that cross ownership of television stations and newspapers, such as is the case with Global, could potentially lead to the complete integration of the owner's television and newspaper news operations. This integration could eventually result in a reduction of the diversity of the information presented to the public and of the diversity of distinct editorial voices available in the markets served. For example, under a fully integrated

¹⁵⁰ Broadcasting Decision CRTC 97-482, Transfer of effective control of TQS inc., a company to be incorporated and to be controlled by Communications Quebecor inc. – Application approved, August 22, 1997.

¹⁵¹ Broadcasting Decision CRTC 2001-457, *Licence renewals for television stations controlled by CTV*, August 2, 2001, at para 103.

¹⁵² *Ibid.*, Appendix A – Monitoring Committee Structure.

¹⁵³ *Ibid.*

¹⁵⁴ Broadcasting Decision CRTC 2001-458, *Licence renewals for the television stations controlled by Global*, August 2, 2001, at para 30.

structure, **the same editor could decide what matters would be investigated and what stories would be covered by a commonly owned television station and newspaper.** Under such an integrated structure, the television station and the newspaper may no longer compete and might present a **single editorial position and approach to the selection of stories considered relevant to the viewers and readers.**¹⁵⁵ [Emphasis added.]

268. Concurrent with the 2007 Diversity of Voices proceeding, the CRTC released a public notice to consider a Code of Journalistic Independence, proposed by the Canadian Broadcast Standards Council (CBSC).¹⁵⁶ As a result, the Commission subsequently approved the Journalistic Independence Code to be adopted by the industry and to be administered by the CBSC.¹⁵⁷
269. Despite all this activity around measures to ensure the independence of journalistic reporting, concern over journalistic independence has continued to be raised and has increased in recent times. The opportunity and incentive to make competitors “invisible” in the media while bolstering their own corporate profiles is of sufficient concern that the CRTC should be granted powers to make regulations or conditions of licence to address any such conduct.
270. Similar incentives to “use” affiliated programming services for the greater good of the VI entity are at play in respect of advertising availabilities. A VI entity has similar incentives to forego advertising revenues generated by its programming services in favour of using the advertising spots for its own advertising of affiliated carriage services, such as for wireless and Internet-access services. It is relevant to note that wireless services are among the biggest users of TV advertising in Canada. Accordingly, there is significant benefit to a VI entity getting preferential access to advertising availabilities.

¹⁵⁵ *Ibid.*, at para 107.

¹⁵⁶ Broadcasting Notice of Public Hearing CRTC 2007-5, Diversity of Voices Proceeding and Broadcasting Public Notice CRTC 2007-41, *Call for comments on the Canadian Broadcast Standards Council's proposed Journalistic Independence Code*, both dated April 13, 2007.

¹⁵⁷ Broadcasting Public Notice CRTC 2008-8, *Regulatory Policy – Journalistic Independence Code*, January 15, 2008.

271. The Commission expressed concern over VI entities' ability to exert control over the advertising market. In the Astral Decision, the Commission stated that:

...with the acquisition of Astral's services, BCE will control a significantly large advertising inventory, both on television and radio, and will be in a position to limit access to valuable advertising space by its competitors. This situation could have a detrimental effect on competitors not controlling similar advertising availabilities themselves.¹⁵⁸

272. However, in that decision, the Commission did not deem it necessary to implement any new rules with respect to television advertising stating that "[i]n regard to television undertakings, the Commission considers that the provisions relating to undue preference found in a number of the regulations address these concerns."¹⁵⁹

273. TELUS discussed this issue in detail in more recent proceedings before the Commission,¹⁶⁰ noting that this type of undue preference has a significant negative impact on sustainable competition. Not only does it limit access to valuable advertising space for competitors, it also allows VI entities to water down the effectiveness of the advertising its competitors purchase, by "drowning it out" with a far greater volume of their own advertising. Indeed, VI entities are using significantly greater volume of advertising space on their programming services at either discounted rates, or at no cost at all.

274. As part of the Group-Based Licensing Hearing, TELUS tabled a report from Cossette Media¹⁶¹ which demonstrated how Bell is not reporting spending on advertising on its own television stations. Clearly, Bell is in fact advertising their mobility services on their own programming properties. Anyone who watches CTV, TSN or any other Bell Media television property for any length of time is likely to see multiple advertisements for Bell

¹⁵⁸ *The Astral Decision*, para 77.

¹⁵⁹ *The Astral Decision*, para 78.

¹⁶⁰ Comments of TELUS Communications Company, August 15, 2016, at paras. 84-131, filed in Broadcasting Notice of Consultation CRTC 2016-225 – *Renewal of television licences held by large English- and French-language ownership groups*, June 15, 2016.

¹⁶¹ Cossette Media, *Television Analysis: Competitive Spend View*, August 15, 2016, at p. 3.

TV or Bell wireless services. Yet, Cossette has uncovered no record of any payment having been logged against this advertising by Bell on its own properties.

275. Bell Canada justified this latter practice to the Commission by stating that “additional advertising inventory may be provided to Bell Canada or other clients based on their advertising spending as a “bonus”.”¹⁶²
276. Further, given the significant benefit to using “remnant” advertising, the incentive and opportunity exists for a vertically integrated programming service to artificially inflate its advertising rate cards in order to create more “remnant” advertising. This creates a win-win for the VI entity – it extracts higher than commercial rates from its competitors for its advertising (thereby diminishing the competitors’ purchasing power and decreasing the number of ads they are able to buy) and it benefits from having access to more advertising for itself at lower cost (thereby diminishing the value of the ads purchased by competitors at a premium).

3.5. Calls to Shift the Burden of Funding Canadian Content to Telecommunications Providers Should Be Rejected

277. In its recent report entitled “Harnessing Change: The Future of Programming Distribution in Canada”¹⁶³, the CRTC presented options to address the future of Canada’s broadcasting system, and notably recommended that consideration be given to extending the Canadian content contribution regime to other distribution networks such as ISPs and mobile operators.
278. TELUS also notes that there have been proposals for an additional ISP tax in the context of recent House of Commons Committee hearings reviewing the *Copyright Act*.¹⁶⁴

¹⁶² Reply Comments of Bell Media, August 25, 2016, at para 98, filed in Broadcasting Notice of Consultation CRTC 2016-225 – *Renewal of television licences held by large English- and French-language ownership groups*, June 15, 2016.

¹⁶³ CRTC, “Harnessing Change: The Future of Programming Distribution in Canada”, accessible online at: <https://crtc.gc.ca/eng/publications/s15/>.

¹⁶⁴ See, for example, Canada, Parliament, House of Commons, Standing Committee on Canadian Heritage, *Minutes of Proceedings and Evidence*, 42nd Parl, 1st Session, No. 119 (September 20, 2018).

279. TELUS urges the Panel to reject this unsustainable policy recommendation, which would harm Canada's digital economy and digital citizenship.
280. Imposing a tax on ISPs to fund Canadian content production would be counterproductive and inappropriately blur the distinction between common carriers and content aggregators. Not only would such a policy conflict with the principle of affordable access; it would also create market distortions that would hinder future investments in broadband networks.

3.5.1. *An ISP Tax Would Hinder Network Investments*

281. A tax on ISPs would undermine Canada's innovation strategy by dampening ISPs' incentives to invest in much-needed infrastructure. As noted elsewhere in this submission, broadband networks on which programming is increasingly distributed also serve as the means of delivery of a myriad of telecommunication services. And investments in infrastructure continue to be needed across the country as the demand for greater capacity and speed of networks increase. Market distortions, whether the result of added regulatory burdens or government policies designed to pick winners,¹⁶⁵ do not favour continued investments in the broadband networks that will serve as a platform for future innovation in programming distribution and other areas.
282. The importance of investing in broadband networks was recently recognized by the Government of Canada when it rejected a proposal by the Standing Committee on Canadian Heritage to expand the current five percent levy on broadcasting distribution undertakings so that it applies to broadband distribution revenues.¹⁶⁶ The Government rejected the proposal on the basis that it would conflict with the principle of affordable access. Specifically, in a letter addressed to the Chair of the Standing Committee and

¹⁶⁵ A recent, and particularly harmful, example is the Government proposal to exclude incumbent providers from bidding on a large portion (~43%) of the 600 MHz spectrum that has recently been released for auction by Innovation, Science and Economic Development Canada. This type of market distorting action not only decreases the available supply of spectrum available for the incumbent to acquire, but also artificially raises the demand for the unrestricted spectrum on which it is allowed to bid (effectively imposing a "double tax" on the incumbent's investment). The end result is less competition and higher investment costs for the companies that primarily contribute to the development and deployment of broadband networks.

¹⁶⁶ Government Response to the Sixth Report of the Standing Committee on Canadian Heritage, October 16, 2017, at p. 4.

signed by the Ministers of Canadian Heritage, Finance, and Innovation, Science and Economic Development, the Government's position was stated as follows:

The Committee's recommendation to generate revenue by expanding broadcast distribution levies so that they apply to broadband distribution would conflict with the principle of affordable access. [...] The open Internet has been a powerful enabler of innovation, driving economic growth, entrepreneurship, and social change in Canada and around the world. The future prosperity of Canadians depends on access to an open Internet where Canadians have the power to freely innovate, communicate, and access the content of their choice in accordance with Canadian laws. Therefore, the Government does not intend to expand the current levy on broadcast distribution undertakings.¹⁶⁷

283. TELUS is in full agreement with the Government on this issue. In the context of the Competition Bureau's market study on competition in broadband services, TELUS recently filed evidence with the Bureau [(see Appendix 3 to this submission) demonstrating that the deployment of broadband services in Canada requires comparatively greater capital and operating costs than in most OECD countries.¹⁶⁸ Canadian broadband networks must be deployed in areas of much lower population density, which make the required investments less economical.¹⁶⁹
284. For rural and remote areas in particular, some intervention is necessary to incent investment and construction of networks. Accordingly, the Government of Canada has implemented various programs to improve the economic viability of broadband deployment in these communities. These include:
- the *Broadband Canada* program (2009), which was launched with the objective of extending broadband Internet to more than 200,000 households in underserved areas;¹⁷⁰

¹⁶⁷ *Ibid.*

¹⁶⁸ Expert Report of Dr. Robert W. Crandall filed as part of TELUS' submission to the Competition Bureau in the context of its market study on competition in broadband services, available at Appendix 9.

¹⁶⁹ *Ibid.*

¹⁷⁰ See: <https://www.ic.gc.ca/eic/site/ichepi.nsf/eng/02120.html>.

- the *Connecting Canadians* program (2014), which provided further funding for high-speed Internet with target speeds of at least 5Mbps for 98% of Canadian households;¹⁷¹ and
- the *Connect to Innovate* program (2016), which will invest \$500 million by 2021 to bring high-speed Internet to 300 rural and remote communities in Canada.¹⁷²

285. In addition to these programs, the CRTC recently created a \$750 million fund for investment in high-cost rural and remote areas.¹⁷³ This investment vehicle will be entirely industry-funded, meaning that its costs will ultimately be borne by consumers in the form of higher broadband access prices. Adding yet another levy on these consumers' broadband bills would discourage investment and drive cost-sensitive consumers away from broadband connectivity.
286. TELUS has invested close to \$150 billion dollars in capital and operations since 2000¹⁷⁴ in extending its wireline and wireless communications networks to provide enhanced broadband services to Canadians, including expanding its broadband facilities to rural and remote areas. TELUS expects to spend many more billions in the future to continue developing and operating its networks. That said, one of the keys to ensuring that networks are able to keep pace with ever-increasing future capacity requirements, particularly in rural and remote areas, lies in ensuring that future policies and regulations take into account the high cost of investment in these networks, are fair to existing stakeholders that have already made significant investments in their networks, and favour the most efficient allocation of capital required to further develop and operate these networks. A tax on ISPs to finance the production of domestic content would do none of these things.
287. The Minister of Innovation, Science and Economic Development considers that Canada's innovation strategy is a pillar of Canada's economic strategy, and has stated that "Canada

¹⁷¹ See: <https://www.ic.gc.ca/eic/site/028.nsf/eng/50009.html>.

¹⁷² See: <https://www.ic.gc.ca/eic/site/119.nsf/eng/home>.

¹⁷³ CRTC, Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada's digital economy*, December 21, 2016.

¹⁷⁴ TELUS Press Release dated May 31, 2017, available at: <https://www.telus.com/en/about/news-andevents/media-releases/telus-investing-usd4-7-billion-through-2020-to-extend-advanced>.

needs to capitalize on [new] technologies to give businesses, research institutions and cities a competitive edge.”¹⁷⁵ A new tax would dull this competitive edge and harm economic growth.

3.5.2. *An ISP Tax Would Hurt Canadian Consumers*

288. In addition to harming infrastructure investment at a time where Canada and its international peers are in the “Race for 5G”, a tax on ISPs would make Internet access more expensive for all Canadians. Doing so would be particularly questionable when, as noted above, broadband consumers are already being asked to fund broadband development in rural and high cost areas of the country. Further in this regard, pursuant to its determinations in *Modern Telecommunications Services: The path forward for Canada’s digital economy*, Telecom Regulatory Policy CRTC 2016-496, the CRTC will be levying its telecommunications contribution charge on hitherto contribution exempt retail Internet revenues and texting revenues in the foreseeable future to fund its new broadband funding regime, the details concerning which were released in *Development of the Commission’s broadband funding regime*, Telecom Regulatory Policy CRTC 2018-377.
289. A tax on ISPs would disproportionately hurt lower-income households. Indeed, the regressive nature of the levy would mean that it would affect people with low incomes more severely than people with higher incomes because it would be applied uniformly to all broadband consumers, regardless of their economic situation. Such a policy would be fundamentally unfair, considering that Canadians of all economic backgrounds now require an Internet connection to fully participate in the 21st century economy.
290. The need to ramp up government and industry efforts to assist underserved, lower-income and marginalized communities has been a constant area of focus of the current federal government – and TELUS commends the government for its efforts in that regard. As the government itself acknowledged, adding a tax to the Internet bill of millions of Canadians would contradict the government’s stated objective of helping more Canadians get online.

¹⁷⁵ Government of Canada, *Positioning Canada to Lead: An Inclusive Innovation Agenda*, accessible online at: https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00009.html.

In February 2018, the federal government announced it was launching the Digital Literacy Exchange Program, a \$30 million initiative to support not-for-profit organizations that teach fundamental digital literacy skills to Canadians who would benefit from participating in the digital economy.¹⁷⁶ This program would notably provide much-needed assistance to seniors, new and low-income Canadians, Indigenous people, and those living in northern and rural communities.¹⁷⁷ Providing funding to these constituencies on the one hand, while adding a tax to their Internet bills on the other, would be counterproductive and inefficient.

291. The same conclusion can be drawn when reviewing the interim report of the federal government's Digital Industries Table,¹⁷⁸ which was constituted to set long-term goals to ensure the growth of Canada's ICT sector. Among other things, the report found that increasing the domestic uptake of digital innovation may be the single most important element to improving productivity, noting that a one percent increase in digital technology adoption could generate \$2.5 billion for Canada.¹⁷⁹ The report also stressed the need to foster the growth of homegrown digital companies, finding that Canada lags behind its trading partners in the creation of large digital technology firms and in having a community of successful high-growth firms.¹⁸⁰ It also recognizes that any action plan must allow for greater inclusion of "those traditionally underrepresented in the workforce, such as Indigenous Peoples, women, Canadians with disabilities and older workers."¹⁸¹
292. If Canada wants to foster digitally-skilled talent able to successfully compete in an ever-more competitive economy, it must continue its efforts to democratize broadband access; not impede them by treating broadband networks as proverbial "cash cows" that are to be milked to fulfill industrial policy objectives. TELUS contends that a tax on ISPs would

¹⁷⁶ Innovation, Science and Economic Development Canada, "Government announces funding for digital skills training to help more Canadians get online", accessible online at: <https://www.newswire.ca/news-releases/government-announces-funding-for-digital-skills-training-to-help-more-canadians-get-online-674479753.html>.

¹⁷⁷ *Ibid.*

¹⁷⁸ Government of Canada, *Digital Industries: The sector today and opportunities for tomorrow, Interim Report*, accessible online at: [https://www.ic.gc.ca/eic/site/098.nsf/vwapj/ISEDCTableDI.pdf/\\$file/ISEDCTableDI.pdf](https://www.ic.gc.ca/eic/site/098.nsf/vwapj/ISEDCTableDI.pdf/$file/ISEDCTableDI.pdf).

¹⁷⁹ *Ibid.*, at p. 4.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*, at p. 1.

hurt the very demographics the government wants to attract into the sector. If the most vulnerable are disincentivized from connecting to the Internet and learning key skills that will allow them to flourish in the digital economy, then the federal government will have failed in its efforts to increase digital literacy and build an inclusive economy.

293. Shortly before the launch of this Broadcasting and Telecommunications Legislative Review was launched by the federal government, ISED Minister Bains indicated that the impact of proposals on consumers – particularly cost implications – would be a key factor in the government’s review of the report.¹⁸² TELUS agrees with the Minister, and submits that, at a time when government policy is focused on democratizing access to the Internet and improving digital literacy, adding yet another tax to consumers’ bills should, self-evidently, be a non-starter.

3.5.3. *There is No Compelling Policy Rationale for Taxing ISPs*

294. TELUS has recommended, elsewhere in this submission, that Canadian content exhibition and spending requirements for private commercial companies be eliminated in order to level the regulatory playing field with unregulated competitors such as Netflix, Google and Amazon. However, should the Panel not endorse such a recommendation, TELUS contends that – at the very least – the Panel should reject calls to expand the contribution regime to ISPs.
295. While there is a rationale – outdated as it may be – for TV distributors to contribute to the creation of Canadian content, this rationale does not exist for ISPs. Indeed, unlike distributors, ISPs do not play any role in the selection or marketing of content available over the internet. In fact, net neutrality principles prevents them from doing so.
296. Furthermore, consumers have many uses for their Internet that are completely unrelated to broadcasting, including email access, social media, online research, telework and online shopping. Going forward, wireless technology, including 5G, will enable driverless cars

¹⁸² Daniel Leblanc, “CRTC wants Netflix, Spotify to fund Canadian content”, *Globe and Mail*, May 31, 2018, accessible online at: <https://www.theglobeandmail.com/business/article-crtc-calls-for-levies-on-internet-providers-and-foreign-streaming/>.

and smart homes, businesses and cities, as well as applications, devices and services that promote wellness, improve educational outcomes and support environmental sustainability. None of these activities fall within the purview of the *Broadcasting Act*, so why should they be made to contribute to the fulfillment of its objectives? And, if ISPs are to finance the production of Canadian content because their networks are used to distribute programming, then what prevents government from subsidizing any sector of the Canadian economy via ISP taxes, in the coming “Internet of Everything” era? Should ISPs subsidize Canada’s auto industry because their networks are used to enable driverless cars? Should they finance Canada’s healthcare system because their networks are used to provide telemedicine and e-health solutions? Should they subsidize the travel industry because most trips are now being booked online? While these examples may be wild-eyed, they rely on the same faulty logic as the case for funding Canadian content through an ISP tax. And TELUS urges the Panel to reject that logic.

297. It must be noted that Canada is not alone among its international peers in having refrained from relying on ISPs to support the creation and dissemination of domestic content. As shown in a report authored by former CRTC Commissioner Suzanne Lamarre, submitted as Appendix 7 to this submission, a majority of Western countries have rejected that policy option. Even members of the European Union, which have implemented numerous measures over the years to promote the creation and dissemination of domestic cultural products, have largely shied away from implementing ISP taxes.¹⁸³ Canada should emulate these countries by confining the ISP tax to the dustbin of bad policy ideas.

¹⁸³ Two notable exceptions are France and Spain, which have both imposed a tax on telecommunications operators to finance the activities of their respective public broadcasters. Earlier this year, however, the French government decided to no longer use the proceeds of its “taxe télécoms” to fund France’s public broadcaster. See: Cyril Lacallière, “L’État prive France Télévisions de la ‘taxe Copé’... mais la garde pour lui!”, *l’Opinion*, 24 septembre 2018, accessible online at : <https://www.lopinion.fr/edition/economie/l-etat-prive-france-televisions-taxe-cope-garde-lui-163158>.

4.0 Theme C – Improving the Rights of the Digital Consumer

4.1. Enhancing Digital Literacy Is the Greatest Opportunity to Promote Participation in the Digital Economy

298. In order to fully participate in the digital economy, Canadians need the knowledge and tools to do so. Digital literacy is the single greatest opportunity to facilitate the adoption of broadband services and participation in the digital economy. While digital literacy does not need to be part of any of the Acts under review and is outside the purview of the CRTC, other government departments including Innovation, Science and Economic Development Canada, Employment and Social Development Canada, Public Safety Canada and the Privacy Commissioner of Canada have a role to play in increasing digital literacy.
299. The CRTC has described digital literacy as “the set of knowledge, skills, and behaviours that enable people to understand and use digital systems, tools and applications, and to process digital information.” The CRTC further notes that “these capabilities and aptitudes link strongly with a population’s capacity to be innovative, productive and creative, and to participate in democracy, the digital economy, and other spheres of life.”¹⁸⁴
300. The digital literacy problem exists in Canada and the CRTC has acknowledged that there is a gap that contributes to limiting consumers’ ability to participate in the digital economy and society, and that closing this gap would maximize the potential benefits for Canadians.¹⁸⁵ Almost a quarter of Canadian non-adopters surveyed by Statistics Canada say they do not use the Internet is because they lack the skills or the Internet is too difficult for them to use. Almost two thirds of non-adopters say that they have no need, no interest or not enough time to use the Internet.¹⁸⁶ The former is a direct indication of a digital literacy gap, which the latter is likely a proxy for it.¹⁸⁷

¹⁸⁴ CRTC Submission to the Government of Canada’s Innovation Agenda, 21 December 2016, online: <https://crtc.gc.ca/eng/publications/reports/rp161221/rp161221.htm>.

¹⁸⁵ *Modern telecommunications services – The path forward for Canada’s digital economy*, Telecom Regulatory Policy CRTC 2016-496, para 245.

¹⁸⁶ Karine Landry and Anik Lacroix, “The Evolution of Digital Divides in Canada,” *2014 TPRC Conference Paper*, August 15, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418462 using data from Statistics Canada, Canadian Internet Use Survey (2012).

¹⁸⁷ *Ibid*, p. 12-13.

301. Clearly more can be done to show non-adopters the benefits of participating in the digital economy and to equip them with the skills and knowledge to do so. A multi-pronged approach that engages government agencies at all levels is necessary. At the present time, there are digital literacy programs overseen by Employment and Social Development Canada, Public Safety Canada and the Privacy Commissioner of Canada, and the Department of Innovation, Science and Economic Development has launched its Digital Literacy Exchange Program.¹⁸⁸ Various provincial and territorial government, particularly in British Columbia, Northwest Territories, Nunavut and Yukon, also have digital literacy programs.¹⁸⁹ These agencies are funding initiatives to enhance digital literacy and address skill deficits that are significant barriers to broadband adoption.
302. TELUS has also played a role in increasing digital literacy. TELUS WISE (Wise Internet and Smartphone Education) is an educational program focused on Internet and smartphone safety to help keep families safe from online criminal activity such as financial fraud and cyberbullying. This program is available to all Canadians in a variety of ways including in-person seminars, visits to schools and online activities. TELUS WISE content was developed in partnership with leading industry experts and aims to provide timely, informative and relevant information about topics related to Internet safety. TELUS has also launched TELUS WISE for seniors, a program to increase internet literacy with seniors, which is delivered to senior citizens in select multi-dwelling buildings. These educational sessions take place either monthly or yearly and, in the last year, TELUS held 122 workshops educating 3,029 attendees.
303. These public and private digital literacy programs need to continue and expand. The CRTC has noted on at least two occasions that digital literacy is not within its core mandate and that it is not well placed to handle the digital literacy gap alone.¹⁹⁰ As a result, there needs to be a multi-faceted approach which includes the participation of other stakeholders.

¹⁸⁸ Further details are available at the following link: <http://www.ic.gc.ca/eic/site/102.nsf/eng/home>.

¹⁸⁹ CRTC Submission to the Government of Canada's Innovation Agenda, 21 December 2016, online: <https://crtc.gc.ca/eng/publications/reports/rp161221/rp161221.htm>.

¹⁹⁰ *Modern telecommunications services – The path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496, para 245-46; CRTC Submission to the Government of Canada's Innovation Agenda, 21 December 2016, online: <https://crtc.gc.ca/eng/publications/reports/rp161221/rp161221.htm>.

While the digital literacy gap does not need to be addressed in any of the statutes under review, this important issue should be addressed by programs administered and funded by other federal and provincial departments and ministries.

4.2. No Legislative Changes Are Required to Address Consumer Protection

304. There are no legislative changes required pertaining to consumer protection and rights in the *Telecommunications Act*. The CRTC already has full jurisdiction over consumer protection and rights for telecommunications services by virtue of the powers granted to it by Parliament. The courts have repeatedly affirmed telecommunications regulation to be within the exclusive jurisdiction of the federal Parliament. The CRTC implements such protections and rights by way of tariff terms, in the case of tariffed services, and various codes of conduct for forborne services.
305. While no legislative changes are necessary for the CRTC to effectively regulate consumer protection, TELUS recommends a clear legislative statement regarding the exclusivity of Parliament's authority over telecommunications, to discourage further intrusions into this field by the Provinces. All stakeholders would benefit from eliminating the uncertainty, confusion, and complexity caused by such provincial laws and the expense of litigating their constitutionality. TELUS recommends that such a statement be included in the revised telecommunications policy objectives, and discussed further in Section 5.1.

4.3. No Legislative Changes Required to Address Accessibility

306. On the related matter of accessibility, the CRTC has jurisdiction to implement rules about accessibility of telecommunications services, and has done so in many past decisions. As noted in Section 5.1 in this submission, TELUS is asking that accessibility of telecommunications services be enshrined as a Canadian telecommunications policy objective. As a result, the CRTC would continue to have jurisdiction over accessibility of telecommunications services.
307. In addition, TELUS notes that under the proposed Bill C-81, the *Accessible Canada Act*, telecommunications service providers would be required to implement an accessibility plan

to be filed with the CRTC. The CRTC would continue to have jurisdiction to impose conditions about accessibility and to enforce the provisions of the Accessible Canada Act. This demonstrates that it is Parliament's desire to continue to have the CRTC to be the body that enforces telecommunications services accessibility under both the *Telecommunications Act* and the *Accessible Canada Act*.

4.4. No Legislative Changes Required to Address Privacy

308. Privacy should continue to be included as a Canadian telecommunications policy objective. The CRTC has and continues to carry out a number of functions to fulfill this objective. In this regard, the CRTC has established regulatory measures to safeguard customer information and to protect the privacy of consumers. For example, in *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657, the Commission directed all primary ISPs, as a condition of providing retail Internet services, not to use for other purposes personal information collected for the purposes of traffic management and not to disclose such information.¹⁹¹
309. However, consumers recognize that privacy protections, and protections for their data, can be more holistically and functionally provided to Canadians through the enactment of law of general application. For consumers, the value of their privacy does not change industry by industry. They care deeply about how their data is handled and protected and they are looking for clarity about what that means. For this reason, cross-industry privacy protections, such as are provided to consumers in *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), are the most effective approach for legislation.
310. There is simply no reason for additional industry/sector specific regulations for privacy, and there are many arguments against such a move. Industry specific regulation will result in confusion for customers as to why regulations apply to one industry and not another. Further, such legislation is likely to stifle innovation by making cross-industry partnerships complicated and potentially inequitable. Consumers are rightly more concerned with what

¹⁹¹ TRP 2009-657, para 103.

is being done with their data (the uses and activities) rather than with which sector holds their data. Regulating one sector differently than another could result in misleading assurances for consumers, who are interacting with multiple providers from various industries on a regular basis, and inequitable regulation of the same business activities. Further, it is not apparent that the telecommunications industry holds any more sensitive data than those in other industries that are not captured by the *Telecommunications Act* (e.g., social media, online/web industry, financial industry, technology device manufacturers, etc.).

311. Due to the oversight of privacy by other Canadian, federal and provincial, legislation and bodies, TELUS recommends that no change to the *Telecommunications Act* is required with respect to privacy. While including privacy among the policy objectives found in section 7 recognizes this right as an important consideration for those organizations subject to the *Telecommunications Act*, the Commission needs no new legislative powers to fulfil this policy objective for the reasons outlined above.

4.5. No Legislative Changes Are Required to Address Net Neutrality

312. The existing provisions of the *Telecommunications Act* are sufficient to protect net neutrality. Under section 27(2) of the *Telecommunications Act*, carriers are prohibited from providing an undue preference and engaging in unjust discrimination when providing telecommunications services, or subjecting any person to an undue or unreasonable disadvantage. Section 36 of the *Telecommunications Act* also prevents Canadian carriers from controlling the content or influencing the meaning or purpose of telecommunications carried by them for the public. In the aggregate, these provisions reflect the elements of a conventional approach to net neutrality.

4.5.1. Context of the Public Discussion on Net Neutrality

313. Net neutrality has re-entered telecommunications policy discussions since the United States Federal Communications Commission announced its decision to repeal the Obama administration's so-called "Title II" regulations, which classified the internet as a public utility. These developments caused a significant reaction – both in the United States and

internationally – with many critics warning that the policy changes brought about by the FCC would mark “the end of the internet as we know it.”¹⁹² However, to be clear, the Title II policy had not yet come into effect before it was repealed, so the “internet as we know it” was the one without net neutrality rules.

314. The Canadian government has reiterated its support for net neutrality.¹⁹³ On May 9, 2018, the House of Commons Standing Committee on Access to Information, Privacy and Ethics released a report entitled “The Protection of Net Neutrality in Canada,” which recommended that the federal government consider enshrining the principle of net neutrality in the *Telecommunications Act*.¹⁹⁴ Shortly after the report was published, the House of Commons passed a motion acknowledging Canada’s existing net neutrality protections and calling on the government to make net neutrality a “guiding principle” of the *Telecommunications Act* and *Broadcasting Act* review and to consider enshrining it in the *Telecommunications Act*.¹⁹⁵ Finally, in announcing the Panel’s review of Canada’s communications legislation, the federal government indicated that the review would be “guided by the principle of net neutrality.”¹⁹⁶
315. TELUS commends the federal government for its commitment to net neutrality and wishes to underscore its commitment to an open internet. Notably, no legislative changes are required to achieve this goal as the existing provisions of the *Telecommunications Act*

¹⁹² Joe Concha, “CNN heading declares ‘End of the Internet as we know it’ After Michael Lewis, “Repeal of net neutrality in U.S. could impact Canada”, *Toronto Star*, 22 November 2017, accessible online at: https://www.thestar.com/business/tech_news/2017/11/22/repeal-of-net-neutrality-in-us-could-impact-canada.html.

¹⁹³ Michael Lewis, “Repeal of net neutrality in U.S. could impact Canada”, *Toronto Star*, 22 November 2017, accessible online at: https://www.thestar.com/business/tech_news/2017/11/22/repeal-of-net-neutrality-in-us-could-impact-canada.html.

¹⁹⁴ House of Commons, “The Protection of Net Neutrality in Canada: Report of the Standing Committee on Access to Information, Privacy and Ethics”, May 2018 [*The Protection of Net Neutrality in Canada*], accessible online at: <http://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9840575/ethirp14/ethirp14-e.pdf>.

¹⁹⁵ House of Commons, Private Members’ Motion – M-168 – Net Neutrality, 23 May 2018, accessible online at: [http://www.ourcommons.ca/Parliamentarians/en/members/John-Oliver\(88881\)/Motions?sessionId=152&documentId=9630989](http://www.ourcommons.ca/Parliamentarians/en/members/John-Oliver(88881)/Motions?sessionId=152&documentId=9630989).

¹⁹⁶ Canadian Heritage, “Government launches review of Telecommunications and Broadcasting Acts”, 5 June 2018, accessible online at: <https://www.canada.ca/en/canadian-heritage/news/2018/06/government-of-canada-launches-review-of-telecommunications-and-broadcasting-acts.html>

provide the CRTC with sufficient tools to enforce net neutrality principles of no unwarranted blocking or throttling, no harmful prioritization, and transparency – goals which TELUS fully supports. TELUS cautions the Review Panel against adopting any overly rigid legislative amendments aimed at protecting net neutrality that could have counterproductive results. Further in this regard, TELUS wishes to stress the need for the CRTC to adopt a more flexible approach to net neutrality using its existing legislative powers.

4.5.2. *There Is No Need for a Net Neutrality Amendment*

316. Existing legislative provisions have enabled the CRTC, over the years, to issue a series of policy decisions responding to evolutions in telecommunications services that form the CRTC’s net neutrality framework.¹⁹⁷ These include: (i) *the Internet traffic management practice framework*,¹⁹⁸ which established rules governing the use of internet traffic management practices; (ii) the *Mobile TV decision*,¹⁹⁹ which directed ISPs to stop giving their mobile television services an unfair advantage in the marketplace, to the disadvantage of other internet content; and (iii) the *Differential pricing practices framework* (“DPP Framework”),²⁰⁰ which effectively banned most forms of zero-rating and sponsored data programs.
317. In a recent testimony before the House of Commons Standing Committee on Access to Information, Privacy and Ethics, Chris Seidl, the Executive Director of the CRTC’s telecommunications branch, contended that sections 27(2) and 36 of the *Telecommunications Act* “provide the CRTC with the tools and the flexibility to establish and enforce a net neutrality framework that is entirely appropriate and reasonable for

¹⁹⁷ CRTC, “Strengthening Net Neutrality in Canada”, accessible online at: <https://crtc.gc.ca/eng/internet/diff.htm>

¹⁹⁸ *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657

¹⁹⁹ *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv*, Broadcasting and Telecom Decision CRTC 2015-26

²⁰⁰ *Framework for assessing the differential pricing practices of Internet service providers*, Telecom Regulatory Policy CRTC 2017-104.

Canada.”²⁰¹ Mr. Seidl further cautioned against enshrining the principle of net neutrality in the *Telecommunications Act*, claiming that such an amendment might not fit with the flexibility needed going forward.²⁰² Even Professor Michael Geist, a strong net neutrality proponent, has indicated that a net neutrality amendment to the *Telecommunications Act* should not be considered a priority.²⁰³

318. Entrenching the principle of net neutrality in legislation is not only unnecessary; it could potentially bring about negative unintended consequences. Indeed, adopting an overly prescriptive net neutrality amendment could harm innovation and investment, prevent new offerings from being brought to market, and even hinder telecommunications carriers’ ability to address cyber-security concerns. In this regard, TELUS echoes the comments of CRTC Chairman Ian Scott, who recently indicated that net neutrality is not a “black-and-white” issue and that flexibility may be required going forward for situations relating to public safety or security, telemedicine or self-driving cars.²⁰⁴

4.5.3. *The CRTC Should Provide a More Flexible Net Neutrality Framework Using its Existing Powers Under the Telecommunications Act*

319. TELUS submits that it is crucial to develop a balanced approach to net neutrality that reconciles the core statutory protections on the one hand, and the need for a regulatory environment conducive to capital investment and innovation, on the other. TELUS recommends that the CRTC adopt a less rigid approach to different pricing practices, as is the case in other peer jurisdictions, to ensure that carriers retain the ability to protect the integrity of their networks from cybersecurity threats, and to make innovative service offerings. The approach recommended in this section is consistent with TELUS’ proposed principle 9: once it is credibly demonstrated that regulation is required, some form of *ex post* regulation should be adopted as a default. If and only if it is credibly demonstrated

²⁰¹ The Protection of Net Neutrality in Canada, at p. 8.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ CRTC, *Ian Scott to the annual conference of the Canadian Chapter of the International Institute of Communications*, November 1, 2018, accessible online at: <https://www.canada.ca/en/radio-television-telecommunications/news/2018/11/ian-scott-to-the-annual-conference-of-the-canadian-chapter-of-the-international-institute-of-communications.html>.

that *ex post* regulation fails to achieve the stated objectives should some form of *ex ante* regulation be considered. Net neutrality, to the extent it requires regulation, should rely on *ex post* measures.

320. While Chairman Scott does not oppose enshrining net neutrality in the *Telecommunications Act*, he cautioned the government about being overly prescriptive:

I will give you a simple example. When it comes to public security or public safety, do we want to be net neutral? Not necessarily. When it comes to a 5G environment and the priority given to driverless cars versus parking metres, do we want to be net neutral? The answer is obviously no. The commission has the tools today, interestingly enough, without any mention of the term “net neutrality,” because we have the ability to say you mustn’t give an undue preference or unjustly discriminate against someone, and carriers cannot influence the content of the messages they carry without our permission. In fact, those broad principles have given us all the tools we need.²⁰⁵ (emphasis added)

321. It is particularly critical to ensure that cybersecurity needs not be subjugated to an overly rigid definition of net neutrality. It is important for ISPs to retain the ability to protect subscribers from fraudulent and malicious websites and software, particularly in light of the fact that cybersecurity threats are constantly changing. An overly prescriptive net neutrality approach could act as a straightjacket that would impede on ISPs’ ability to protect the integrity of their networks. TELUS provides further comments with respect to the issue of security in Section 6.0, response to Question 5.1.
322. Further in this regard, certain components of the CRTC’s net neutrality framework do not show a sufficient degree of regulatory flexibility and have the ability to hinder innovation and harm consumers. The DPP Framework is a case in point. Established in April 2017, the framework effectively bans the use of zero-rating, a practice by which network operators allow end-users to access certain content without being charged for the corresponding data consumption.

²⁰⁵ The Standing Senate Committee on Transport and Communications, Evidence, October 30, 2018, accessible online at: <https://sencanada.ca/en/Content/SEN/Committee/421/trcm/54343-e>.

323. The DPP Framework underscores how a regulator’s commitment to net neutrality can sometimes lead to counterproductive rules. Banning innovative practices such as zero-rating does nothing to protect the integrity of the internet; rather, it raises prices for certain consumers and lowers them for no one. In making such a decision, the CRTC downplayed or ignored the obvious benefits that DPPs can have in the broadband ecosystem. These include enhancing internet affordability; enhancing the discoverability of, and demand for, online content; encouraging non-users to access the internet; and helping close the digital divide. In most cases, the use of DPPs is a “win-win-win” situation: consumers win by accessing services and applications at exempt or discounted rates; ISPs see the demand for services increase as a result of the availability of more content; and content providers are able to reach a larger number of consumers. Even strong net neutrality proponents such as former FCC chair Tom Wheeler have recognized that DPPs do not constitute *per se* violations of net neutrality and can be pro-competitive.²⁰⁶
324. TELUS recommends that the CRTC adopt a less rigid approach to zero-rating as is the case in other peer jurisdictions. For example, in the United States, the FCC has recognized that the practice of zero-rating enhances not only consumer welfare, but also broadband competition in general.²⁰⁷ In Europe, net neutrality rules do not ban zero-rating,²⁰⁸ and BEREC (the Body of European Regulators for Electronic Communications) has recommended that zero-rating programs be assessed on a case-by-case basis, rather than being banned outright.²⁰⁹ In 2017, 20 of the European Union’s 28 nations had some form of zero-rating.²¹⁰ The practice is also widespread in Australia.²¹¹

²⁰⁶ Indeed, the FCC’s 2015 *Open Internet Order* acknowledges that zero-rating-based business models may, in some instances, provide consumer and competitive benefits.

²⁰⁷ Taylor Hatmaker, “Trump’s FCC just dropped all investigations into zero-rating practices”, *TechCrunch*, accessible online at: <https://techcrunch.com/2017/02/03/pai-zero-rating-fcc/>.

²⁰⁸ See EU Regulation 2015-20, accessible online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120>.

²⁰⁹ BEREC, “What is zero-rating?”, https://www.berec.europa.eu/eng/netneutrality/zero_rating/.

²¹⁰ Michael Chaia, “Net Neutrality Challenges in the World: Zero-Rating in the European Union”, *Public Knowledge*, accessible online at: <https://www.publicknowledge.org/news-blog/blogs/net-neutrality-challenges-in-the-world-zero-rating-in-the-european-union>.

²¹¹ Australian Broadcasting Corporation, “Net neutrality: The digital landscape set to change as the US moves to overturn regulations”, 21 November 2017, accessible online at: <http://www.abc.net.au/news/2017-11-22/net-neutrality-regulations-to-be-overturned-in-the-us/9179512>.

325. The shortcomings of the CRTC's DPP framework – while not being an area of focus *per se* of the Panel's review – highlight the need for legislative and regulatory humility, and demonstrate that regulations adopted with the best of intentions do not always end up enhancing the general welfare of society. The CRTC should exercise greater flexibility using its existing powers under the *Telecommunications Act* with respect to differential pricing practices. These practices should not be the subject of an *ex ante* ban as is the case under the current DPP framework and should be assessed on a case-by-case basis, as is the case in other jurisdictions.

4.6. Additional Provisions Are Required to Protect Carriers from Liability in Light of Their Neutral Position with Respect to Content

326. A new limitation of carrier liability should be included in the *Telecommunications Act*. Under section 36 of the *Telecommunications Act*, carriers have statutory duties not to control the content or influence the meaning or purpose of telecommunications carried by them for the public. However, carriers appear to be at risk of liability where the content they carry is itself illegal. Canadian carriers are potentially exposed to liability for carriage of problematic types of content that customers or other users might distribute via non-tariffed services, such as defamatory material, child pornography and illegal commercial electronic messages or computer program installations. The risks of carrier liability for carrying such material is unwarranted, especially given the restrictions placed on carriers in section 36 of the *Telecommunications Act*, as noted above.
327. Section 36 potentially exposes carriers to some unique risks. A message they carry may be defamatory, and because of their role in the distribution of that message, they may be deemed to be liable as a “publisher” of the message; a video accessed through their networks that is hosted on the site of a “pirate” may make them potentially complicit in copyright infringement; they may be involved, unbeknownst to themselves, in distributing child pornography, and therefore potentially party to a criminal offence.

328. More recently, a new source of potential liability has arisen with respect to Canada’s anti-spam legislation (“CASL”).²¹² The CRTC has signalled its intent to pursue intermediaries (including telecommunications and Internet service providers) under a provision prohibiting the aiding or inducing of substantive CASL violations.²¹³ The CRTC is suggesting that carriers have some (undefined) obligation to proactively limit the distribution of illegal commercial electronic messages or installation of computer programs. Although the CRTC’s interpretation is legally dubious,²¹⁴ it nevertheless signals a tension between carriers’ obligation to remain neutral under the *Telecommunications Act* and law enforcement’s desire to conscript carriers into a non-neutral role for purposes of other legislation.
329. Most of Canada’s peer jurisdictions, including the European Union, the United States, and Japan, recognize that it is undesirable and unjust to hold telecommunications carriers liable where they have played an essentially passive role in carrying such messages and distributing such content on behalf of third parties. A summary of the measures used by those jurisdictions is included in Appendix 8 to TELUS’ submission.

4.6.1. *Limitations of Liability in Carrier Terms of Service of Limited Application*

330. In 1986, the CRTC exercised its authority over carrier limitations of liability²¹⁵ to exempt carriers from liability in a wide range of circumstances. The 1986 Terms of Service provide that Canadian carriers are not liable for:

²¹² An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c. 23.

²¹³ See *Guidelines on the Commission’s approach to section 9 of Canada’s anti-spam legislation (CASL)*, Compliance and Enforcement Information Bulletin CRTC 2018-415. These guidelines are in reference to the prohibition set out in s 9 of CASL, which states “[i]t is prohibited to aid, induce, procure or cause to be procured the doing of any act contrary to any of sections 6 to 8.”

²¹⁴ Amongst other things, the CRTC guidelines seem to contradict Parliament’s intention to limit carrier liability, at least with respect to s 6 of CASL. Subsection 6(7) provides “[t]his section does not apply to a telecommunications service provider merely because the service provider provides a telecommunications service that enables the transmission of the message.”

²¹⁵ The CRTC’s authority flows from sections 24, 24.1, 31 and 32(g) of the *Telecommunications Act*.

- (a) any act or omission of a telecommunications carrier whose facilities are used in establishing connections to points which the Company does not directly serve;
- (b) defamation or copyright infringement arising from material transmitted or received over the Company's facilities;
- (c) infringement of patents arising from combining or using customer-provided facilities with the Company's facilities; or
- (d) copyright or trademark infringement, passing off or acts of unfair competition arising from directory advertisements furnished by a customer or a customer's directory listing, provided such advertisements or the Information contained in such listings were received in good faith in the ordinary course of business.²¹⁶

331. However, the Terms of Service apply only to tariffed services.²¹⁷ In 1986, essentially all services were tariffed. Tariffed services now account for only 4% of carrier revenues.²¹⁸ While the CRTC has from time to time approved limitations of liability in specific instances for inclusion in carrier contracts,²¹⁹ there is no general CRTC-approved or prescribed limitation of liability applicable to non-tariffed (so-called “forborne”) services. The result is that there is no CRTC-mandated limitation on carrier liability applicable for 96% of Canadian carrier traffic (by revenues).

²¹⁶ See *Review of the General Regulations of the Federally Regulated Terrestrial Telecommunications Common Carriers*, Decision 86-7, Appendix, item 16.2.

²¹⁷ *Ibid.*, item 1.1.

²¹⁸ CRTC Communications Monitoring Report 2018, Table 4.1 (Percentage of telecommunications revenues generated by forborne services).

²¹⁹ For example, Co-Location, Telecom Decision CRTC 97-15, at paras 106-109. In *Conditions of service for wireless competitive local exchange carriers and for emergency services offered by wireless service providers*, Telecom Decision CRTC 2003-53, the CRTC approved the text of a provision limiting the liability of wireless carriers relating to emergency services provided to end-users on a mandatory basis, as well as a provision limiting inter-carrier liability.

332. In 2012, Parliament enacted the *Copyright Modernization Act*, which provides ISPs with protection from liability for copyright infringement.^{220, 221, 222} This measure had the effect of restoring, where non-tariffed (forborne) services of Canadian carriers are concerned, the protection originally provided by the Terms of Service. But there is no similar legislation that extends protection to Canadian carriers for carriage via non-tariffed services of other problematic types of content that customers or other users might distribute, such as defamatory material, child pornography and illegal commercial electronic messages or computer program installations.²²³

4.6.2. *Recommendations for Legislative Changes*

333. As is clear from the above, at present, the law does not clearly protect carriers from any liability they may incur for their role in distributing such content. Other entities that are engaged in the distribution of content (such as newspapers and social media) *are* allowed to control the content they distribute (a newspaper can refuse to print defamatory content;

²²⁰ S.C. 2012, c. 20, s. 31.1.

²²¹ There are other provisions in the Act relevant to the matter of carrier liability. Section 2.4(1)(b) of the Act provides that “a person *whose only act* in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public” (emphasis added). Section 2.3 provides that “[a] person who communicates a work or other subject-matter to the public by telecommunication does not *by that act alone* perform it in public, *nor by that act alone is deemed to authorize its performance in public*” (emphasis added). These sections imply that, if an ISP goes further than merely communicating infringing material and “*authorizes*” communication of such material, the protection afforded by those sections will be unavailable.

²²² The phrase “services related to the operation of the Internet or another digital network” is not defined in section 31.1(1), nor are any of the key words. It appears to include P2P intermediaries as well as ISP intermediaries. Sections 31.1(2) and (4) make it clear that the phrase also includes caching providers and hosting intermediaries. The protection provided by s. 31.1(1) may overlap with s. 2.4(1)(b), which applies more generally to providers of telecommunications services.

²²³ The common law does not at present provide any defences to such claims, although the common law may be evolving in a way that will eventually establish such protection. For example, where carriers can establish that they are “innocent disseminators” of content or have had a purely passive role as distributors and not engaged in a “deliberate act”. See *Crookes v. Newton*, 2011 SCC 47, <http://canlii.ca/t/fngpv>. Whether Canadian law will eventually recognize a robust defence to content-related claims, and what qualifications might be attached to such a defence, remains to be seen. In TELUS’ submission, Parliament should not await the uncertain outcome of future litigation, which may endure many years, before providing telecommunications carriers relief from content-related claims along the lines available in peer jurisdictions.

a social media company can block access to websites that include offensive content). As a consequence, these entities do not face the same legal exposures as carriers.

4.6.3. *Recommended Legislative Changes*

334. As a *quid pro quo* for their legal duties under section 36, the law should make it clear (as it does in other jurisdictions) that carriers have no liability for the content they carry. Therefore, TELUS proposes that the *Telecommunications Act* be amended as follows:

36.1 A Canadian carrier is not liable for the content, meaning or purpose of the telecommunications it carries, provided that:

(a) the carrier did not initiate the transmission or select the receiver;

(b) the carrier did not select or modify the content meaning or purpose of the telecommunications; and

(c) the carrier does not store the content longer than is reasonably necessary for the transmission.

4.7. Addressing the Proliferation of False or Misleading Information

335. An informed citizenry is essential to the democratic process. The continued creation of, and access to, trusted, accurate and diverse news is a worthy policy objective. Journalistic integrity principles should be made requirements for all programming services which provide news and information content to Canadians. Social media would not be captured in the definition of programming services under the *Broadcasting Act* but we recognize that this form of communication raises important concerns that should be addressed by government outside of the broadcasting framework.
336. Government has rightfully recognized that a large part of the answer to this thorny problem is the creation of “good news” to combat the “fake news”. To this end, in the 2018 Fall Economic Statement, the Government committed close to \$600M over five years to support Canadian journalism in all its forms. The measures to support Canadian journalism consist of three initiatives: allowing non-profit news organizations to act as registered charities, introducing a new refundable tax credit to support original news content creation, and

introducing a new temporary non-refundable tax credit to support subscriptions to Canadian digital news media.²²⁴

337. TELUS also addresses the need for journalistic integrity principles in the context of addressing concerns relating to the extreme vertical integration of Canada's media industry. As discussed in greater detail in Section 3.4 above, TELUS remains concerned with the way in which the ownership of media assets provides vertically integrated entities with the ability to exert influence on news and informational programming to the benefit of their own corporate interest and the detriment of competitors. It is important for Canadians to access unbiased information, and the ever-rising level of vertical integration in the Canadian media landscape provides certain news programming organizations with the incentive to act in ways benefiting themselves and their shareholders as opposed to consumers. As a result, legislative and regulatory levers must be developed to uphold Canadians' right to access unbiased news, and curb the ability of vertically integrated firms to unduly influence their news programming organizations.
338. Ultimately, in regards to the proliferation of fake news on social media, TELUS notes that much of this content would not be captured by the legislative framework for the broadcasting system. TELUS nevertheless recognizes that this form of communication raises important concerns that should be addressed by government outside of the broadcasting framework.
339. To this end, TELUS notes the recent Report of the Standing Committee on Access to Information, Policy and Ethics,²²⁵ and supports the recommendation of the committee with regard to enacting regulation to obligate social media:
- to clearly label content produced automatically or algorithmically (e.g. by 'bots');
 - to identify and remove inauthentic and fraudulent accounts impersonating others for malicious reasons;

²²⁴

<https://budget.gc.ca/fes-eea/2018/docs/statement-enonce/fes-eea-2018-eng.pdf>.

²²⁵

Report of the Standing Committee on Access to Information, Privacy and Ethics, "*Democracy under threat: Risks and solutions in the era of disinformation and data monopoly*", December 2018.

- to adhere to a code of practices that would forbid deceptive or unfair practices and require prompt responses to reports of harassment, threats and hate speech and require the removal of defamatory, fraudulent, and maliciously manipulated content (e.g. “deep fake” videos); and
- to clearly label paid political or other advertising.²²⁶

5.0 Theme D – Renewing the Institutional Framework for the Communications Sector

340. Changes to the institutional framework are necessary to calibrate the regulatory system to modern conditions. Below, TELUS identifies several opportunities for improvement, including amending the Canadian telecommunications policy objectives to emphasize competition, innovation and investment; transferring responsibility for spectrum to the CRTC; crafting specific powers for the CRTC (instead of relying on general basket clause powers); reducing asymmetric regulation; revising the structure and organization of the CRTC; eliminating cabinet appeals; amending to the administrative monetary penalty regime; and the creation of procedural protections for regulatory investigations.

5.1. The Telecom Policy Objectives Should Be Amended to Emphasize Competition, Innovation, Investment, and Timely Deployment of Facilities

341. TELUS recommends replacing the existing Canadian telecommunications policy objectives with new objectives emphasizing competition, innovation and investment and the timely deployment of infrastructure as key Canadian public policy objectives for the telecommunications services industry. The policy objectives should also express support for the exclusive federal authority over telecommunications.
342. The *Telecommunications Act* lacks a clear, consistent, and unambiguous statement of contemporary and future-oriented policy objectives. The current objectives constitute an open-ended, unranked, largely undefined and indeed often contradictory policy statement that has the effect of governmental abdication to the regulatory agency to be the primary policy maker. The Chairperson of the CRTC has recently asked for more effective

²²⁶ *Ibid*, at section entitled “Potential Regulatory Solutions”.

legislative policy guidance on the grounds that this would enable the CRTC to carry out its mandate in the most efficient and effective way.

5.1.1. *Historical Overview of Canadian Telecommunications Policy Objectives and the Need for Reform.*

343. TELUS has commissioned Dr. Richard Schultz, Professor of Political Science at McGill University in Montreal, to provide the Broadcasting and Telecommunications Legislative Review Panel with a historical overview of the Canadian telecommunications policy objectives and the need for reform. In his report entitled “Controlling the Habit: A Paper Submitted in Support of the TELUS Submission to the Broadcasting and Telecommunications Legislative Review Panel,” Dr. Schultz provides a detailed examination of the development of the current objectives as seen in their political context, underlining the seminal importance of providing the regulator with effective legislative policy guidance to enable it to carry out its mandate in the most efficient and effective way, without which any other proposed reforms will be a wasted opportunity. Dr. Schultz’s expert report may be found in Appendix 9 to TELUS’ submission, along with his C.V.

5.1.2. *Current Policy Objectives Should be Removed and Replaced by New Objectives*

344. The following are TELUS’ specific comments on the existing individual clauses in section 7. In the following paragraphs, TELUS briefly explains the problems with the existing policy objectives which should be removed, and in certain cases recommends new or clarified policy objectives in their place.

Preamble: It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada’s identity and sovereignty and that the Canadian telecommunications policy has as its objectives

345. The preamble of section 7 is derived from the *Broadcasting Act*, whose emphasis is primarily of a cultural nature, rather than an economic nature as is the *Telecommunications Act*. Notwithstanding, the specifics of this role and the link between telecommunications and “the maintenance of Canada’s identity and sovereignty” have never been effectively established and arguably are of limited relevance to telecommunications as compared to

the broadcasting sector. To the extent that there are concerns about telecommunications linkages to national security and consequent sovereignty-related matters, these should be addressed through laws of general application as explained elsewhere in this submission, and consistent with TELUS' proposed principle 6: social regulation and technical regulation, where required, should be applied symmetrically and should be applied through laws of general application, as distinct from sector-specific regulation, whenever possible.

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions.

346. The idea of an “orderly development” is reflective of the state planning concept that was popular in the 1960s but surely is of questionable relevance in today’s dynamic telecommunications sector. The concept also reflects the failed attempt at a Ministerial licensing regime for telecommunications carriers which was rejected by Parliament at the time of the passage of the 1993 Act. And, as noted above, the language “to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions” is derived from the *Broadcasting Act*, whose primary focus differs and is of limited relevance to telecommunications. To the extent that such goals are considered relevant, they are best achieved through competition.

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada.

347. This objective is best achieved through competition and innovation and investment, which TELUS proposes as new policy objectives. TELUS elaborates upon the importance of competition, innovation and investment elsewhere in this submission (see Section 2.3).
348. This policy objective refers to affordability. For the reasons explained elsewhere in this submission (see Section 2.4), this issue is best addressed by government by other means than through sector-specific regulation, and for this reason TELUS proposes to omit reference to it as a section 7 policy objective.

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications.

349. Again, this objective is best achieved through competition and innovation and investment, which TELUS proposes as new policy objectives.

(d) to promote the ownership and control of Canadian carriers by Canadians.

350. As noted elsewhere in this submission (see Section 2.5) today, the Canadian telecommunications ownership and control regime now effectively applies to a handful of entities. The existing regime entails expensive compliance costs and limits access to foreign capital that is required to invest in new and innovative networks and services. There is no longer any need for this regime. TELUS further notes that in the telecommunications sector, these rules have been effectively superseded by national security concerns under the *Investment Canada Act*.

351. Short of abolition of the regime, which TELUS recommends, further liberalization is possible. Notably, the Canadian ownership and control regime for telecommunications services has not been liberalized to the extent as is the case in the Canadian airlines sector. With recent amendments under the *Canadian Transportation Act*, direct foreign investment up to 49% is now permitted in the airlines sector, with a control-in-fact regime still in place. Amending the *Telecommunications Act* to provide for the same regime would go at least some way to achieve liberalization and to encourage further investment and innovation in the telecommunications services sector

(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside of Canada.

352. The utilization of Canadian facilities is another legacy objective from the mid-1980's whose origins lie in the ill-conceived attempt at Government licensing and supervision of the telecommunications services industry. The objective has been made further obsolete by technology. Canadians will use Canadian facilities only to the extent that they offer

them the best value for their money and satisfy their needs for the most modern and efficient telecommunications systems and services.

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective.

353. The objective, as currently worded, is at best a limited nod towards competition rather than an explicit statement that competition is a fundamental policy objective that is required in today's environment. As a result, TELUS proposes a much stronger endorsement of competition as a Canadian telecommunications policy objective.

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services.

354. This policy objective can be replaced by TELUS' proposed new policy objectives of competition, which foster research and development, and innovation and investment. Research and development and innovation will not result from a government-regulated command and control telecommunications sector.

(h) to respond to the economic and social requirements of users of telecommunications sector

355. This objective is vague and open-ended. Economic requirements of telecommunications users are best provided by competitive market forces, hence TELUS' recommendation to explicitly specify competition as a telecommunications policy objective. TELUS provides comments on social requirements immediately below.

(i) to contribute to the protection of privacy of persons.

356. Privacy is an important social public policy issue and should be maintained as an objective. In addition to privacy, TELUS proposes accessibility, security and safety to be specified

as social policy objectives for the reasons explained elsewhere in this submission (see Section 6.0, Response to Terms of Reference Question 5.1). Social requirements, as is true in most other economic sectors, are also best provided for by market forces. However, where there is a clear case of market failure, then regulation may be necessary to address such failure, either through sector-specific regulation or through laws of general application.

5.1.3. *Guidelines for Implementing the Policy Objectives*

357. Following the recommendations of the 2006 Telecommunications Review Panel Final Report, TELUS proposes including as part of an amended section 7 a new sub-clause enunciating guidelines for the implementation of the policy objectives. Put another way, the TELUS proposal in this regard is effectively the incorporation of the Policy Direction directly into the *Telecommunications Act* for greater legal certainty.

5.1.4. *Declaration Regarding Constitutionality*

358. TELUS further recommends the addition of section immediately following the objectives and guidelines declaring Parliament's exclusive authority over telecommunications. Although the 1993 Act did not state it in the terms proposed here by TELUS, it was clearly Parliament's intention. During the parliamentary debates preceding the adoption of the *Telecommunications Act*, Minister of Communications at the time, Mr. Perrin Beatty, mentioned the following with regards to the importance of a national regulation:

Three years ago the Supreme Court of Canada ruled that members of Telecom Canada fell within federal jurisdiction. Since then we have successfully concluded agreements with six of the seven provinces affected. Now we need to build on those agreements. We must pull the correct patchwork of legislation into one bill designed to encourage efficiency and excellence and help us compete in international markets.

Bill C-62 will do exactly that. It will eliminate the barriers which fragment our internal market, leaving us with one unified telecommunications market. It will establish a coherent policy for

the entire country that will be co-ordinated by one regulatory agency, the CRTC.²²⁷

359. Since that time, contrary to Parliament's intentions, provincial and municipal governments have frequently purported to regulate telecommunications and undermine the purpose of the *Telecommunications Act* and the regulatory regimes established thereunder. For example, some municipalities have created by-laws frustrating public access rights and delaying network deployment, and some provinces purport to apply "consumer protection" laws to telecommunications services, interfering with Parliament's intent for a single coherent policy for the country (relying on market forces and CRTC rules), thereby creating the exact patchwork of regulation that Parliament was trying to avoid in the 1993 Act.
360. Although the courts have repeatedly ruled in favour of exclusive federal authority, the continued need for litigation over unconstitutional provincial and municipal measures is wasteful of resources for all stakeholders, creates confusion about what laws apply, and exposes industry players to undue risk. Affirming exclusive federal authority in the legislation would establish that exclusive federal jurisdiction is not just a constitutional fact, but a present objective to be nurtured and defended. Practically speaking, it may encourage federal authorities to give fuller voice to the jurisdiction they are exercising. Among other things, the CRTC should take its cue to issue decisions that are exclusive and not concurrent with provincial laws. Additionally, such an express legislative statement may prompt the Attorney General of Canada to more proactively intervene in litigation where exclusive federal authority is being challenged.

5.1.5. *Recommended Legislative Changes*

361. In view of the above, TELUS proposes that the following be substituted for the current section 7:

Canadian Telecommunications Policy

²²⁷

[House of Commons Debates, 34th Parliament, 3rd Session](#) : Vol. 14, pp. 18067 and following.

Objectives

- 7.1 It is hereby affirmed that telecommunications performs an essential role in the economic and social welfare of Canada and that Canadian telecommunications policy is based on the following objectives:
- (a) to allow competition and market forces to achieve the efficient, dynamic and reliable provision of telecommunications services in all regions of Canada, including urban, rural and remote areas;
 - (b) to regulate the provision and pricing of telecommunications services where it is demonstrated that market forces do not and will not protect users from the abuse of market power and the costs of regulation do not outweigh the benefits;
 - (c) to ensure that where it is demonstrated that the provision and pricing of telecommunications services must be regulated, all regulatory measures are efficient, effective and proportionate to their purpose and interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;
 - (d) to promote investment and innovation in the telecommunications sector, thus enhancing the efficiency of Canadian telecommunications markets and the productivity of the Canadian economy;
 - (e) to facilitate the expeditious deployment of telecommunications facilities and services to benefit Canadians; and
 - (f) to enhance the social well-being of Canadians and the inclusiveness of Canadian society by:
 - (i) facilitating access to telecommunications by persons with disabilities;
 - (ii) maintaining public safety and security, including limiting public nuisance through telecommunications.
 - (iii) contributing to the protection of personal privacy.

Guidelines

- 7.2 (a) The Commission, when relying on regulation, should use measures that satisfy the following guidelines:
- (i) specify the telecommunications policy objective that is advanced by those measures and demonstrate their compliance with the objective.

- (ii) if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry,
 - (iii) if they are not of an economic nature, to the greatest extent possible, are implemented in a symmetrical and competitively neutral manner.
 - (iv) ensure technological and competitive neutrality, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers.
 - (b) The Commission, to enable it to act in a more efficient, informed and timely manner, should adopt the following practices, namely,
 - (i) to use only tariff approval mechanisms that are as minimally intrusive and is minimally onerous as possible;
 - (ii) to publish and maintain performance standards for its various processes; and
 - (iii) to continue to explore and implement new approaches for streamlining its processes.
- 7.3 It is further declared that the Canadian telecommunications system constitutes a single system and that the objectives of the telecommunications policy set out in subsection (1) can best be achieved through the exercise of Parliament's exclusive authority over all aspects of telecommunications, including the offering and provisions of telecommunications services, and the construction, maintenance and operation of telecommunications networks.

5.2. Proposals to Modernize and Streamline Radiocommunication

362. TELUS recommends making numerous changes to the legislative framework pertaining to radiocommunication. These changes promote the first principle underpinning TELUS' submission, namely that market forces be relied on to the greatest extent possible, and the eighth principle, that any regulation used be justified and proportionate. The rationale for these proposals is provided in the following sections. In particular, TELUS recommends:

- The transfer of the responsibility for spectrum regulation from the Minister of Industry and the Governor in Council to the CRTC.
- The codification of principles of independent regulation and governance.

- That radiocommunication and telecommunications be the subject of a single unified Act sharing clear concise economic objectives and requiring market-based approaches to regulation as in the current Policy Direction.
- A provision for the Government of Canada to establish overall spectrum policy in a manner that is transparent and provides for public input.
- The inclusion of a form of radio authorization for flexible commercial use of the spectrum having exclusive usage rights and being tradable in the secondary market and being subject to bankruptcy and insolvency laws. Further that licensees be permitted to sub-lease licence spectrum usage rights, in whole or in part, to third parties who would not be required to hold their own subordinate licence.
- A requirement that the spectrum regulator publish a five-year work plan for spectrum management on an annual basis and report progress against the previous year's work plan.
- The spectrum regulator should be required to maintain by electronic means a registry of apparatus, spectrum and class licences and devices to be made publicly available on the regulator's website. The registry is to contain administrative and technical details with respect to the licences as well as the status and history of licence trading and sub-leasing arrangements in the secondary market.

5.2.1. *Spectrum Management Should be Transferred to the CRTC to Promote Regulatory Independence*

363. Wireless services hold enormous economic importance and a prominent place in the Canadian telecommunications industry landscape. This is a direct result of the importance placed on wireless services by Canadians. Given this importance, radiocommunication must be regulated with the utmost of integrity, fairness and transparency. As was observed by the Telecommunications Policy Review Panel, a strong majority of peer countries have placed spectrum regulation into the hands of an independent expert regulator to achieve this end while maintaining the ability of government to establish policy.²²⁸ There is an

²²⁸ 2006 Telecommunications Policy Review Panel Final Report, Recommendation 5-10.

extensive international body of evidence that favours this model, demonstrates its effectiveness and guides its implementation with established best practices.

364. TELUS supports the transfer of the responsibility for spectrum regulation from the Minister of Industry²²⁹ to the CRTC. Making this change will deliver several key benefits, notably by providing for more stable regulatory processes and the avoidance of political pressures. The Telecommunications Policy Review Panel (“TPRP”) made this recommendation in 2006, observing that “Canada is one of the few OECD countries where a politically appointed minister remains responsible for spectrum licensing and management.”²³⁰
365. The Telecommunications Policy Review Panel noted the key benefits of having an independent regulator:²³¹
- providing more stability in processes
 - providing a greater degree of continuity
 - allowing for arbitration
 - having more effective enforcement powers
 - freedom from political pressure.
366. The Telecommunications Policy Review Panel’s characterization of the role of government as policy-maker being distinct from that of the regulator has become the established norm internationally and across many fields of regulation.²³² In this regard, the Telecommunications Policy Review Panel recommended that spectrum regulation follow the clear distinction between “the role of government — to establish policies from the role

²²⁹ Now known as Innovation, Science and Economic Development.

²³⁰ Telecommunications Policy Review Panel, Final Report, 2006, pp 5-22.

²³¹ OECD, Telecommunication Regulatory Institutional Structures and Responsibilities, DSTI/ICCP/TISP(2005)6/REV1, September 15, 2005, paragraph 8, cited in the 2006 Telecommunications Policy Review Panel Final Report, pp 5-22.

²³² See, for example, The policy-regulatory nexus in Canada’s energy decision making: From best practices to next practices, Stephen Bird, Pre-workshop Discussion Paper for the Positive Energy Workshop on The Policy-Regulatory Nexus in Canadian Energy Decision Making. June 6 & 7, 2017, uOttawa.

of the regulator, which is to implement those policies in an independent and transparent manner.”²³³

367. TELUS recommends to the Broadcasting and Telecommunications Legislative Review Panel the body of expert analysis and guidance accumulated by the OECD in this regard, noting the extensive treatment given to important issues such as policy-making, regulation, regulatory agency independence, accountability, legitimacy, credibility, investor confidence, and competition.²³⁴ Canada’s efforts to re-cast legislation may profit enormously from these insights and the adoption of the internationally recognized best practices found therein.

5.2.2. *Radiocommunication Regulatory Authority Should Be Streamlined and Principles-Based*

368. The *Radiocommunication Act* currently bestows regulatory powers to both the Minister of Industry and the Governor in Council, with the former being the operative regulator. The Minister of Industry, while having broad powers, has a limited set of regulatory tools to give force to decisions and frequently relies on conditions of licence to indirectly give them effect. Both actors make extensive use of incorporation by reference.
369. The combined result of these schemes is a complex network of interrelated and interdependent regulatory instruments which unduly complicates compliance and frustrates broader public participation in their formulation. The current Legislative Review offers the opportunity to consolidate spectrum regulation under the CRTC and take advantage of its more flexible and accessible processes and regulatory instruments.

²³³ 2006 Telecommunications Policy Review Panel, pp 5-22.

²³⁴ Examples of OECD products include:
Telecommunications Regulations: Institutional Structures and Responsibilities.
Enhancing Market Openness Through Regulatory Reform: Regulatory Reform in Canada.
Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance.
The Governance of Regulators.
Creating a Culture of Independence: Practical Guidance Against Undue Influence.

370. There are notable gaps under the *Radiocommunication Act* having implications for enforcement both for current and emerging networks and devices.²³⁵ Two illustrative examples follow.
371. Section 5.(1)(f) of the *Radiocommunication Act* provides that the Minister of Industry may “approve each site on which radio apparatus, including antenna systems, may be located, and approve the erection of all masts, towers and other antenna-supporting structures.” The Minister of Industry routinely exercises this power in the course of considering applications for radio authorizations (e.g. licences). Those who wish to install, operate or possess radio apparatus are compelled by *Radiocommunication Act* section 4 to seek a radio authorization from the Minister of Industry unless the apparatus has been exempted. It is evident then that the requirement to seek a radio authorization for non-exempt apparatus is a “hook” that brings to the Minister of Industry for approval the applicant’s proposed support structure (e.g. a tower). What is not evident is any similar hook where the proponent intends to use exempt apparatus as there is no requirement for a radio authorization in that case and no explicit requirement for an authorization for the support structure itself. This apparent omission takes on greater significance to the extent that licence exempt apparatus may become much more common in the provision of wireless services.²³⁶ Similarly it is not apparent that the Minister’s approval is required for the erection of a tower by a third party tower owner having no intention themselves to install, operate or possess radio apparatus.²³⁷
372. The Minister of Industry has no ability to make regulations of general application to radiocommunication, but the Minister of Industry does have frequent occasion to promulgate policies for which he/she would wish to secure compliance. The Minister of Industry therefore makes frequent use of the power to fix the terms and conditions of radio

²³⁵ “The scope of the Minister’s discretion under the *Radiocommunication Act* is broad.” The Attorney General of Canada, Factum of the Appellant, Supreme Court of Canada, Court File No. 33041.

²³⁶ For example the Minister is considering making several bands available for licence-exempt use for the provision of 5G services. See: Consultation on Releasing Millimetre Wave Spectrum to Support 5G, SLPB-001-17, June 2017.

²³⁷ The Minister’s procedures do purport to apply. See: Radiocommunication and Broadcasting Antenna Systems, CPC-2-0-03, Issue 5.

authorizations as an indirect means give effect to various policies, secure in the knowledge that non-compliance is an offence under the *Radiocommunication Act* that may result in severe penalties or revocation. Examples of such policies include spectrum aggregation limits, licence transfers, displacement of incumbents, antenna tower consultations, periodic provision of technical information, coordination requirements, provision of lawful intercept capability, research and development expenditure, deployment requirements, tower and site sharing, mandated roaming and annual reporting. The length of the list alone is testimony to the need for a more direct and explicit regulatory tool. And, similar to the situation previously cited with respect to support structures, the Minister of Industry is entirely without a regulatory hook for these or any other policies when it comes to those who would provide wireless services using licence exempt apparatus.

373. Essential to the effective and efficient functioning of decision-making structures governing the use of spectrum is having clarity in policy. In this regard, TELUS recommends that radiocommunication regulation have the same policy objectives as those that apply to other telecommunications. This can be accomplished by combining the radiocommunication legislative provisions with the *Telecommunications Act*. At present, there is a disconnect. While the CRTC *must* have regard to Canadian policy objectives set out in the *Telecommunications Act*,²³⁸ the Minister of Industry, when acting under the *Radiocommunication Act*, is *empowered but not obliged* to consider those same objectives.²³⁹
374. Moreover, government direction regarding implementation of communications legislation should be consistent between the different Acts. In particular, radiocommunication should also be subject to the Policy Direction provided by Governor-in-Council to the CRTC on implementing the objectives found in the *Telecommunications Act*.²⁴⁰ The Policy Direction requires that the CRTC “take a more market-based approach.” TELUS agrees and encourages the Panel to recommend that the essence of the Policy Direction be enshrined

²³⁸ *Telecommunications Act*, s 47.

²³⁹ *Radiocommunication Act*, s 5(1.1).

²⁴⁰ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, December 14, 2006.

in new legislation governing telecommunications, including radiocommunication, noting the anomalous situation wherein currently the Minister of Industry is not required to follow the Policy Direction in the exercise of powers under the *Radiocommunication Act*.

375. Although the Minister of Industry has recognized the importance of efficient regulatory processes and reliance on market forces to the maximum extent possible,²⁴¹ he is not bound by these principles. For example, despite its own guidelines, the Minister imposed additional regulatory oversight in 2013 through the implementation of a spectrum licence transfer framework²⁴² that requires ISED review of all spectrum licence transfer requests. Since its introduction, the administratively burdensome review and approval process has brought into question whether Canada has a well-functioning secondary market for spectrum licences. TELUS recommends legislative change to ensure that radiocommunication regulation is carried out under the same principles as telecommunications regulation.²⁴³

5.2.3. *Radiocommunication Regulation Should Rely on Market-Based Measures*

376. Radiocommunication legislation in Canada has not been comprehensively revised since the 1938 *Radio Act*. The scheme of the *Radiocommunication Act* reflects the “command and control” mindset prevalent in an era when radiocommunication regulation was an exercise in imposing order on the emerging deployment and operation of a manageable number radio stations. The *Radiocommunication Act* is ill-suited to effectively governing radiocommunication in a decentralized environment of smart devices, dynamic spectrum

²⁴¹ Spectrum Policy Framework for Canada, DGTP-001-07, June 2007. See s 4.4, “Enabling Guidelines”, “Market forces should be relied upon to the maximum extent feasible”, and “Regulatory measures, where required, should be minimally intrusive, efficient and effective”. See also Study of Market-based Exclusive Spectrum Rights, McLean Foster & Co., August 31, 2007, including proposals to enable secondary markets for spectrum, regulatory independence, and periodic milestones to review progress.

²⁴² Framework Relating to Transfers, Divisions and Subordinate Licensing of spectrum Licences for Commercial Mobile Spectrum, DGSO-003-13, June 2013.

²⁴³ Study of Market-based Exclusive Spectrum Rights, McLean Foster & Co., August 31, 2007. The Study was the subject of several Access to Information requests and was eventually released under that process with no announcement.

access and rapid spontaneous innovation and where the efficient functioning of markets demand new approaches to regulation.

377. TELUS encourages the Broadcasting and Telecommunications Legislative Review Panel to examine the recommendations of the 2006 Telecommunications Policy Review Panel with respect to Spectrum Policy and Regulation.²⁴⁴ As the Panel noted: “[i]nternationally, there has been a trend among spectrum managers to move away from the traditional prescriptive models of spectrum assignment toward more flexible and market-oriented approaches.” While the Panel allowed that “Canada has also been moving toward more flexible and market-oriented approaches to spectrum management” it qualified that this movement “has been tentative.” TELUS contends that in the intervening period the movement to more flexible and market-oriented approaches in Canada has ground to a standstill if not regressed.
378. The current *Radiocommunication Act* establishes a regulatory regime that is largely concerned with obviating the potential for radio interference. The *Radiocommunication Act* is ill-suited to creating the flexibility and certainty required in a competitive environment characterized by massive investment and rampant innovation. Here again TELUS concurs with the Telecommunications Policy Review Panel and recommends legislative changes that will establish clear, concise policy objectives and regulation that supports the effective functioning of markets through the use of market-based mechanisms and the extension of tangible spectrum usage rights to licensees.²⁴⁵
379. The concept of spectrum users having anything akin to spectrum usage rights is entirely foreign to the command and control premise of the *Radiocommunication Act*. If new legislation is to result in effective spectrum regulation in an environment of rapid market-driven technological change, dynamic innovation, competition and intensive spectrum use, it must embrace the concept of spectrum usage rights and provide for remedies both regulatory and civil. So as not to limit the ability to embrace new regulatory models and

²⁴⁴ Telecommunications Policy Review Panel, Final Report, 2006, Chapter 5 Technical Regulation.

²⁴⁵ 2006 Telecommunications Policy Review Panel Final Report, Recommendation 5-9.

recognizing that knowledge of how future technology and markets will evolve is imperfect, new legislation should afford the regulator sufficient flexibility to decide whether any given portion of the spectrum will be regulated as a commons, subject to managed and restricted access, as akin to private property or anything along the continuum.

380. Accordingly, in addition to the current provisions for the issuance of radio (apparatus) licences, spectrum licences and for the exemption from licensing, new legislation should provide for the issuance of class licences as well as device registration so as to better facilitate various “light regulation” options.

5.2.4. The Demand for Spectrum Requires More Timely Spectrum Auctions

381. Further, as the pace of change of technology development continues to accelerate, new demands for services in turn require new spectrum releases. The cadence of Canada’s public consultation process and spectrum release plan has historically worked well. However, as the need for new spectrum releases is rapidly accelerating, the regulator should consider ways to fast track their processes for spectrum release in order to address increasing demand.
382. World-leading networks will enable Canada to meet the needs of its citizens and industries by providing the coverage, speed, capacity, reliability and ultra-low latency required for future applications such as artificial intelligence, smart cities, autonomous vehicles, innovative healthcare, emergency services, the IoT and many other complex applications being envisioned and developed by innovators across Canada. For Canada to truly fulfill its innovative potential and establish itself as a global innovation hub, it cannot happen without the timely and equitable access to spectrum.
383. At the heart of good policy must be a spectrum strategy based on a stable regulatory process that avoids political pressure to create the best possible opportunity for wireless deployment, resulting in the enrichment of Canadian society. To this end, the spectrum regulator should publish a five year work plan for spectrum management on an annual basis and report progress against the previous year’s work plan.

5.2.5. *The Legislation Should be Amended to Promote Coordination and Predictability in Regulation*

384. Moreover, with the trend of looking to share spectrum bands among services, there will be an increased need to coordinate with other operators. Currently, there is an issue with the ISED database, whereby some required data is incomplete or inaccurate. A complete data set is needed to efficiently manage coordination issues and for future spectrum band planning. Beyond the accuracy and validity of site registration data comes the challenge of scale. As the number of licensed bands increases and with further network densification, the data set will grow accordingly. To better control interference and ensure effective coordination among various spectrum users, TELUS recommends that the spectrum regulator maintain technical and administrative data that is readily accessible to the public and reassess the scalability of its existing systems to accommodate the order of magnitude growth for site data and spectrum licences that is anticipated in the near term.

5.3. The CRTC Should Be Given Specific, Circumscribed Regulatory Powers

385. In addition to providing a clear set of objectives to provide better guidance to the regulator, TELUS recommends that the *Telecommunications Act* be modified such that services are by default forborne from rate regulation and to provide the CRTC with suitable legislative tools to engage in the types of regulation that have come to dominate its mandate, and that such regulation occurs in a predictable manner, in the form intended by Parliament.
386. The telecommunications sector was once governed primarily by tariff regulation. The legislation provides a detailed scheme for regulating in this manner. However, as tariff regulation has receded, it has been replaced by thorough and invasive regulation through the operation of sections 24 and 24.1 of the *Telecommunications Act*. These sections are catch-all clauses and are insufficiently detailed to enable principled regulation of the scope seen today. Indeed, in the broadcasting context, the CRTC's reliance (or proposed reliance) on basket clause powers has been determined to be invalid by the Supreme Court of Canada.²⁴⁶ TELUS' recommendations in this section will help the CRTC to avoid crafting

²⁴⁶ See *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489

invalid regulation as well as the significant disruption and uncertainty occasioned by litigation.

5.3.1. *Retail Telecommunications Services Are Now Mostly Provided Outside of the CRTC Pre-approval Regime*

387. Most retail telecommunications services are now provided pursuant to a forbearance order. For example, mobile wireless voice and data services,²⁴⁷ retail internet services,²⁴⁸ and long distance (“toll”) services are all forborne on a national basis²⁴⁹ and have been since the late 1990s (at the latest). Retail local telephone services provided by non-dominant providers to end-users are forborne nationally.²⁵⁰ Local telephone services provided by the local incumbent exchange carriers (“ILECs”) are forborne on an exchange-by-exchange basis rather than nationally.²⁵¹ The large majority of local and access revenues are now forborne – 83% in 2017.²⁵² Thus, the vast majority of retail services are provided without CRTC pre-approval of tariffs. Section 25 accordingly has little practical application.
388. While forbearance is prevalent, forbearance does not mean “not regulated.” Forbearance powers do not apply to every section of the *Telecommunications Act*,²⁵³ for where applicable, the *Telecommunications Act* expressly allows for partial and conditional forbearance.²⁵⁴ As a matter of practice, forbearance is virtually always partial or conditional. In this regard, it is standard practice for the CRTC to retain powers to impose conditions pursuant to section 24 (Conditions of Service), and to assess allegations of

²⁴⁷ Forbearance of this services beginning with *Regulation of wireless services*, Telecom Decision CRTC 94-15, extended to all carriers over time, final such decision Telecom Order CRTC 99-991.

²⁴⁸ Extended to all carriers by *Forebearance from retail internet services*, Telecom Order CRTC 99-592.

²⁴⁹ Forbearance for dominant carriers in *Forebearance - Services provided by non-dominant Canadian carriers* Telecom Decision CRTC 95-19; extended to ILECs in *Forebearance – Regulation of toll services provided by incumbent telephone companies*, Telecom Decision CRTC 97-19.

²⁵⁰ *Local competition*, Telecom Decision CRTC 97-8.

²⁵¹ *Forebearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15, as varied by Order in Council P.C. 2007-532.

²⁵² 2018 CRTC Communications Monitoring Report, Table 4.1 (Percentage of telecommunications revenues generated by forborne services).

²⁵³ Section 34(1): forbearance orders may apply only to section 24, section 25, section 27, section 29, and section 31 powers.

²⁵⁴ Section 34(1).

unjust discrimination under section 27(2), among other sections. In practice, these sections have been used to craft pervasive and onerous regulation applicable to “forborne” services.

389. By way of illustration, consider the regulation of retail mobile wireless services, which since 2013 have been governed by a “Wireless Code.”²⁵⁵ The Wireless Code regulates most aspects of the provision of retail wireless services, except for price, and even price is greatly affected by the contract term limit. To illustrate the breadth of the obligations, the Code

- effectively limits contracts to two years in length;
- institutes caps on data overages or roaming charge overages;
- requires that devices be provided “unlocked,” or be unlocked without charge;
- mandates the provision of a trial period;
- limits the collection of early termination fees;
- requires the provision of a permanent copy of the contract, including in paper (at the consumer’s choice); and
- requires numerous other contract form requirements, including the requirement to provide a “critical information summary” to prospective customers.

390. The Wireless Code is an example of a comprehensive, detailed regulatory regime. It was created under the authority of section 24 of the *Telecommunications Act*.²⁵⁶ It applies to services that had been forborne for many years.

391. The CRTC is currently consulting on a potential ISP Code,²⁵⁷ which it proposes be applicable to the large fixed wireline Internet service providers and which would seek to match many of the *Wireless Code* requirements, and would also rely on the apparent power of section 24 of the *Telecommunications Act* for imposition.²⁵⁸ Regardless of what the CRTC elects to do with respect to this proposed code, retail internet services are already

²⁵⁵ First established in *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271. Revised code established in *Review of the Wireless Code*, Telecom Regulatory Policy CRTC 2017-200.

²⁵⁶ See, for example, *Review of the Wireless Code*, Telecom Regulatory Policy CRTC 2017-200, para 451.

²⁵⁷ *Call for comments – Proceeding to establish a mandatory code for Internet services*, Telecom Notice of Consultation CRTC 2018-422.

²⁵⁸ *Ibid*, para 34.

subject to a variety of regulatory requirements pursuant to earlier rulings, including contract clarity and bill management tool measures,²⁵⁹ as well as requirements related to management of traffic and differential pricing.²⁶⁰

392. Forborne local telephone services, now being rapidly displaced by mobile wireless services, are subject to a host of service conditions imposed via section 24 of the *Telecommunications Act*, including requirements related to:

- emergency services (e.g. 9-1-1 service);
- message relay service (“MRS”);
- access to long distance networks of the customer’s choice;
- various customer privacy safeguards;
- the customer transfer regime;
- provision of alternative format billing;
- provision on request of specific service information; and
- other requirements.²⁶¹

5.3.2. *Regulation of the Industry No Longer Matches the Legislative Structure*

393. The foregoing is not an exhaustive list but is illustrative of the scope of retail regulation in the telecommunications industry. What has happened, as explained above, is that the retention of section 24 powers, in conditional and partial forbearance rulings, has led to regulation with little guidance or constraint from the empowering legislation. Section 24 simply states that the “[t]he offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission.” The CRTC need do little more than satisfy itself that something is a “good idea” before imposing it as a regulatory requirement. While the CRTC must ensure consistency with policy objectives

²⁵⁹ *Modern telecommunications services – The path forward for Canada’s digital economy*, Telecom Regulatory Policy CRTC 2016-496.

²⁶⁰ *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657; *Framework for assessing the differential pricing practices of Internet service providers*, Telecom Regulatory Policy CRTC 2017-104.

²⁶¹ *Forbearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15, as varied by Order in Council P.C. 2007-532.

(as well as ensure that the Policy Direction is applied), these are sufficiently vague, as noted elsewhere in this submission, so as to allow for almost any desired outcome. Consequently, telecommunications policy is subject to far-reaching regulatory intervention, but the regulatory authority has few constraints on its power to set policy.

394. Rather than simply delegating authority to the CRTC to regulate telecommunications in any manner it sees fit, Parliament should provide the CRTC with a robust set of specific tools allowing it to achieve legitimate regulatory goals. Such tools would ensure that telecommunications regulation unfolds in a predictable manner, in the form intended by Parliament.
395. To this end, TELUS proposes a number of measures. First, TELUS proposes that the *Telecommunications Act* be amended such that full, tariff-based (economic) regulation be permitted only where it is demonstrated that the provider possesses significant market power. This was proposed in the 2006 Telecommunications Policy Review Panel Final Report,²⁶² and it continues to be sage policy in the current era characterized by widespread forbearance (much more so than existed in 2006, prior to the forbearance of local telephone services provided by incumbent local exchange carriers). As noted above, most services provided to most customers are now forborne. The legislation should better reflect that economic regulation is the exception rather than the rule.²⁶³
396. Second, TELUS recommends several amendments to existing sections 24 and 24.1.
397. In this regard, TELUS recommends that a new combined section 24 include requirements that track the new Canadian telecommunications policy objectives discussed in Section 5.1. TELUS also recommends the elimination of the distinction between carriers and non-carriers, which exists in the current legislation by virtue of the language respectively applying under sections 24 and 24.1. In particular, TELUS recommends that the new

²⁶² 2006 Telecommunications Policy Review Panel Final Report, Recommendation 3-3.

²⁶³ Wholesale regulation, which is the more common form of economic regulation, can continue on the same basis: if the CRTC determines that there is significant market power, it may regulate the rates and other terms and conditions on which wholesale services are provided.

section specify that the CRTC's powers thereunder apply to telecommunications services provided by any person, including a Canadian carrier.

398. Additionally, the new provision should be limited to the specific measures contemplated. The current section 24.1, though more specific than section 24, nevertheless begins with a general power and then identifies particular types of measures as being included (“any condition, including those related to ...”). TELUS recommends that the reference to “any condition” be eliminated. If a general grant of power for residual matters is required, it should be addressed at the end, and should denote that it is for regulating other similar matters.
399. Finally, TELUS proposes a change that would reduce the instances of asymmetric regulation, consistent with TELUS’ proposed principles 6 and 7. If the CRTC determines social regulatory measures are required, there is no principled basis to limit their application to only one type of provider. For example, it would not make sense to extend an ISP code only to “large providers,” as the CRTC has recently proposed to do.²⁶⁴ If regulatory requirements are deemed necessary in the absence of significant market power, then the size or type of provider should not matter, since the implicit finding is that some form of protection is required that the market will not deliver.
400. With the amendments proposed below, the *Telecommunications Act* will provide the CRTC with a set refreshed tools for the regulatory oversight required for the modern telecommunications services provided to the Canadian public.

5.3.3. *Recommended Legislative Changes*

401. As a means of addressing these above-noted concerns, TELUS proposes the following specific legislative changes.
402. In place of section 25, TELUS proposes the following:

²⁶⁴ See *Call for Comments – Proceeding to establish a mandatory code for Internet services*, Telecom Notice of Consultation CRTC 2018-422, Appendix 1, Internet Code Working Document, Application.

25 (1) Where the Commission finds that a telecommunications service provider possesses significant market power in respect of a telecommunications service, the Commission may prohibit the telecommunications service provider from providing the telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.²⁶⁵

403. In place of section 24 and section 24.1, TELUS proposes the following:

24 (1) The offering and provision of any telecommunications service by any person are subject to conditions imposed by the Commission relating to

- (a) service terms and conditions in contracts with users of telecommunications services;
- (b) protection of the privacy of those users;
- (c) access to emergency services;
- (d) access to telecommunications services by persons with disabilities; and
- (e) limiting public nuisance through telecommunications.

24(2) Conditions imposed pursuant to section 24(1) shall be imposed on all persons who offer or provide the service, unless the Commission determines, as a question of fact, that it would be consistent with the telecommunications policy objectives and the purpose of the condition to exempt a telecommunications service provider or class of telecommunications service providers from the condition.

5.4. Symmetrical Regulation for All Providers of Communications Services

404. TELUS recommends that regulation, when required, be imposed symmetrically to the greatest extent possible.

405. Symmetrical treatment under the *Broadcasting Act* is discussed at length in Section 3 of this submission in which TELUS proposes that the Canadian broadcasting system should formally acknowledge a “foreign” element in the system and that this element should also have some obligations towards Canadian cultural policy goals commensurate with its access to the Canadian market. In parallel, the private element of the Canadian broadcasting system should be provided the flexibility to seek commercial success both globally and domestically and no longer be subject to as many prescriptive rules that put Canadian companies at a disadvantage in the global digital content market place.

²⁶⁵ Subsections 25(2) through 25(4) should remain in place.

406. Symmetrical treatment is also important within the context of the *Telecommunications Act*. This recommendation is consistent with TELUS' guiding principle 6 for telecommunications recommendations, which states that social regulation and technical regulation, where required, should be applied symmetrically and should be applied through laws of general application, as distinct from sector-specific regulation, whenever possible. It is also consistent with guiding principle 7, economic regulation must be imposed symmetrically so as not to distort the efficient choice of either service provider or technological platform.
407. Many of the recommendations in this submission implicitly promote symmetric regulation. With the widespread adoption of broadband internet access, services can be provided directly to end-users by non-traditional entities. Many "over the top" applications are provided by entities that do not own or operate facilities in Canada. This development creates challenges for communications regulation policy makers and enforcers, as the entities they have traditionally regulated are now competing with other types of entities, often with limited connection to Canada. In particular, policy makers have struggled to determine how to address digital giants, like Facebook, Amazon, Google, and Netflix.

5.4.1. *All Telecommunications Service Providers Should be Subject to the Same Rules*

408. Historically, telecommunications regulatory burdens have been borne disproportionately by the incumbent local exchange carriers and, to a lesser extent, cable carriers, through the form of tariff regulation and indirect regulation of third parties. Industry participants should be regulated consistently, and historical asymmetries should be removed. Even as prescriptive tariff regulation has faded in prominence, these entities were tasked with the indirect enforcement of CRTC regulations. Prior to the enactment of section 24.1 of the *Telecommunications Act*, the CRTC did not have the authority to directly regulate non-carrier service providers. To ensure that regulatory policies were fully implemented for consumers and other stakeholders, the CRTC imposed many obligations indirectly on non-carriers through carriers, that were obligated to include in service contracts terms and conditions that effectively bound the non-carrier to the substance of applicable CRTC decisions.

409. Following the introduction of section 24.1, the CRTC eventually determined that most such safeguards would be imposed directly on non-carriers.²⁶⁶ However, the CRTC declined to remove the requirement that these obligations be included in service contracts with underlying carriers.²⁶⁷ Moreover, the CRTC charged carriers with monitoring and reporting to the CRTC non-compliance of non-carriers.²⁶⁸ Carriers were effectively conscripted into a regulatory enforcement role, in addition to the substantive obligations that apply to other industry players. This form of asymmetric regulation should be removed.
410. A further form of asymmetric regulation is the provision of what are telecommunications services by OTT players. Regulation of OTT providers not based in Canada raises a number of issues, including the CRTC's jurisdiction to regulate these entities if it chooses to, which requires further study. However, consistent with TELUS' guiding principle 6, that economic regulation, where required, should be applied symmetrically so as not to distort the efficient choice of either service provider or technological platform, and consistent with TELUS' proposed guideline (a) (iv) that the CRTC, when relying on regulation, should ensure technological and competitive neutrality to the greatest extent possible. The CRTC should consider telecommunications services by OTT players when conducting relevant market analysis in its inquiries in order to apply symmetric regulation to all participants in the market
411. Additionally, many of the policy questions arising out of the operations of the aforementioned digital giants and other similar lesser players revolve around privacy and security. As noted elsewhere in this submission, these issues are best addressed through laws of general application, such as PIPEDA. To the extent that the CRTC retains powers

²⁶⁶ *Application of regulatory obligations directly to non-carriers offering and providing telecommunications services*, Telecommunications Regulatory Policy CRTC 2017-11.

²⁶⁷ *Application of regulatory obligations directly to non-carriers offering and providing telecommunications services*, Telecommunications Regulatory Policy CRTC 2017-11, para 24, retaining the requirements in a somewhat modified form.

²⁶⁸ See *Application of regulatory obligations directly to non-carriers offering and providing telecommunications services*, Telecommunications Regulatory Policy CRTC 2017-11, para 25 requiring monitoring of a registration requirement, and para 26, indicating that other obligations do not require monitoring or enforcement by carriers, but require the reporting "without delay and known or suspected non-compliance to the Commission."

to address privacy and security in the telecommunications sector, it should only use such powers to address industry-specific issues. General issues, (*e.g.*, tracking of information online, the use of location data from apps, etc.), ought to be addressed generally. Although these issues may have a connection to telecommunications, they are not telecommunications- or broadcasting-specific.

5.5. Subsection 27(2) of the Telecommunications Act Should Be Retained and Expanded to Apply to All Telecommunications Service Providers

412. TELUS recommends that the *Telecommunications Act* provision regarding unjust discrimination (subsection 27(2)) be retained, with minor changes, to ensure that the provision applies to all telecommunications service providers. More specifically, subsection 27(2) should be amended to enable the CRTC to consider allegations concerning the offering of telecommunications services by persons other than “Canadian carriers.” As noted elsewhere in this submission, the rationale for this distinction between varying classes of providers (carriers vs non-carriers) is no longer relevant and should be discarded. From an end-customer point of view, it does not matter whether unjust discrimination is at the hands of an owner of transmission facility, a provider who operates only “exempt transmission apparatus,” a reseller, or any other type of provider. What matters is the outcome.
413. This core provision has allowed for principled but flexible regulation. In virtually all its forbearance determinations, the CRTC has refrained from forbearing from its powers under subsection 27(2). Accordingly, it has been able to address specific allegations of discriminatory conduct on a case-by-case basis. The structure of this provision has given it the flexibility to be useful in a dynamic environment of forbearance, even though it was a monopoly-era creation.
414. TELUS recommends that section 27(2) remain in the governing telecommunications legislation. TELUS recommends that it be modified to apply to all telecommunications service providers, rather than just carriers, to address the gap addressed above. This is consistent with the comments elsewhere in this submission that regulation should be

applied symmetrically to all providers of telecommunications services, not just those who own or operate certain types of equipment.

5.5.1. *Recommended Legislative Changes*

27(2) No telecommunications service provider shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

5.6. Support Regulatory Independence By Eliminating Cabinet Appeals

415. The Governor in Council's power to vary, rescind or refer back CRTC decisions should be repealed.
416. The current legislation does not strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way.
417. TELUS has commissioned Professor Richard Schultz, Professor of Political Science at McGill University in Montreal, to provide the Legislative Review Panel with an historical overview of the Cabinet appeals power and the need for reform. In his report entitled "Controlling the Habit: A Paper Submitted in Support of the TELUS Submission to the Broadcasting and Telecommunications Legislative Review Panel," Professor Schultz provides a retrospective view of various criticisms of this power, most notably its lack of transparency, the fact that political appeals may fail to serve their fundamental purpose of providing policy direction to a regulatory agency because they may not actually result in any real clarification of the policy of the government, the potential to change public policy retroactively with no notice, and the undermining of the integrity of the administrative processes of the independent regulatory agency. Professor Schultz's expert report may be found in Appendix 9 to TELUS' submission.
418. In addition to Professor Schultz's cogent analysis, as explained by the Telecommunications Policy Review Panel in its 2006 Final Report, although Federal Cabinet has used its review power relatively infrequently since 1993, there have been frequent petitions to use it by

parties who were dissatisfied with CRTC decisions.²⁶⁹ As the Panel observed, each time a petition to review a CRTC decision is filed, significant resources are consumed in considering these petitions, uncertainty is created and certain constituents may be at a disadvantage to participate in the process.

419. Clarifying the statutory objectives as recommended by TELUS, coupled with a policy direction power would go a long way to establishing the appropriate policy balance between the government and the regulatory agency, and if these changes are made, TELUS recommends removing the power granted to the government to review and vary or rescind CRTC regulatory decisions under both the *Broadcasting Act* and the *Telecommunications Act*.
420. Although the preceding commentary supports TELUS's submission that the appeal provision should be removed, there is an alternative that TELUS would support, in the event that either the Broadcasting and Telecommunications Legislative Review Panel and/or the Government of Canada do not support such a recommendation. This is a proposal that was made in the original *Telecommunications Act (Bill C-43)*, which was given First Reading, March 22, 1977. The paper proposed that, while the power to vary or rescind a decision should be abolished, the power to send back decisions for review, similar to the existing power in the *Broadcasting Act*, should be continued subject to both a sixty day time limit and the requirement that any request for a review be accompanied by a justification based on policy issues or, alternatively, a policy direction pertinent to the decision.

5.7. The Organization of the CRTC Should Be Revised to Separate Advocacy, Enforcement and Adjudicative (review) Functions

421. As a further recommendation for institutional reform, TELUS recommends that Parliament should consider establishing an arm's length tribunal to carry out adjudicative functions, including applications to review and vary CRTC decisions and hearings to determine

²⁶⁹ For a comprehensive overview of the Governor in Council's use of this power, see *Executive Control of Administrative Action: 'Cabinet Appeals' and the CRTC*, Michael Ryan, MHRyan Law, April 14, 2014, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403402

whether to impose large administrative monetary penalties that exceed a monetary threshold (or where the tribunal grants leave). While studying the option of a fully separate tribunal, an interim form of tribunal could reside within the CRTC but rely on walled staff and legal counsel as appropriate.

422. At present, the CRTC acts as policymaker, advocate, prosecutor, and adjudicator. This creates a reasonable apprehension of bias that can be solved through structural separation. A similar precedent already exists in the separation of the Competition Bureau from the Competition Tribunal. The CRTC may already take some measures on a voluntary basis to separate its various functions. However, this legislative review process affords Parliament the opportunity to codify existing best practices and to conduct a thorough review of the CRTC's practices as they relate to its mandate, which has been modified over time and may well change again through this process.
423. The regulatory structure set up by the *Telecommunications Act* creates a reasonable apprehension of institutional bias in at least two instances. First, in the case of applications to review and vary CRTC decisions, the same Commissioners and CRTC staff that contributed to and decided a decision under review are tasked with adjudicating an internal appeal of that decision. Second, in the cases of administrative monetary penalties levied for breaches of the *Telecommunications Act*, the same Commissioners and CRTC staff are able to both investigate and prosecute alleged breaches, to adjudicate whether a breach has occurred, and to determine the appropriate remedy, if any. Both of these cases violate the maxim "*nemo judex in sua causa*"—nobody should be a judge in his own case. While overlapping jurisdiction in violation of administrative law principles may be permissible when authorized by statute, subject to constraints of the constitution, it is nevertheless problematic and can readily be corrected through structural separation of roles within the CRTC.
424. While there is no similar structure in the *Broadcasting Act* that raises the same level of concern in regards to institutional bias, TELUS would urge the Panel to ensure that any

amendments proposed for the *Broadcasting Act* are in keeping with the principles set out below.

5.7.1. *Administrative Law and Institutional Bias*

425. All administrative regulatory bodies owe a duty of fairness to the parties that they regulate.²⁷⁰ While the content of the duty of fairness changes depending on a number of factors, “an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness, the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias.”²⁷¹
426. Bias, or an appearance of bias, can occur both on an individual level (for example, if a decision-maker has a pecuniary interest in the outcome of proceedings) and on an institutional level. With respect to institutional bias, the Supreme Court of Canada has held that “whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met.”²⁷² The test for institutional impartiality is the same as the test for institutional independence: “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.”²⁷³
427. Institutional bias can occur where administrative officials perform overlapping functions. For example, in 2747-3174 *Québec Inc. v. Quebec (Régie des permis d'alcool)*, the Supreme Court of Canada addressed the institutional impartiality of the Quebec Régie des permis d'alcool. The Court ruled that a structural overlap of roles created a reasonable apprehension of bias in two respects. First, in-house counsel to the Régie both made submissions to the directors *and* advised on the appropriate disposition of the case. Second,

²⁷⁰ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at para 21 [“Newfoundland Telephone”]. See also *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 32.

²⁷¹ *Newfoundland Telephone* at para 21.

²⁷² *R. v. Lippé*, [1991] 2 S.C.R. 114 at para 51 [“Lippé”].

²⁷³ *Lippé* at para 57, citing *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, adapting the test for institutional independence (as opposed to impartiality) set out in *R. v. Valente*, [1985] 2 S.C.R. 673.

the Chairman of the Régie was authorized to initiate an investigation, decide to hold a hearing, and hear the case him or herself, and directors may have both made the decision to initiate an investigation and adjudicated the same case on the merits.²⁷⁴

428. That said, the mere existence of a reasonable apprehension of bias arising as a result of overlapping functions will not always give rise to a reasonable apprehension of bias. As the Supreme Court of Canada has held, “Some boards will have a function that is investigative, prosecutorial and adjudicative. It is only boards with these three powers that can be expected to regulate adequately complex or monopolistic industries that supply essential services.”²⁷⁵ Instead, the degree to which a reasonable apprehension of bias will violate principles of administrative law will depend upon the role of the tribunal in any given proceeding:

Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient [...] Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.²⁷⁶

²⁷⁴ 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at paras. 54-60.

²⁷⁵ *Newfoundland Telephone* at para 18. See also *Ocean Port* at para 41: “The overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role.”

²⁷⁶ *Newfoundland Telephone* at para 27. See also *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 at para 22: “To say that tribunals span the divide between the executive and the judicial branches of government is not to imply that there are only two types of tribunals — those that are quasi-judicial and require the full panoply of procedural protections, and those that are quasi-executive and require much less. A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain government policies are furthered.”

429. Finally, although institutional bias is never desirable, courts will not ordinarily intervene where the institutional bias is authorized by statute. The Supreme Court of Canada made clear in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* that “absent constitutional constraints, it is always open to the legislature to authorize an overlapping of functions that would otherwise contravene the rule against bias.”²⁷⁷ Thus, to the extent the *Telecommunications Act* can be read to permit institutional bias, legislative intervention is of paramount importance, precisely because courts will not ordinarily intervene.²⁷⁸

5.7.2. *Institutional Bias, the CRTC, and the Telecommunications Act*

430. As the jurisprudence above demonstrates, administrative decisionmakers can fill multiple roles, and so does the CRTC. At times, it is primarily a policymaking body, soliciting views of a wide range of stakeholders to formulate policy that fulfils the objectives of the *Telecommunications Act*. Institutional bias in these proceedings—though still troubling—is nevertheless of a lesser concern, especially with respect to the principles of administrative law. At other times, however, the Commission fills a more adjudicative role. Examples of such occasions are when the CRTC hears applications to review and vary its own decisions, when it considers imposing administrative monetary penalties, and when it adjudicates disputes *inter partes* under Part 1 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*.²⁷⁹

²⁷⁷ *Ocean Port* at para 42. See also *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29 at para 117.

²⁷⁸ See also *Brosseau v. Alberta (Securities Commission)* [1989] 1 S.C.R. 301. In that case, the Supreme Court of Canada addressed an allegation of institutional bias with respect to the Alberta Securities Commission, where the Chairman participated in the investigation of a regulated party and later in the adjudication of the hearing of that party. The Court ruled at paras 20-21 that “[o]ne exception to the ‘nemo iudex’ principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue.” Thus, the Court determined that it would only disqualify the Commission from hearing the matter if the Commission exceeded the scope of its statutory authority. In turn, the Court held that “[i]t is clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that certain activities which might otherwise be considered ‘biased’ form an integral part of its operations.” Accordingly, the enabling legislation of the Commission ousted the common law requirement of institutional impartiality.

²⁷⁹ SOR/2010-277.

431. To be clear, there should be no problem with the CRTC, as an institution, undertaking overlapping roles. And indeed, there is not necessarily any need to create a new commission to fill the CRTC's adjudicative function. However, the *Telecommunications Act*, at present, provides insufficient structural separation within the CRTC to avoid institutional bias. An appropriate remedy would be to ensure that these functions, while residing within the CRTC, are sufficiently structurally separate and independent from each other to avoid a reasonable apprehension of bias.

5.7.3. Section 62 Applications to Review and Vary CRTC Decisions

432. Section 62 of the *Telecommunications Act* provides that “Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision” (emphasis added). This provision is treated by the CRTC as an internal appeal. The relevant CRTC guidelines provide as follows:

In order for the Commission to exercise its discretion pursuant to section 62 of the Act, applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to

- (i) an error in law or in fact;
- (ii) a fundamental change in circumstances or facts since the decision;
- (iii) a failure to consider a basic principle which had been raised in the original proceeding; or
- (iv) a new principle which has arisen as a result of the decision.²⁸⁰

433. The problem at present with the exercise of this power is that applications to review and vary a CRTC decision further to an allegation of an error of fact or law are *potentially heard by the very commissioners that decided the matter under review*. In fact, CRTC by-laws at present actually prevent such applications from being heard by only a subcommittee of commissioners. Specifically, By-law 10 establishes a Telecommunications Committee,

²⁸⁰ *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, at para 5.

comprised of all members of the Commission and delegates to the Telecommunications Committee, with a quorum of three members, to “inquire into and dispose of” certain applications. However, By-law 10 excludes from this delegation applications that “seek to stay or review or vary a Commission decision pursuant to section 62 of the *Telecommunications Act*.”²⁸¹

434. This feature of the *Telecommunications Act* also differs from the telecommunications administrative structure set out in the *National Transportation Act, 1967*, which applied to proceedings before the Canadian Transport Commission (“CTC”), including formerly telecommunications proceedings, until jurisdiction was moved to the CRTC for telecommunications in 1976. That act provided that where an operator objected to an order, rule or direction made by a committee of the CTC, “the Commission shall, otherwise than by that committee of the Commission, review the order, rule or direction ... and shall confirm, rescind, change, alter or vary the order, rule or direction or re-hear the matter thereof.”²⁸² No such language is found within the *Telecommunications Act*.
435. At present, however, the *Telecommunications Act* permits Commissioners to sit in appeal of their own decisions and further makes no provision for the structural separation of staff that advise the Commissioners on these matters. This institutional structure is analogous to the institutional structures set out in the case law above and raises a reasonable apprehension of bias. Precisely because certain elements of institutional bias may be permissible where authorized by statute, this shortcoming should be corrected by legislative amendment.

5.7.4. *Proceedings to Impose Administrative Monetary Penalties*

436. The *Telecommunications Act* vests in the Commission the power to impose administrative monetary penalties under two distinct regimes.

²⁸¹ By-Law No. 10, cl. (c)(3).

²⁸² *National Transportation Act, 1967*, S.C. 1966-67, c. 69, s. 17(1), repealed S.C. 1987, c. 34, s.305.

437. First, sections 72.001 to 72.0093 of the *Telecommunications Act* create a regime whereby the CRTC can impose administrative monetary penalties for breaches of most sections of the *Telecommunications Act* and regulations or decisions made pursuant to the *Telecommunications Act*. The maximum such penalty the CRTC may impose (other than against an individual) is \$10,000,000 for a first contravention and \$15,000,000 for a second contravention.²⁸³ The *Telecommunications Act* sets out the steps pursuant to which a penalty can be imposed. The CRTC may designate a person to issue a notice of violation.²⁸⁴ The party receiving the notice then has 30 days to either pay the penalty or make representations with respect to the violation and the penalty.²⁸⁵ The CRTC then decides on a balance of probabilities whether the party committed the violation and whether to impose the penalty.²⁸⁶ Additionally, the CRTC may impose a penalty in the course of a proceeding where it finds that there has been a contravention of an applicable section.²⁸⁷
438. Second, sections 72.01 to 72.13 create a similar regime whereby the CRTC can impose administrative monetary penalties for breaches of regulations with respect to unsolicited telecommunications. The maximum such penalty the CRTC may impose (other than against an individual) is \$15,000.²⁸⁸ The *Act* then sets out a similar scheme under which a designate of the CRTC will issue a notice of violation, a party may make representations and the CRTC decides, on a balance of probabilities if a violation has occurred and whether to impose the penalty.²⁸⁹

5.7.4.1. *The Institutional Framework Should Be Amended to Be Consistent with More Recently Updated Federal Frameworks*

439. The transparency of the institutional framework with respect to the potential imposition of a \$10 million general administrative monetary penalty is out of step and out of date when compared with similar federal schemes. For example, under the *Competition Act*, the

²⁸³ S.72.001.
²⁸⁴ S.72.005(1).
²⁸⁵ S. 72.005(2)(b).
²⁸⁶ S.72.007(2).
²⁸⁷ S.72.003.
²⁸⁸ S.72.01.
²⁸⁹ Ss.72.07-72.08.

deceptive marketing practices regime includes liability for an administrative monetary penalty against a corporation for a first violation of up to \$10 million.²⁹⁰ In contrast with the *Telecommunications Act* model, the *Competition Act* forum for the determination of liability uses an optional combination of the Competition Tribunal, the Federal Court or the superior court of a province.²⁹¹ The Competition Tribunal consists of a combination of judges from the Federal Court and subject matter experts.²⁹²

440. The *Competition Act* is a relevant basis for comparison since it has been applied in the telecommunications context. For example, the Competition Tribunal approved of an administrative monetary penalty of \$10 million imposed against Bell Canada entities where the Competition Commissioner had concluded that marketing representations created the general impression that consumers need only pay the advertised monthly price plus applicable taxes, fees imposed by government on consumers, and optional fees for the services in question, when in fact consumers were not able to purchase those services at the advertised prices.²⁹³ Another example is the decision of Justice Marrocco imposing an administrative monetary penalty in the Chatr wireless case.²⁹⁴ TELUS has been the subject of consent agreements filed with the Competition Tribunal.²⁹⁵
441. The Competition Tribunal is a quasi-judicial body which has its own rules of procedure that include document discovery on the basis of relevance, which is a fitting standard for the imposition of a \$10 million administrative monetary penalty.²⁹⁶
442. By contrast with the *Competition Act* model, the *Telecommunications Act* monetary penalty regimes provide no structural separation with respect to the CRTC's investigative, prosecutorial, and adjudicative roles. There is no legislative provision that the same

²⁹⁰ *Competition Act*, Section 74.1 (1) (c).

²⁹¹ *Competition Act*, 74.09.

²⁹² Competition Tribunal Act (R.S.C., 1985, c. 19 (2nd Supp.)) section 3(2).

²⁹³ https://www.ct-tc.gc.ca/CMFiles/CT-2011-005_Consent%20Agreement_1_45_6-28-2011_7559.pdf.

²⁹⁴ Canada (Commissioner of Competition) v. Chatr Wireless Inc. (2014), 2014 CarswellOnt 1961, 238 A.C.W.S. (3d) 334, 2014 ONSC 1146 (Ont. S.C.J.).

²⁹⁵ https://www.ct-tc.gc.ca/CMFiles/CT-2015-015_Registered%20Consent%20Agreement_2_38_12-30-2015_9250.pdf.

²⁹⁶ Competition Tribunal Rules, SOR/2008-141 section 60(2)(a).

Commission staff do not investigate, issue notices of violation, and advise the Commissioners on whether or not to impose a penalty after reviewing submissions from a party served with a notice of violation (although presumably this does not occur as a matter of good practice). While the legislation contemplates that the CRTC may designate persons with authority to issue notices of violations,²⁹⁷ it does not express any direction on the degree of independence such persons must have from the CRTC. Whatever independence exists is left for the CRTC to establish voluntarily. Moreover, we note that in the case of general administrative monetary penalties, the use of a notice of violation process is currently optional for the CRTC.²⁹⁸ As such, whatever institutional separation may be implied in the current legislation in respect of notices of violation would not be extended to penalties assessed through other processes, such as in the course of a CRTC proceeding.

443. Furthermore, as presently constituted, the Chairman and Chief Executive Officer of the Commission could commence an investigation against a party, determine that a notice of violation should be issued, and then potentially adjudicate whether or not to impose a penalty. This is an obvious potential conflict of interest and again should be remedied by legislative amendment. By way of contrast with the *Competition Act* model, the CRTC procedures in relation to administrative monetary penalties are not subject to formal rules of procedure but rather the subject of comment in a guideline.²⁹⁹

5.7.4.2. *A Separate Tribunal Is Most Needed for Large Penalties*

444. As noted above, the Supreme Court of Canada in the *Ocean Port* decision has permitted overlapping jurisdictions in the context of enforcement of administrative schemes.³⁰⁰ Indeed, with respect to administrative monetary penalties *at the lower end* of the monetary scale, there is academic support for an integrated model such as the legislative scheme in the *Telecommunications Act*. At this lower level, the advantages of integration include

²⁹⁷ *Telecommunications Act*, s 72.004.

²⁹⁸ *Telecommunications Act*, s 72.003.

²⁹⁹ <https://crtc.gc.ca/eng/archive/2015/2015-111.pdf>.

³⁰⁰ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch) 2001*, 2001 CarswellBC 1877, 204 D.L.R. (4th) 33, [2001] 2 S.C.R. 781 (S.C.C.), remitted (2002), 2002 CarswellBC 1068, 213 D.L.R. (4th) 273, 40 Admin. L.R. (3d) 103 (B.C. C.A.), most recently cited in *Walter v. British Columbia (Attorney General)* 2018 CarswellBC 2068, 2.

reduction of transaction costs, specialization, and fast track intervention.³⁰¹ However, in *Ocean Port*, the issue was a two day licence suspension, a far cry from a \$10 million dollar penalty. The insertion of multi-million dollar administrative monetary penalties changes the *Ocean Port* analysis, as these very large administrative monetary penalties were not around when *Ocean Port* was argued.

445. A formal separation of powers for the higher level of administrative monetary penalties has academic and judicial support. An analysis prepared by the Osborne Report for the Ontario Securities Commission (the “OSC”) suggests that independence of the prosecution branch is a prudent principle when the stakes are higher. The Osborne Report strongly advised the OSC to take steps to separate its adjudicative function from the OSC. While the analysis specific to the OSC, one of the major factors cited was the increase in penalties, such as the \$1,000,000 administrative monetary penalty.

We are satisfied that the nature of the apprehension of bias has become sufficiently acute as to not only undermine the Commission's adjudicative process, but also the integrity of the Commission as a whole among the many constituencies that we interviewed. Matters of institutional loyalty, the involvement of the Chair in the major cases, the increased penalties, the sense that the "cards are stacked against them", the home-court advantage, the lengthy criminal law-like trials, and the Commission's aggressive enforcement stance, which likely will only increase over time, all combine to make a compelling case for a separate adjudicative body.³⁰²

446. While an integrated model may have some benefits, it also has costs. Academics studying the issue have written:

We have identified the relevant benefits and costs that should be considered when designing investigation and prosecution processes and structures. As regards benefits, we have focused on the reduction of transaction costs, the gains from specialisation, the possibility of fast track interventions, and the advantages of

³⁰¹ Nuno Garoupa, Anthony Ogus and Andrew Sanders, "The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?" (2011), 70:1 Cambridge L.J. 229 at 253-255.

³⁰² Hon. C.A. Osborne, D.J. Mullan and B. Finlay, "Report of the Fairness Committee to the Ontario Securities Commission" (March 5, 2004), at p. 32.

"monopoly power" in the context of negotiated compliance. With respect to costs, we have discussed error costs, the consequences of weak accountability, and the problems posed by behavioural effects.³⁰³

447. Scholars such as Justice Richard Posner have identified the potential for an agency to have some bias in assessing penalties that may justify the agency's own existence. Agencies have a statutory goal or agenda, such as preventing the deception of consumers. A sector may change with time such that the agency in question ought to play a less intrusive role. The problem, according to Justice Posner, is that an administrative agency that would dismiss the majority of complaints before it would be "inviting its liquidation by Congress."³⁰⁴
448. This issue is particularly acute in the context of the *Telecommunications Act* general administrative monetary regime, since it allows for the imposition of a penalty for any contravention of a CRTC regulation or decision (except for those promulgated under the unsolicited telecommunications powers).³⁰⁵ The CRTC is not a neutral third-party when assessing compliance *with its own decisions*. As a rule-making and policy-creating regulator, the CRTC has a mandate and interest in achieving certain objectives. For example, the CRTC describes how it will engage in public consultation to "ensure that Canadians are connected to world-class communications services," among numerous other objectives.³⁰⁶ Compliance and enforcement is listed amongst these other objectives. This creates a conflict of interest.
449. In particular, the threshold question of whether a contravention has occurred is fraught with conflict. There are often disputes over the interpretation of a regulation or decision, and whether or not a contravention has actually occurred. The party resolving that dispute must be neutral: it must consider whether there has been a contravention of the rule, *as written*. But the CRTC is not neutral, since the decision or regulation was created by it for some other policy purpose. The CRTC will be tempted to interpret its own decisions through the

³⁰³ Nuno Garoupa, Anthony Ogus and Andrew Sanders, "The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?" (2011), 70:1 Cambridge L.J. 229 at 258.

³⁰⁴ Richard Posner, *The Economic Analysis of Law*, 6th ed. (New York: Aspen Publishers, 2003), at p. 642.

³⁰⁵ *Telecommunications Act*, s 72.001.

³⁰⁶ See Departmental Plan 2018-2019, <https://crtc.gc.ca/eng/publications/reports/dp2018/dp2018.htm>.

lens of the policy goal it would like to see achieved, rather than interpreting the plain meaning of the text that it created.

450. The lack of institutional fairness undermines the statutory purpose of the general administrative monetary penalty regime. The purpose of these penalties is to promote compliance with the *Telecommunications Act* and CRTC regulations and decisions.³⁰⁷ There is every chance that the CRTC could use an administrative monetary penalty process to further another competing objective, such as the animating purpose behind the decision establishing the rule in question. Creative interpretation to address a gap in the drafting of the rule does not promote *compliance*. Instead, it simply promotes saving the CRTC the effort of amending the substantive rule and disappointment or embarrassment over gaps in the original drafting.
451. Archibald and Jull³⁰⁸ recommend that where the stakes are higher, the type of independent model used by the Competition Tribunal ought to be used.
452. TELUS therefore recommends that:
- (i) Consideration be given to the creation of a separate enforcement tribunal, similar to the Competition Tribunal, for the enforcement of administrative monetary penalties at the higher monetary levels; and
 - (ii) A study be commissioned to identify the costs and benefits within the telecommunications sector of an integrated model and to identify the higher monetary levels at which the new enforcement tribunal would operate.

5.7.5. *Recommended Legislative Changes*

453. The strongest and clearest way to remove any reasonable apprehension of institutional bias is to create structural separation within the CRTC by establishing a new CRTC tribunal to carry out adjudicative functions, including applications to review and vary Commission

³⁰⁷ *Telecommunications Act*, s 72.002(2).

³⁰⁸ Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance*, (2018) Student Edition, 15:70:70 (“Archibald and Jull”).

decisions and hearings to determine whether to impose an administrative monetary penalty. Such a tribunal could reside within the Commission but would be structurally separate and rely on walled staff and legal counsel as appropriate.

454. The institutional framework of the Competition Tribunal provides a good starting point for considering the role of an independent CRTC adjudicative tribunal. The Competition Tribunal is a specialist tribunal with jurisdiction to adjudicate proceedings under certain parts of the *Competition Act*.³⁰⁹ Thus, the policymaking and investigative competition regulation functions are generally performed by the Competition Bureau, but the adjudicative function is administered separately by an independent tribunal.
455. The Competition Tribunal also benefits from expertise both in competition regulation *and* in law and adjudication. Unlike the CRTC, panels of the Competition Tribunal are generally comprised both of lay members, who have expertise in competition regulation, and a judge of the Federal Court, who may lack expertise in competition policy but will have expertise in adjudication and law.³¹⁰ The workload of the Tribunal is divided accordingly: questions of law are determined exclusively by judicial members of the Tribunal, and questions of fact and mixed law and fact are determined by the full panel.³¹¹

³⁰⁹ *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 8(1): “The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the Competition Act and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.”

³¹⁰ *CTA*, s.3(2).

³¹¹ *CTA*, s.12(1). See *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para 53: “Clearly it was Parliament's view that questions of competition law are not altogether beyond the ken of judges. However, one of the principal roles of the judicial members is to decide such questions of pure law as may arise before the Tribunal. Over those questions they have exclusive jurisdiction. ... But over questions of fact and of mixed law and fact, the judicial members share their jurisdiction with the lay members. ... Thus, while judges are able to pronounce on questions of the latter kind, they may do so only together with the lay members; and, in a typically constituted panel, such as the one that sat in this case, the lay members outnumber the judicial ones, so that in the event of a disagreement between the two camps, the lay members as a group will prevail. This makes sense because, as I have observed, the expertise of the lay members is invaluable in the application of the principles of competition law.”

456. A separate CRTC adjudicative tribunal could be constituted by adapting with necessary modifications the *Competition Tribunal Act* and granting the new tribunal exclusive jurisdiction to hear adjudicative matters, as opposed to policymaking matters.

5.8. The General Administrative Monetary Penalty Regime Should be Modified

457. The general administrative monetary penalty regime in the *Telecommunications Act* should be modified such that:
- large penalties are administered by a separate body (or a walled-off division within the CRTC);
 - all penalties be issued through a stand-alone notice of violation process that recognizes that no liability attaches until the matter is considered on its merits or there is a consent agreement;
 - higher level administrative monetary penalties engage a right to an oral hearing, rather than the restriction to written representations;
 - a course of conduct is a single violation rather than multiple individual violations, similar to provisions under the *Competition Act*; and
 - communications industry administrative monetary penalty regimes are consistent.
458. The general administrative monetary penalty regime requires amendment to ensure that industry participants are afforded procedural fairness and to ensure that penalties are imposed for their stated purpose of encouraging compliance. The regime should also be amended to specify that a course of action that may lead to many individual contraventions is treated as a single violation to ensure that penalty amounts are effectively limited to the quantum stated in the legislation and in accordance with the criteria for penalty listed in the legislation.
459. In 2014, Parliament amended the *Telecommunications Act* to establish a general administrative monetary penalty regime.³¹² This amendment was an historically significant and fundamental change to Canadian telecommunications law enforcement. However,

³¹² *Telecommunications Act*, s 72.001 through 72.0093.

despite its importance, the introduction of the general administrative monetary penalty regime was not accompanied by consequential changes to the institutional and procedural framework necessary to ensure that administrative monetary penalties are employed fairly and predictably. In more than four years since the general administrative monetary penalty powers were introduced, industry participants have been provided very little additional guidance. To date, the CRTC has published only a brief and unspecific set of non-binding guidelines setting out a general approach for the use of administrative monetary penalties.³¹³ Neither is there any guidance from precedents, as no administrative monetary penalties have been assessed under these provisions (although the CRTC has expressly decided not to impose administrative monetary penalties in certain cases).³¹⁴ Accordingly, there is a need to resolve the lingering uncertainty through an amendment to the legislative provisions.

460. Telecommunications service providers operate in competitive, dynamic conditions. To succeed in these conditions, telecommunications service providers must make significant investments and develop innovative products and service offerings. This is precisely what is required for Canada's digital future: innovation, investment, and dynamic competition. However, providers need clearly articulated obligations and fairly enforced rules to invest and innovate. Without this certainty and predictability, regulatory risks unduly limit investment and innovation. Relatively modest amendments to the general administrative monetary penalty regime can help remedy this problem.
461. Two types of change are required: procedural and institutional changes and changes to the quantum of potential administrative monetary penalties.

³¹³ Compliance and Enforcement and Telecom Compliance Bulletin CRTC 2015-111.

³¹⁴ See, for example, *Frontier Networks Inc. – Application regarding the refusal of Eastlink to allow Frontier to resell high-speed access services*, Telecom Decision CRTC 2018-458.

5.8.1. *Procedural and Institutional Changes Are Required for Telecommunications Regulation to Be Consistent with the Rule of Law*

462. To operate fairly, the general *Telecommunications Act* general administrative monetary penalty regime requires institutional change. TELUS recommendations in this regard are set out in detail in Section 5.7 of this submission.
463. A second procedural fairness problem arises out of the vagueness of the hearing process. The legislative text contemplates that persons subject to a proposed administrative monetary penalty be provided a notice of violation, which then triggers a series of procedural steps, including providing the person with an opportunity to make representations.³¹⁵ However, the *Telecommunications Act* is clear that this is only one avenue in which the CRTC may issue an AMP: the CRTC is expressly empowered to issue penalties in the course of any proceeding occurring before it under the *Telecommunications Act*.³¹⁶
464. In this connection, TELUS notes that the CRTC holds very many proceedings, on a variety of matters. Notices of consultation, and even disputes between parties, are typically polycentric: they address numerous substantive matters, involve numerous stakeholders, and engage numerous CRTC roles (adjudicative, policy making, etc.). An allegation of non-compliance may be a part of this mixture.³¹⁷ But when an administrative monetary penalty is proposed by some party or raised as a possibility by the CRTC, the party targeted by the proposal does not have the benefit of a specific finding of non-compliance or the quantum of administrative monetary penalty sought. How can the party properly challenge an administrative monetary penalty in such a context? It makes little sense for a party to address the type and magnitude of penalty when the question of whether or not there has

³¹⁵ *Telecommunications Act*, s 72.005(2).

³¹⁶ *Telecommunications Act*, s 72.003.

³¹⁷ See, for example, Telecom Decision CRTC 2018-458, concerning a dispute over the interpretation of a wholesale tariffed service. The applicant requested that AMPs be imposed on the carrier. The CRTC considered this request, ultimately declining to issue AMPs, among numerous interpretive findings and policy considerations.

even been a contravention has not been determined, and the decision maker is considering that question along with many other matters.

465. Accordingly, TELUS recommends that the general administrative monetary penalty regime be amended to require that the notice of violation process be used in all cases where an administrative monetary penalty is proposed. This fully preserves the CRTC's ability to use administrative monetary penalties for legitimate compliance purposes but eliminates the significant procedural fairness concerns and uncertainty discussed above.
466. Moreover, it would be impossible for an administrative monetary penalty imposed in the course of a CRTC proceeding to respect the institutional division of responsibility we have recommended in this submission. Accordingly, this proposed procedural change is necessary to effect the institutional change we believe to be necessary.
467. Finally, this approach is consistent with the CRTC's existing administrative monetary penalty powers in respect of unsolicited telecommunications,³¹⁸ and CASL,³¹⁹ both of which require a notice of violation process. This is also consistent with administrative monetary penalty powers under the *Radiocommunication Act*.³²⁰ Therefore, requiring a notice of violation process for *Telecommunication Act* general administrative monetary penalties will ensure consistency between the communications sector administrative monetary penalty regimes.
468. While TELUS does not support the extension of administrative monetary penalties into the *Broadcasting Act*, if Parliament ultimately elects to do so, we recommend that the regime be consistent with the *Telecommunications Act* general administrative monetary penalty regime, amended as recommended in this submission.

³¹⁸ *Telecommunications Act*, s 72.04-72.07.

³¹⁹ CASL, s 22.

³²⁰ *Radiocommunication Act*, s 15.14.

5.8.2. *Parties Should Have the Right to an Oral Hearing for Larger Penalties*

469. In March of 2015 the CRTC issued Guidelines³²¹ regarding the general administrative monetary penalty regime under the *Telecommunications Act*. This document states as follows:

The person served with the Notice of Violation has 30 days to either (i) pay the AMP, or (ii) make **written representations** to the Commission regarding whether the violation has occurred, the amount of the AMP, or both. However, the Commission may specify a longer period if it so chooses. [emphasis added].³²²

470. Archibald and Jull argue that procedural fairness requires that for higher level administrative monetary penalties, there should be a corresponding right to an oral hearing, rather than the restriction to written representations:

The present rules set out in CRTC guidelines which only permit written submissions on liability or penalty could be described as a "one size fits all" model for the entire range of potential administrative monetary penalties. The CRTC Guidelines regarding the general regime have not yet been subject to administrative challenge. The courts will be required in the future to characterize the nature of a specific administrative monetary penalty along a spectrum of impact, which will then provide guidance as to the level of procedural protections that fairness requires. We are of the view that a "one size fits all" model may fall short of the high requirement of procedural fairness as the penalties escalate and may also trigger constitutional review.³²³

471. Archibald and Jull further note that

The restriction to written representations contrasts with the robust appeal remedies referred to in *Guindon*. The unanswered question is whether the restriction to written representations in relation to a potential \$10 million administrative monetary penalty rises to a level of constitutional challenge. This would only be relevant if the

³²¹ Compliance and Enforcement and Telecom Information Bulletin CRTC 2015-111 (March 27, 2015).

³²² *Ibid*, at paragraph 22.

³²³ Todd L. Archibald and Kenneth E. Jull, *Profiting from Risk Management and Compliance*, (2018) Student Edition, INT:20:50 at p INT-54.

scheme qualified as creating punitive offences under the *Guindon* balancing test.³²⁴

5.8.3. *Amendments to the Quantum of Maximum Penalties Are Required*

472. The present *Telecommunications Act* administrative monetary penalty regime establishes very significant maximum penalties: for a corporation, up to \$10 million for a violation, or \$15 million for subsequent violations. Maximum penalties of this magnitude are not unreasonable. However, the legislation provides no clear guidance on how to determine *how many* violations occur in a given circumstance. To illustrate this, consider the following example: a wireless service provider, which has never been assessed an administrative monetary penalty, establishes a promotional wireless plan. 1,000 customers subscribe to this plan during the promotional period. A year later, a complaint is lodged, and it is determined by the CRTC that some aspect of the plan is inconsistent with the Wireless Code. What is the maximum administrative monetary penalty liability for the wireless service provider? Is it \$10 million, for the violation of designing a non-compliant plan? Or did the service provider violate the Code each time a customer signed up for a plan? In which case, the maximum potential liability would be nearly \$15 billion. Or, is it a separate violation each time the service provider billed a customer, in this case 12,000 violations, which would amount to a maximum potential exposure of nearly \$180 billion?
473. Clearly, a \$180 billion administrative monetary penalty in this context would be absurd. One would not expect the CRTC to issue such a fine. However, simply handing limitless power to law enforcement and relying on them to exercise it reasonably is not sound policy. Even the current requirement that the quantum of penalty must take into account the ability of the person to pay is not helpful,³²⁵ since a) it is only one factor, among many, and b) does not necessarily prevent the imposition of an insolvency-inducing administrative monetary penalty. Companies cannot effectively innovate, or invest to support those innovations, if any misstep, no matter how small, could engender existentially ruinous fines.

³²⁴ Archibald, Jull at INT-56.

³²⁵ *Telecommunications Act*, s 72.002(1)(d).

474. The imposition of an extremely high administrative monetary penalty would be the subject of a constitutional challenge. Archibald and Jull observe that:

The door is still open for constitutional challenges to administrative monetary schemes if they fall within the "punitive paradigm". In *Guindon*, the Supreme Court articulated a balancing test to determine whether an outcome is punitive:

Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty.³²⁶

475. Archibald and Jull observe that the *Income Tax Act*, which was the subject of the leading decision on the constitutionality of AMPs in the Supreme Court decision in *Guindon*,³²⁷ may be distinguished from other legislative schemes such as set out in the *Telecommunications Act*:

Applied to s. 163.2 of the Act, the balancing test led to the conclusion that the penalty in question was administrative in nature and not punitive. An important factor was that s. 163.2 utilizes a somewhat mechanical formula for the assessment of the penalty. By way of contrast, other administrative regimes identify relevant factors in a manner that is far more similar to relying on principles used in criminal sentencing. Those other regimes will be open to constitutional challenges in the future.

The Supreme Court in *Guindon* noted that even though traditional constitutional protections under s. 11 of the Charter are not engaged by s. 163.2 of the Act, those against whom penalties are assessed are not left without recourse or protection. They have a full right of appeal to the Tax Court of Canada and have access to other potential administrative remedies. This reference to appeal rights and other remedies sets a high bar for comparing the regime in issue in *Guindon* with other AMPs regimes.³²⁸

³²⁶ Archibald and Jull, INT -53, citing *Guindon* at paragraph 76.

³²⁷ *Guindon v. Canada*, (2015), 2015 CarswellNat 3231, 327 C.C.C. (3d) 308, 2015 SCC 41 (S.C.C.) ("*Guindon*").

³²⁸ Archibald and Jull, INT-53.

476. To remedy this, TELUS recommends that the *Telecommunications Act* be amended to specify that a violation is a single decision or course of conduct, not each manifestation of it. For a parallel, the *Competition Act* uses the following test: “[w]here, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person...”³²⁹

5.8.4. *Communications Statutes Should be Consistent Where Possible*

477. Finally, TELUS notes that the *Broadcasting Act* does not presently include an administrative monetary penalty regime. While TELUS does not propose that such a regime be established, if Parliament decides to do so, TELUS recommends it made consistent with the proposals and recommendations herein.
478. With respect to the administrative monetary penalties available under the *Radiocommunication Act*, TELUS notes that they already require a notice of violation process. The changes TELUS is recommending to the *Telecommunications Act* in this regard will therefore create consistency between the statutes. TELUS’ recommendation to specify that a course of conduct is a single violation applies equally to the *Radiocommunication Act*.

5.8.5. *Recommendations for Legislative Changes*

479. TELUS recommends the following proposed amendments to the *Telecommunications Act*. TELUS recommends that these changes also be applied to the *Radiocommunication Act* and the *Broadcasting Act*, in the event that administrative monetary penalties are considered for inclusion in the *Broadcasting Act*, which TELUS does not recommend. Other changes may be required to the *CRTC Act* to effect the institutional structure we have recommended herein.

³²⁹ *Competition Act*, section 74.1(1).

General Administrative Monetary Penalties Scheme

Commission of violation

72.001 (1) Every contravention of a provision of this Act, other than section 17 or 69.2, and every contravention of a regulation or decision made by the Commission under this Act, other than a prohibition or a requirement of the Commission made under section 41, constitutes a violation and the person who commits the violation is liable

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

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

(2) For purposes of subsection 1, a course of conduct leading to multiple individual contraventions shall be treated as a single violation.

Criteria for penalty

72.002 (1) The amount of the penalty is to be determined by taking into account the following factors:

- (a) the nature and scope of the violation;
- (b) the history of compliance with this Act, the regulations or the decisions made by the Commission under this Act, by the person who committed the violation;
- (c) any benefit that the person obtained from the commission of the violation;
- (d) the person's ability to pay the penalty;
- (e) any factors established by any regulations; and
- (f) any other relevant factor.

Purpose of penalty

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

Procedures

~~Delete 72.003 Despite subsection 72.005(1), the Commission may impose a penalty in a decision in the course of a proceeding before it under this Act in which it finds that there has been a contravention of a provision, a regulation or a decision referred to in section 72.001.~~

Power of Commission — violation

72.004 The Commission may

- (a) designate a person, or class of persons, that is authorized to issue notices of violation or accept an undertaking; and
- (b) establish, in respect of each violation, a short-form description to be used in notices of violation.

5.9. The Telecommunications Act and the Broadcasting Act Should Be Amended to Ensure CRTC Decisions Are Reviewed on a Court-Like Standard

480. The *Telecommunications Act* should be amended as follows:

1. Repeal subsection 52(1), which currently provides that “[t]he Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.”
2. Amend subsection 64 to read as follows: 64 (1) An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court, **as if it were a judgment of the Federal Court.**

481. The *Broadcasting Act* should be amended as follows:

1. Amend subsection 31(2) to read as follows: “An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court, **as if it were a judgment of the Federal Court,** on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.”

482. The *Telecommunications Act* vests in the CRTC broad powers traditionally exercised by superior courts. Moreover, section 64 *Telecommunications Act* also provides a right of appeal, with leave, to the Federal Court of Appeal on questions of law or jurisdiction. Despite the fact that the legislation provides a right of appeal, courts have consistently treated appeals from CRTC decisions as judicial reviews and accordingly have accorded significant deference to the CRTC, including on questions of law. The current statutory language is inconsistent with the CRTC's powers and functions and should be amended with language similar to that used in the *Competition Tribunal Act* in order to signal to courts that CRTC decisions should be treated with a similar degree of deference accorded to courts when they exercise similar powers.

483. TELUS's recommendations will help to ensure that CRTC decisions are reviewable by the courts to ensure compliance with the statute, consistent with TELUS' proposed principle 10.

5.9.1. *The Judicial Powers of the Commission and the Treatment of CRTC Decisions on Appeal*

484. Although an administrative tribunal, the CRTC has many powers traditionally reserved for courts. For example, section 55 of the *Telecommunications Act* provides as follows:

The Commission has the powers of a superior court with respect to

- (a) the attendance and examination of witnesses;
- (b) the production and examination of any document, information or thing;
- (c) the enforcement of its decisions;
- (d) the entry on and inspection of property; and
- (e) the doing of anything else necessary for the exercise of its powers and the performance of its duties.

485. Section 63(1) of the *Telecommunications Act* in turn provides that any "decision of the Commission may be made an order of the Federal Court or of a superior court of a province

and may be enforced in the same manner as an order of that court as if it had been an order of that court on the date of the decision.”

486. The CRTC also has significant inspection and punitive powers, also traditionally the domain of courts. Section 71(4) of the *Telecommunications Act* permits the Commission to engage in warrantless inspections of any place other than dwelling-houses. The general administrative monetary penalty regime set out in sections 72.001 and following permits the Commission to levy administrative monetary of up to \$15,000,000 per offence. Finally, section 56 provides that the Commission may award interim and final costs, also functions traditionally vested in courts.
487. With respect to the *Broadcasting Act*, although there is of yet no power for the Commission to issue administrative monetary penalties, the Commission is similarly given many of the powers of a superior court with respect to hearings³³⁰ and can enforce orders as though they were orders of the Federal Court.³³¹ The same arguments therefore apply with equal force to the *Broadcasting Act*.
488. The *Telecommunications Act* and *Broadcasting Act* recognize the broad nature of these powers at least in part by creating a right of appeal, with leave, directly to the Federal Court of Appeal. However, despite the fact that a statutory right of appeal is a “factor suggesting a more searching standard of review,”³³² courts have repeatedly interpreted recent jurisprudence, including *Dunsmuir v. New Brunswick*,³³³ such that where leave is granted under section 64, “both factual and legal issues will likely be reviewed on a reasonableness

³³⁰ *Broadcasting Act*, s.16.

³³¹ *Broadcasting Act*, s.13(1).

³³² *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28 at para 11. See also *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para 38, holding that courts must review an administrative law decision “on the basis of administrative law principles ... regardless of whether the review is conducted in the context of an application for judicial review or a statutory appeal.”

³³³ 2008 SCC 9.

standard.”³³⁴ Also, the *Telecommunications Act* and *Broadcasting Act* both presently contain privative clauses, suggesting a higher degree of deference.³³⁵

489. As a consequence of the existing administrative law jurisprudence, as well as the existence of a privative clause, a tribunal with broad court-like powers is be subject to a less stringent review process. However, this is a problem that is readily corrected by statute, and there is an easily adaptable precedent in the *Competition Tribunal Act* (“CTA”).
490. The CTA, as its name implies, is the constituting statute of the Competition Tribunal. Like the CRTC, the Competition Tribunal has broad, court-like powers. For example, similarly to section 55 of the *Telecommunications Act* set out above, subsection 8(1) of the CTA provides that the “Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.” And similarly to section 72.001 of the *Telecommunications Act* set out above, subsection 74.1(1) of the *Competition Act* grants the Competition Tribunal the authority to levy administrative monetary penalties of up to \$15,000,000 per offence. However, unlike the *Telecommunications Act*, nothing in the CTA or the *Competition Act* grants the Tribunal the authority to order the inspection of any place or property, with or without a warrant. The text of these provisions is set out in Appendix 10 to TELUS’ submission.
491. Despite the similarity in powers between the two statutes—and indeed the *Telecommunications Act* arguably grants the CRTC broader powers than the CTA grants to the Tribunal—only the CTA makes clear that appeals to the Federal Court of Appeal are to be reviewed in the same manner as appeals from a court of first instance. Section 13 of the CTA provides as follows:

³³⁴ *Public Mobile Inc. v. Canada (Attorney General)*, 2011 FCA 194 at para 26.

³³⁵ *Telecommunications Act* Subsection 52(1): “The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.” *Broadcasting Act*, s.31(1): “Except as provided in this Part, every decision and order of the Commission is final and conclusive.”

13 (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court. (Emphasis added)

(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

492. The Supreme Court of Canada has ruled that the phrase “as if it were a judgment of the Federal Court” mandates that a reviewing court apply a lesser degree of deference:

The appeal provision in the *Competition Tribunal Act* evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness. The presumption that questions of law arising under the home statute should be reviewed for reasonableness is rebutted here.³³⁶

493. Given the broad and court-like powers accorded to the CRTC and Parliament’s decision to create a right of appeal, with leave, to the Federal Court of Appeal, the *Telecommunications Act* should be adapted to reflect modern jurisprudence and signal that questions of law will be reviewed on a standard of correctness. To do this, the *Telecommunications Act* should be amended to remove the privative clause and revise section 64 with language mirroring subsection 13(1) of the *Competition Tribunal Act*.

5.10. Reforming the Telecommunications Act Investigation and Enforcement Powers to Align with the Purpose of Legislation and Modern Investigative Practices

494. The *Telecommunications Act* should be amended to establish judicial oversight of CRTC investigations and to permit entities subject to investigation to challenge the scope of requests from investigators in most circumstances. Investigative powers should be made consistent with those established under Canada’s anti-spam legislation³³⁷ (“CASL”).

³³⁶ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para 39.

³³⁷ *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (S.C. 2010, c. 23), ss 15-19.

495. Although entities operating in a regulated industry have lower expectation of privacy than private individuals, the *Telecommunications Act* investigative powers are lacking in procedural protections when compared to those employed in other regulatory regimes with similar aims to modern telecommunications regulations. Moreover, investigations undertaken pursuant to the existing powers may even be vulnerable to challenge under the *Charter of Rights and Freedoms* in certain cases. The amendments TELUS suggests will bring telecommunications regulation into alignment with modern approaches to regulatory investigations, while ensuring that law enforcement agencies have the ability to carry out their mandates.
496. The *Telecommunications Act* establishes very broad investigatory powers, mistakenly described as “inspection” powers.³³⁸ The Act relies on an outdated dual track system whereby contraventions of the *Telecommunications Act* may be enforced by administrative sanctions or alternatively by way of more serious offence provisions.³³⁹ These powers are no longer sufficiently detailed or circumscribed for today’s regulatory environment, characterized by competition, forbearance, and broad behavioural regulation, rather than prescriptive technical regulation.

5.10.1. *Judicial Oversight of Investigations Is Required*

497. The *Telecommunication Act*’s primary investigative powers are established by section 71.³⁴⁰ This section allows for warrantless access to places of business, warrantless access to computer systems and documents, and production orders that are not subject to judicial supervision. The only apparent limitation is where an inspector seeks access to a dwelling-house, in which case a warrant is required. Aside from this one scenario, the

³³⁸ The CRTC does not use these powers to simply conduct inspections, but to investigate suspected violations of the *Telecommunications Act*. See *Show cause proceeding and call for comments: Failure of Topline Air Duct Cleaning Inc. and Mr. Naveed Raza to respond to a request for information letter and to provide information to the Commission as required*, Compliance and Enforcement Notice of Consultation CRTC 2017-281, para 1.

³³⁹ Archibald, Jull and Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Thomson Reuters updated annually) at 15:20:20.40 Multiple Track AMPS.

³⁴⁰ Additional investigative or production powers are given with respect to unsolicited telecommunications (s 41.2(c)), and the CRTC may require carriers to submit information required for the administration of the *Telecommunications Act*, in periodic reports or such other form determined by the Commission (s 37(1)(b)).

Telecommunications Act does not subject investigators to any judicial oversight, nor does it establish other procedural safeguards for persons subject to investigation (e.g., a process to challenge a production order).³⁴¹ The documents and data obtained through the conduct of these searches may be used against an individual or corporation in a subsequent prosecution or notice of violation process.

498. Even in a regulated context, investigations undertaken in the manner permitted by the *Telecommunications Act* may well violate one or more sections of the *Charter*. Accordingly, amendments are required to ensure that industry participants are not subject to unlawful investigations. Such amendments will also bring the *Telecommunications Act* in line with modern legislative practices to extend procedural protections in the context of regulatory investigations and will better reflect the nature of telecommunications regulation in Canada in the 21st century.
499. The recommendations in this section must be viewed in parallel to our recommendations for institutional division of powers articulated in Section 5.7. With the CRTC's many overlapping objectives and roles, the lines between a compliance inspection or investigation and a policy proceeding or dispute resolution matter, are completely blurred. Separating the enforcement function from other CRTC functions would assist in ensuring that investigations and inspections are carried out for their compliance purpose, and that regulated entities understand the purpose for which information is being sought.³⁴²

5.10.2. The Nature of Telecommunications Regulation Calls for More Specific Investigatory Powers

500. Investigative powers supporting other regulatory requirements now frequently provide superior procedural protections to those under the *Telecommunications Act*. In particular,

³⁴¹ See Gover Report, *Review of Section 11 of the Competition Act*: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02709.html>.

³⁴² The *Telecommunications Act* contemplates inspections by either the CRTC, regarding the sections of the legislation for which the CRTC is responsible (s 71(1)), or by the Minister, regarding the sections of the legislation for which the Minister is responsible (s 71(2)). TELUS' recommendations apply to both. However, the CRTC inspection powers are a more glaring issue, given that the scope of the CRTC's activities and functions is much broader than the Minister's.

TELUS notes that investigations under the *Competition Act* and investigations under provincial consumer protection legislation are subject to judicial oversight. These comparisons are directly relevant, since contemporary telecommunications regulation covers similar substantive ground as do those other regimes. Regulation of this type does not lend itself well to compliance audits. The “inspection” provisions under the *Telecommunications Act* are the sort of powers that enable precisely this type of audit, and are consequently unaligned with the measures they support. Accordingly, TELUS recommends that the *Telecommunications Act* investigative powers be amended to model the procedural protections offered in other, similar, contexts.

501. Assessment of whether a telecommunications service provider has complied with its obligations often requires detailed analysis and weighing of evidence: statutory interpretation, findings of facts or law, balancing of interests, and so on.
502. Determining compliance with measures of this nature is an inherently adversarial process: regulators and regulated entities will often disagree on the meaning and scope of requirements. Compliance cannot be assessed by simply checking items off a list, as might be possible in other regulatory environments.
503. Under the *Competition Act*, numerous provisions allow for the civil review of behaviours.³⁴³ These sections are roughly analogous to industry-specific provisions of the *Telecommunications Act* (for example, section 27(2) which prohibits, *inter alia*, unjust discrimination by carriers). However, unlike the *Telecommunications Act*, the *Competition Act* ensures that parties being investigated are afforded a degree of protection, for example, orders to produce documents or give oral evidence require court orders.³⁴⁴ Similarly, entry onto premises for an investigation require warrants.³⁴⁵ To be clear, these protections

³⁴³ See Part VIII of the *Competition Act*, addressing matters such as refusal to deal (s 75), abuse of dominant position (s 78), and others.

³⁴⁴ *Competition Act*, s 11.

³⁴⁵ *Competition Act*, s 15.

expressly apply whether the matter being investigated is criminal in nature *or* a reviewable practice.

504. Provincial consumer protections laws apply to non-federally regulated businesses, and govern similar subject matter, such as contract terms, rights of rescission, etc. Those laws provide substantially more protections to an entity under investigation, even if they also retain inspection powers with lesser protections. For example, Ontario's *Consumer Protection Act* requires that investigators obtain a warrant prior to conducting searches where there are reasonable grounds for suspecting a violation has occurred.³⁴⁶ Similarly, under the *Alberta Consumer Protection Act*, where investigators believe an offence has occurred, they may only enter premises or obtain documents with the consent of the investigated party, failing which they must obtain judicial authorization.³⁴⁷ Both Acts also include a form of inspection power, for use when violations are not suspected. The *Telecommunications Act* contains no such distinction, and as noted above, the CRTC uses the inspection powers to investigate suspected violations.
505. Regulators may conduct compliance audits which are not intended to uncover a breach of the *Telecommunications Act* but are for the purpose of protecting the public.³⁴⁸ However, Canadian businesses and individuals have an expectation that law enforcement officials may not enter their premises or search their persons or belongings for purposes of investigating suspected non-compliance without robust judicial oversight and other

³⁴⁶ S 107(1)(b).

³⁴⁷ S 147-148.

³⁴⁸ [*Comité Paritaire de l'Industrie de la Chemise v. Potash; Comité Paritaire de l'Industrie de la Chemise v. Sélection Milton*](#), 1994 CarswellQue 113, [1994] 2 S.C.R. 406 *sub nom.* *R. v. Potash; R. v. Sélection Milton*. La Forest J. held that the scope of the constitutional guarantee afforded by s. 8 may vary depending on whether a search or inspection is involved. At p. 417, he adopted the following passage distinguishing an inspection from a search:

[TRANSLATION] An inspection is characterized by a visit to determine whether there is compliance with a given statute. The basic intent is not to uncover a breach of the Act: the purpose is rather to protect the public. On the other hand, if the inspector enters the establishment because he has reasonable grounds to believe that there has been a breach of the Act, this is no longer an inspection but a search, as the intent is then essentially to see if those reasonable grounds are justified and to seize anything which may serve as proof of the offence.

procedural protections. However, none of these protections are contemplated in the current *Telecommunications Act*. Instead, only broad “inspection” powers are granted.

5.10.3. *Investigations may constitute unreasonable search or seizure*

506. Section 8 of the *Charter* guarantees the right not to be subjected to unreasonable search or seizure. Searches for regulatory purposes may be subject to less stringent standards than those conducted for criminal law purposes.³⁴⁹ However, where a search is for a criminal law purpose, it must comport with the *Charter*. At a minimum, once an investigator has reasonable grounds to believe that an offence has been committed, the search must be carried out under stricter criminal law standards.³⁵⁰ Officials “cross the Rubicon” when the inquiry in question engages the adversarial relationship between the regulated entity and the state.³⁵¹
507. While the *Telecommunications Act* is mostly a regulatory statute, there are several ways in which investigations and proceedings under the *Telecommunications Act* may trigger the application of the *Charter*. First, violations of the *Telecommunications Act* and CRTC determinations are offences punishable by summary conviction and fines.³⁵² Section 11 of the *Charter* provides that “[a]ny person charged with *an offence* has the right...” (emphasis added) to a series of enumerated rights. Summary conviction offences trigger the application of this section.
508. Second, the imposition of administrative monetary penalties *may* also trigger Charter protections. Generally, administrative monetary penalties are intended to promote compliance rather than punish, and, in many cases, administrative monetary penalties

³⁴⁹ *Goodwin v British Columbia (Superintendent of Motor Vehicles)* [2015] 3 SCR 250, para 60.

³⁵⁰ *R v Potash; R v Selection Milton*, [1994] 2 SCR 406, para 29.

³⁵¹ In *R. v. Jarvis*, [2002 CarswellAlta 1440](#), [2002] 3 S.C.R. 757, the Supreme Court stated: “In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials “cross the Rubicon” when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry” (para 88).

³⁵² *Telecommunications Act*, s 73.

proceedings will not engage *Charter* protections. However, administrative monetary penalties may cross a boundary into the punitive realm, at which point the *Charter* applies. In particular, where the amount of the penalty is out of proportion to the regulatory purpose, it may have a true penal consequence.³⁵³ This outcome is all the more likely in the context of the *Telecommunications Act*, where rights of appeal are quite limited (as discussed elsewhere in this submission), and entities subject to administrative monetary penalties are deprived of this procedural protection.³⁵⁴

509. In the specific case of the *Telecommunications Act*, while the notional purpose of the administrative monetary penalty is to promote compliance and not to punish,³⁵⁵ the *Telecommunications Act* nevertheless creates the possibility of high administrative monetary penalties, as discussed elsewhere in this submission.
510. This does not mean that the *Telecommunications Act*'s general administrative monetary penalties regime is inherently penal, always triggering *Charter* protections. However, it does mean that a given AMP may cross a line, after which point *Charter* protection is engaged. The line is not yet well defined and may well be the subject of future disputes between the regulated entities and the regulator.
511. Entities subject to investigation under the *Telecommunications Act* may be subject to criminal sanction, in the form of summary convictions or administrative monetary penalties with a true penal consequence. Given all these factors, an investigator may unwittingly cross into territory where the regulated entity is guaranteed certain procedural rights that are not contemplated in the *Telecommunications Act*. The entire process would, at that point, become vulnerable to challenge. Amending the *Telecommunications Act* to provide

³⁵³ *Guindon, supra*, at para 77. An important factor in *Guindon* was that the *Income Tax Act* utilizes a somewhat mechanical formula for the assessment of the penalty. By way of contrast, the *Telecommunications Act* AMPs provisions list relevant factors in a manner that is far more similar to relying on principles used in criminal sentencing.

³⁵⁴ The presence of full right of appeal was noted by the Supreme Court in its disposition of *Guindon, supra*, at para 90 – while *Charter* rights did not extend to the situation considered in that appeal, “those against whom penalties are assessed are not left without recourse or protection.” By contrast, those against whom penalties are assessed under the *Telecommunications Act* would have no such right of full appeal.

³⁵⁵ *Telecommunications Act*, s 72.002(2).

more structure and oversight to the investigatory process would help avoid this outcome. It would also afford entities with a measure of protection of their privacy interests.³⁵⁶

512. Even in those cases where there is no criminal law investigation or purpose, and the case is purely administrative, section 8 Charter rights may still apply if there is a search or seizure that is unreasonable.³⁵⁷

5.10.4. *Recommended Legislative Changes*

513. In view of the above, the *Telecommunications Act* should be amended to establish judicial oversight of investigations and to permit entities subject to investigation to challenge the scope of requests from investigators in appropriate circumstances. There is a simple, elegant solution available to resolve the tensions addressed above. The CRTC acts as the enforcer of more than one piece of legislation. In addition to exercising powers under the *Telecommunications Act* and the *Broadcasting Act*, the Commission also has investigation and enforcement powers under CASL, specifically set out in section 15-19 thereof. Similar to the *Telecommunications Act*, CASL provides for summary conviction offences as well as the possibility of significantly high administrative monetary penalties.³⁵⁸ The investigative and enforcement powers of CASL better balance the privacy interests of the entity being investigated with the purposes of the legislation. They also have the benefit of being familiar to the CRTC and will streamline processes in use by the CRTC's enforcement division.
514. Moreover, TELUS recommends that the reference to investigations related to unsolicited telecommunications in section 41.2 be amended to note that any such investigations be undertaken pursuant to the new investigative powers we are suggesting. Finally, section 37

³⁵⁶ Certain provisions of the *Criminal Code* will apply to investigation of offences under the *Telecommunications Act*, see *Interpretation Act*, s 34(2). But given that compliance under the *Telecommunications Act* is rarely pursued through the offence provisions, it is unlikely that CRTC investigations would be guided by those provisions. As such, the CRTC may find itself unable to pursue convictions in appropriate cases because the investigation did not comply with the *Criminal Code*.

³⁵⁷ Shea Coulson "Case Comment on Goodwin v. British Columbia (Superintendent of Motor Vehicles), [2015 CarswellBC 2938](#), [2015 SCC 46](#): Reviewing the Consequences of a Search or Seizure in Administrative Regimes"(2017), 50 U.B.C. L. Rev. 37-48.

³⁵⁸ CASL, ss 20, 42-43, 46. The maximum penalty for a single violation is \$10,000,000 (s 20(4)).

should be amended to clarify that these document production powers do not apply to investigations. If a form of inspection power is to be retained alongside new investigatory powers, the provision should specify that inspections are only applicable where violations are not suspected, and that they should be proportional to their purpose.

5.10.5. *Changes to the Broadcasting Act May Require a Consideration of Investigative Powers in the Broadcasting Context*

515. The *Broadcasting Act* does not contain investigative powers akin to those discussed above in relation to the *Telecommunications Act*, and it would be unnecessary to introduce such investigative powers into the regulation of broadcasting. However, to the extent that the introduction of an administrative monetary penalty regime into the *Broadcasting Act* may be contemplated as a result of this legislative review, TELUS notes that it would trigger all of the above-noted procedural considerations, which should be addressed by way of statute.

5.11. Other Suggestions to Improve the Effectiveness of the CRTC

516. In this section, TELUS suggests various reforms that would enhance the effectiveness of the CRTC, including reducing the number of Commissioners, providing budget for expert staff, the establishment of a new Office of Economics and Analytics, publication of a code of consolidated CRTC regulatory rules, and reforming the existing CRTC costs award process.
517. Although the Broadcasting and Telecommunications Legislative Review Panel is calling for reforms to update the three principal statutes of communications legislation, the following proposed ancillary changes to the CRTC would improve the regulatory functioning of the tribunal

5.11.1. *Reducing the Number of CRTC Commissioners*

518. Under the *CRTC Act*, thirteen full-time commissioners may be appointed to the CRTC.³⁵⁹ As noted in the 2006 Telecommunications Policy Review Panel Final Report, this is an

³⁵⁹ *CRTC Act*, section 3(1).

exceptionally large number of compared to other OECD countries. This is the case even despite recent reform where the position of part-time commissioner was abolished.³⁶⁰

519. As noted in the 2006 Final Report, the large number of CRTC commissioners can complicate and delay the decision-making process and result in lowest common denominator consensus decisions.³⁶¹ Based on the experience of other countries, it is not necessary to have more than five commissioners,³⁶² who would undertake both telecommunications and broadcasting functions, and the CRTC's new responsibilities for spectrum management pursuant to TELUS recommendation to transfer responsibility for spectrum management from ISED to the CRTC as outlined elsewhere in this submission (see Section 5.2).

520. As noted by the Telecommunications Policy Review Panel in its Final Report, the recruitment process and compensation levels may also have to be revisited to facilitate a reduced number of commissioners and their expert staff.³⁶³

5.11.2. *Providing Budget for Expert Staff*

521. As further noted by the Telecommunications Policy Review Panel, from time to time the CRTC will require specialize professional expertise not available in-house. As that Panel noted, timely recourse to outside consulting expertise would assist the CRTC in making decisions on complex files. TELUS concurs with Panel's recommendation that the CRTC should be granted clear authority and sufficient budget to retain outside expert consultant at market rates when required.³⁶⁴ Additionally, TELUS recommends that the CRTC have the authority and budget to develop and maintain in-house expertise.

³⁶⁰ Formerly up to six part-time commissioners could be appointed, which was repealed pursuant to (R.S.C. 2010, c. 12, s. 1701.

³⁶¹ 2006 Telecommunications Policy Review Panel Final Report, pp 9-21.

³⁶² 2006 Telecommunications Policy Review Panel Final Report, Recommendation 9-6, pp 9-22.

³⁶³ Pursuant to Recommendations 9-7 and 9-8.

³⁶⁴ 2006 Telecommunications Policy Review Panel Final Report, Recommendation 9-10, pp 9-25 and 26.

5.11.3. *New Office of Economics and Analytics*

522. Consistent with the preceding recommendation to provide budget for expert staff, TELUS further recommends that the Legislative Review Panel also consider the establishment of a new Office of Economics and Analytics in the CRTC, similar to the office of that name maintained by the Federal Communications Commission.³⁶⁵
523. TELUS recommends the establishment of such an office to ensure regulatory decisions are consistent with the economic objectives of the *Telecommunications Act* and to better facilitate the integration of economic analysis into the CRTC's decision-making process.
524. The FCC's Office of economics an Analytics includes four divisions:
- The Economic Analysis Division, which provides analytical and quantitative support for rulemakings, transactions, reviews, adjudications, and other matters.
 - The Industry Analysis Division, which designs and administers significant, economically-relevant data collections.
 - The Auctions Division, which leads auction design and implementation issues, including for spectrum and universal service auctions.
 - The Data Division, which develops and implements best practices, processes, and standards for data management.³⁶⁶
525. The creation of such a new office, either through the FCC's organizational structure or one adapted to the CRTC's current structure, could contribute significantly to the work of the CRTC, including its existing functions and facilitating its new role as project manager for the CRTC's new broadband fund with respect to mapping and other data requirements. Such an office would also facilitate a new role for the CRTC for spectrum management as recommended by TELUS in Section 5.2.

³⁶⁵ FCC Opens Office of Economics and Analytics, FCC News Release, December 11, 2018: <https://docs.fcc.gov/public/attachments/DOC-355488A1.pdf>.

³⁶⁶ *Ibid.*

5.11.4. *Publishing a Consolidation of CRTC Regulatory Rules*

526. Following on the recommendation of the 2006 Telecommunications Policy Review Panel Final Report, in order to facilitate greater regulatory transparency and compliance, TELUS recommends that the CRTC establish a consolidated regulatory code of rules which would be easily accessible on the CRTC website and updated regularly. The relevant recommendation is as follows:

Recommendation 9-23

The CRTC should establish a single code of the regulatory rules that apply to telecommunications markets by consolidating and updating rules now contained in various decisions, orders, rules, regulations, public notices, circulars and other documents. This consolidated approach to rule making should be applied prospectively in the case of new CRTC rules. In the case of the CRTC's existing rules, the consolidation should be completed within three years.³⁶⁷

527. Although the above recommendation was made in the context of telecommunications matters, TELUS proposes that a consolidated regulatory code be established for both telecommunications and broadcasting rules. The codes would contain only current rules and indicate when prior documents have been amended or replaced by a subsequent document. As the Telecommunications Policy Review Panel noted, a consolidated code would make regulatory compliance less time-consuming and less costly and improve the transparency of the regulatory framework.³⁶⁸
528. In 2018, the CRTC celebrated its fiftieth year of operation, that began with the regulation of broadcasting in 1968 and the assumption of regulatory oversight for telecommunications from the Canadian Transport Commission in 1976. The CRTC's regulatory framework has evolved and changed significantly over the past decades, including a significant review of its telecommunications regulatory framework in the late 2000s following the release of the Policy Direction. A consolidation of the CRTC's vast rule-making history is long past

³⁶⁷ 2006 Telecommunications Policy Review Panel Final Report, Recommendation 9-23, pp 9-46 and 48.

³⁶⁸ 2006 Telecommunications Policy Review Panel Final Report, Recommendation 9-23, pp 9-47.

due, and would be welcome now, as an aid for industry, other stakeholders, and the CRTC itself.

5.11.5. *Reform of the CRTC Costs Awards Function*

529. TELUS also recommends that section 56 of the *Telecommunications Act*, which establishes the costs awards regime, be abolished and that funding for participation in CRTC proceedings come from the federal government. In this regard, TELUS urges the CRTC to adopt Recommendation 9-30 from the 2006 Telecommunications Policy Review Panel Final Report which is as follows:

Recommendation 9-30

The government should review the issue of public interest group participation in telecommunications regulatory proceedings. Funding for such participation should come from a multi-year commitment by government to subsidize such participation, rather than costs awards imposed by the CRTC on individual telecommunications service providers.

530. The CRTC has authority to award costs pursuant to section 56 of the *Telecommunications Act*. Under the guise of this authority, the CRTC has established procedures for the award of costs pursuant to the *Canadian Radio-television and Telecommunications Rules of Practice and Procedure* (the “Rules”)³⁶⁹ and has also established guidelines for the award of costs which were substantially updated in 2010.³⁷⁰
531. Despite this elaborate regime, the award of costs has become increasingly contentious in recent years. In many situations, multiple groups purporting to represent the public interest participate, often raising substantially the same concerns, leading to superfluous submissions. Also, Larger and more frequent costs awards have resulted in acrimonious disputes between consumer groups and other interested parties whose aim is to further the

³⁶⁹ Rules, Part 4, sections 60-70.

³⁷⁰ *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, and attached *Guidelines for the Assessment of Costs*, December 23, 2010. See also *Guidance for costs award applicants regarding representation of a group or a class of subscribers* Telecom Information Bulletin 2016-188.

public interest on the one hand, and those required to pay these costs in the telecommunications industry on the other hand. Costs awards now involve significant amounts of money due to more frequent proceedings, which often involve complex matters dealt with in proceedings which occur over long periods of time.

532. The current costs award process is flawed. It is a legacy from the monopoly era when the incumbent local exchange carriers were assessed costs which they could recover from their regulated rate of return, a form of regulation now long gone. This is no longer the case in a competitive industry where the incumbents are no longer subject to rate of return regulation but rather are subject to price cap regulation for the services which are still regulated. This means that all cost respondents must pay cost awards out of their operating revenues, which means that there is no recovery for these costs and marketplace profitability is affected by cost claims.
533. Despite recent reforms, the current situation is untenable to the extent that it pits consumer groups that in many cases rely significantly on costs awards against an industry that must pay for these costs from their bottom line. Timeliness of payments, when costs are ultimately awarded, is also an issue for consumer groups which frequently must continue operations for long periods of time without payment.
534. As noted by the Telecommunications Policy Review Panel, the problems of the current costs awards regime can be remedied by making funding available as a subsidy directly from the federal government. In this regard, TELUS notes that ISED has provided funding to consumer groups in the past for research that has been used in CRTC proceedings. The TELUS recommendation to provide cost award funding directly from the federal government would simply reinforce the federal government's current commitment to protecting the consumer interest.
535. In summary, the TELUS recommendation to reform the costs award process has several benefits including reaffirming the federal government's commitment to the consumer interest, eliminating time-consuming costs awards disputes that require extensive time and resources for consumer groups, the industry, and the regulator to resolve, creating more

certainty of funding for participating groups, and relieving the industry from the payment of increasing costs awards that they can no longer afford.³⁷¹

³⁷¹ Further in this regard, TELUS notes that the industry is also responsible for paying telecommunications fees, contribution fees, spectrum fees and numerous other fees which amount to hundreds of millions of dollars a year.

6.0 Responses to Questions in the Government of Canada's Terms of Reference to the Broadcasting and Telecommunications Legislative Review Panel

Universal Access and Deployment

1.1 Are the right legislative tools in place to further the objective of affordable high quality access for all Canadians, including those in rural, remote and Indigenous communities?

TELUS Response:

536. TELUS is proposing a new set of Canadian telecommunications policy objectives to replace the existing objectives, including objective 7(b) which is cited in the question. TELUS recommends new objectives that emphasizes the importance of competition, innovation and investment to facilitate affordable, high quality access for all Canadians, including those in rural, remote and Indigenous communities. In those cases where market forces are insufficient to provide access, the CRTC has sufficient legislative tools with respect to subsidies to achieve this result, which should be considered in concert with other government subsidies to address access.

1.2 Given the importance of passive infrastructure for network deployment and the expected growth of 5G wireless, are the right provisions in place for governance of these assets?

TELUS Response

537. TELUS makes several recommendations for legislative changes required to ensure the timely deployment of network facilities, including those for wireline and wireless 5G networks. TELUS suggests changes to the *Telecommunications Act* to ensure that carriers have access to public lands and assets. TELUS also suggests various changes to the *Radiocommunication Act* ensure timely deployment for passive network infrastructure, including that the site approval processes for wireless equipment installation does not unduly hinder deployment. These amendments are discussed above in Section 2.6.

Competition, Innovation, and Affordability

2.1 *Are legislative changes warranted to be better promoted competition, innovation, and affordability?*

TELUS Response

538. Competition and innovation and investment should be recognized as key Canadian telecommunications policy objectives of the new legislative framework.
539. There is no trade-off between competition, innovation and affordability. The goal of affordable telecommunications services will be accomplished as a result of a focus on the economic concept of dynamic efficiency which emphasizes investment, innovation and facilities-based competition. Issues of income and affordability cannot be solved with the limited tools at the disposal of a sector-specific regulator and are best dealt with by other government departments. TELUS elaborates on these matters in Sections 2.2 through 2.5.

Net Neutrality

3.1 *Are current legislative provisions well-positioned to protect net neutrality principles in the future?*

TELUS Response

540. Yes, the current legislative provisions are sufficient to protect net neutrality principles in the future. Sections 27(2) and 36 of the *Telecommunications Act* are sufficiently flexible to enable the CRTC to develop and modify a net neutrality framework. They continue to be sufficient to address any future concerns. However, TELUS further recommends that the CRTC exercise greater flexibility with respect to the implementation of its current regulatory policy pertaining to net neutrality pursuant to its existing statutory powers.
541. TELUS' position is set in more detail in Section 4.5.

Consumer Protection, Rights, and Accessibility

4.1 Are further improvements pertaining to consumer protection, rights, and accessibility required in legislation?

TELUS Response

542. There are no legislative changes required pertaining to consumer protection and rights in the *Telecommunications Act*. The CRTC already has jurisdiction over consumer protection and rights for telecommunications services and has exercised this jurisdiction by establishing numerous consumer protection measures through the terms of tariffs and binding conditions of services, including codes of conduct.
543. Regarding accessibility, the CRTC already has jurisdiction to implement rules about accessibility of telecommunications services, and has done so in many past decisions. TELUS' position on these issues is set in more detail in Section 4.3.

Safety, Security and Privacy

5.1 Keeping in mind the broader legislative framework, to what extent should the concepts of safety and security be included in the Telecommunications Act/Radiocommunication Act?

TELUS Response

544. The legislative framework is already sufficient to address concepts of safety and security. However, TELUS suggests that both concepts could be included in the policy objectives.

Safety

545. TELUS recommends that one of the revised Canadian telecommunications policy objectives should be “to enhance the social well-being of Canadians and the inclusiveness of Canadian society by...maintaining public safety and security, including limiting public nuisance through telecommunications.”
546. This new policy objective simply recognizes and reinforces the role of telecommunications in enhancing public safety, and takes into account existing rules that the CRTC has put in

place for telecommunications service providers to enhance public safety for Canadians. Recent examples include the CRTC's determinations that all wireless service providers are to participate in the national public emergency alert system³⁷² and that the current 911 system be upgraded to "next-generation" 911 services.³⁷³ These are ongoing mandates for wireless and wireline telecommunications providers that further public safety for Canadians. TELUS expects and acknowledges that these types of mandates will continue as part of any revised *Telecommunications Act*.

Security

547. TELUS' proposed telecommunications policy objective noted above includes security, in addition to public safety. The inclusion of security as an objective recognizes that the CRTC has, and continues, to carry out a number of functions addressing this important public policy issue.
548. In this regard, the Commission has issued decisions with respect to telemarketing activities, instituted the National Do Not Call List in 2008, has an active role in CASL enforcement activities and is taking measures to deal with nuisance telephone calls, pursuant to its powers under section 41 of the *Telecommunications Act*.
549. However, TELUS notes that security is a multi-dimensional issue which goes beyond the purview of the CRTC. In this regard, TELUS further notes that the Government of Canada recently renewed its national policies for public safety and cyber security, including the *National Cyber Security Strategy*, and the *National Strategy and Action Plan for Critical Infrastructure*. These initiatives confirm the Government's commitment to a collaborative and cross-sectoral approach to public safety and security.
550. Within the ICT sector, the Canadian Security Telecommunications Advisory Council (CSTAC) has been an effective senior level forum to collaboratively discuss emerging

³⁷² *Implementation of the National Public Alerting System by wireless service providers to protect Canadians*, Telecom Regulatory Policy CRTC 2017-91.

³⁷³ *Next-generation 9-1-1 – Modernizing 9-1-1 networks to meet the public safety needs of Canadians*, Telecom Regulatory Policy CRTC 2017-182.

security problems and solutions. This dialogue has been the foundation for a number of meaningful and productive initiatives on telecommunications security best practices, and has not raised any gaps or impasses that suggest legislative reform is required.

551. TELUS' experience suggests that the CRTC requires no additional substantive powers with respect to security. Legislation and regulation are not ideal tools to keep pace with security challenges from new technology, because cyber threats and infrastructure will have changed by the time they can be enacted or revised, and security challenges and solutions tend to be specific to groups of people and businesses.
552. The challenges and way forward for children and youth are different than those for small business owners. Blockchain and cryptocurrencies mean different things to the financial sector than they do to the energy sector. Telecommunications policy is too blunt an instrument to accommodate these differences and safety or security improvements will involve many non-regulated stakeholders.
553. Due to the oversight of security by other Canadian, federal and provincial, legislation and bodies, TELUS recommends that beyond recognition of the fact that security is part of the CRTC's activities by formally incorporating it as a Canadian telecommunications policy objective, no other changes to the *Telecommunications Act* are required with respect to this issue. While including security among the policy objectives found in section 7 recognizes this important concern for Canadians, the CRTC needs no new legislative powers to fulfill this policy objective for the reasons outlined above. Stakeholders are adequately served by the Government's current collaborative and cross-sector approach to security.

Effective Spectrum Regulation

6.1 Are the right legislative tools in place to balance the need for flexibility to rapidly introduce new wireless technologies with the need to ensure devices can be used safely, securely, and free of interference?

554. The current legislative tools do not strike the right balance on "the need for flexibility to rapidly introduce new wireless technologies with the need to ensure devices can be used safely, securely, and free of interference." As explained to Section 5.2, to ensure

radiocommunication are regulated with the utmost of integrity, fairness and transparency, TELUS recommends the transfer of the responsibility for spectrum regulation from the Minister of Innovation, Science, and Economic Development to the CRTC. TELUS notes that making this change will deliver several key benefits, notably by providing for more stable regulatory processes, and the avoidance of political pressures.

555. TELUS also recommends that for regulations to be effective, they must be efficient, flexible and timely, based on current market conditions. Moreover, spectrum management must extend beyond a traditional prescriptive model towards offering licensees tangible spectrum usage rights and a competitively neutral environment through the introduction of class licences to better regulate the burgeoning use of licence-exempt apparatus under more effective regulation. Further details are provided in Section 5.2.

Governance and Effective Administration

7.1 Is the current allocation of responsibilities among the CRTC and other government departments appropriate in the modern context and able to support competition in the telecommunications market?

TELUS Response

556. The current allocation of responsibilities among the CRTC and other governments is no longer appropriate in the modern context and should be reformed to better support competition in the telecommunications market. In this regard, TELUS recommends numerous reforms, including changing the institutional roles for ISED, the Governor in Council and the CRTC.
557. TELUS' recommendations pertaining to a changed role for ISED are found in Section 5.2.
558. TELUS' recommendations pertaining to the role of the Governor in Council are found in Section 5.6.
559. TELUS proposes numerous recommendations for institutional reform for the CRTC. These include changes to its organizational structure to separate its advocacy, enforcement

and adjudicative functions to ensure fairness in its decision-making, various legislative reforms under the *Telecommunications Act* to better define, refine and constrain the CRTC's existing powers under that legislation, and other reforms to the CRTC's operations and functioning that would require in certain cases changes to the *Canadian Radio-television and Telecommunications Act*.

560. TELUS' full response to this question is found under Theme D in various, including Section 5.1, Section 5.7, Section 5.3, Section 5.4, Section 5.8, Section 5.9, Section 5.10, Section 5.11, as well as Section 4.6 under Theme C.
561. TELUS also recommends combining the *Telecommunications Act* and the *Radiocommunication Act* under a single statute, further details concerning which may be found under Section 5.2.

7.2 *Does the legislation strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?*

TELUS Response

562. The current *Telecommunications Act* does not strike the right balance "between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way." As explained in Section 5.2, TELUS recommends in particular that the objectives set out in the current legislation are fundamentally flawed and need to be replaced. TELUS also recommends that, assuming that amended legislation would also continue to include the current policy direction power, the existing political appeal power (Governor in Council power to vary, rescind or refer back CRTC decisions) should be eliminated, or as a distinct second-best alternative, be revised to limit the Governor in Council to sending back CRTC decisions for reconsideration or setting them aside, which is the existing provision governing appeals on broadcasting decisions.
563. TELUS' full response to this question is found under Theme D, including Section 5.2, Section 5.6, and the expert evidence of Professor Richard Schultz, Professor of Political Science, McGill University entitled "Controlling the Habit: A Paper Submitted in Support

of the TELUS Submission to the Broadcasting and Telecommunications Legislative Review Panel” (Appendix 9 to TELUS’ submission).

Broadcasting Definition

8.1 How can the concept of broadcasting remain relevant in an open and shifting communications landscape?

TELUS Response

564. In order to remain relevant, Canada’s broadcasting legislative framework needs to be modernized. In doing so, the federal government must recognize that the broadcasting system’s two foundational pillars – (i) a “walled garden” in which consumers must obtain programming through the regulated system, and (ii) a distinct Canadian program rights market – are being eroded due to new technologies that have enabled competition from around the world in the provision of programming services.
565. In TELUS’ view, an essential component of any effort to address the challenges facing the Canadian broadcasting system today is a modernized licensing framework that is both flexible enough to ensure that direct competitors within the Canadian broadcasting industry are playing by the same rules, and adaptable enough to accommodate changes in technology and the business models that drive the production and delivery of content.
566. TELUS proposes updating the relevant broadcasting nomenclature to classify market players into two categories:
- a. **“Programming service”** would replace “programming undertaking” and “network”, and would refer to any entity that exercises control over programming in Canada –whether domestic or foreign.
 - b. **“Content aggregator”** would capture the concept of the “broadcasting distribution undertaking”, and be defined as a service that aggregates content by licensing it on a non-exclusive basis for distribution to consumers.

567. Notably, TELUS recommends that foreign programming services that reach a certain Canadian subscriber threshold also be authorized to operate in the Canadian market by the CRTC, and be required to fulfill certain policy objectives, namely supporting the creation and production of Canadian content.
568. With respect to content aggregators, TELUS submits that licensing requirements should be eliminated, and replaced with (i) pared down and more tightly-focused regulatory obligations that emphasize measures that support Canada's cultural sector, rather than regulating what is best left to market forces, and (ii) concomitant privileges that help offset any burdens associated with the cultural support measures that content aggregators assume. Furthermore, TELUS submits that foreign content aggregators should be allowed to compete in the Canadian market.
569. While TELUS favours streamlining the policy objectives relevant to private market players, the objectives of Canada's public broadcaster, CBC/Radio Canada, should be more extensive and address a variety of social and cultural goals that cannot be fulfilled via market forces alone.
570. TELUS's proposal for a modernized broadcasting legislative and regulatory framework can be found at sections 3.1 (new definitions and concepts), 3.2 (redefining the "elements" of the Canadian broadcasting system) and 3.3 (new policy objectives) of this submission.

8.2 *How can legislation promote access to Canadian voices on the Internet, in both official languages, and on all platforms?*

TELUS Response

571. As noted in Section 3.3, private commercial Canadian companies now compete with global content providers operating within the broadcasting system. It is unsustainable to expect Canadian private companies to continue to contribute in the same manner to the Canadian broadcasting system as they did when they operated in a "walled-garden" protected from external competition. The creation and production of Canadian content should remain a requirement for private Canadian programming services; however, a more open and

flexible regulatory approach is needed to ensure that the pursuit of commercial success, domestically and globally, is a priority for private broadcasters. A new regulatory approach must empower private programming services to innovate and take risks, whether in the types of programs they create, the business models they pursue, or otherwise.

572. Accordingly, private broadcasters should not be burdened by obligations to meet extensive social and cultural objectives that may hinder the pursuit of commercial success. They should be required merely to produce home-grown content using a percentage of their revenues. There should be no qualitative requirements as to the “Canadian-ness” of the programming created, nor any prescriptions as to the type of programming to be created.
573. In exchange for this relief, private programming services should no longer expect support, financial or otherwise, from the rest of the broadcasting system. This would ensure their full commitment to the success of the programming they create, and prevent innovation from being hindered by an excessive reliance on support mechanisms.
574. Other more specific social and cultural goals should be ascribed to the public element of the Canadian broadcasting system.
575. Moreover, the foreign element should also be held accountable for making some contributions to the Canadian broadcasting system commensurate with their access to the Canadian market.

Broadcasting Policy Objectives

9.1 How can the objectives of the Broadcasting Act be adapted to ensure that they are relevant in today’s more open, global, and competitive environment?

TELUS Response

576. As noted in Section 3.3, TELUS submits that new *Broadcasting Act* policy objectives should be divided into three categories, corresponding to the three proposed “elements” of Canada’s broadcasting system: private, public and foreign.

577. The policy objectives affecting private market players should be limited in number, and primarily focus on the creation and production of home-grown programming for the purposes of commercial success, domestically and globally. These objectives should be reasonable and attainable without the current guaranteed internal revenue streams, which are no longer sustainable in a global market. Proposed objectives for programming undertakings can be found at Section 3.3.1, while proposed objectives for content aggregators can be found at Section 3.3.2.
578. Because a re-imagined framework would provide greater flexibility to the private sector to pursue commercial success, domestically and globally, the achievement of important social and cultural goals would need to be met through the public broadcasting element. Indeed, CBC/Radio-Canada should be entrusted with distributing culturally important, but perhaps otherwise commercially unviable programming. The expansion of the public broadcaster's mandate should be met with a commitment to provide the necessary funding to fulfil these objectives (see Section 3.3.3).
579. Finally, certain policy objectives would be targeted at foreign programming services and content aggregators, and aim to ensure that these players bear regulatory obligations that are commensurate with their access to the Canadian market (see Section 3.3.4).

9.2 Should certain objectives be prioritized? If so, which ones? What should be added?

TELUS Response

580. As noted above, TELUS believes that Canada's broadcasting policy objectives should be streamlined, and divided into three categories, *i.e.*, those to be fulfilled by the private, public and foreign elements. Particular attention should be given to the policy objectives for private sector market players, which should focus on supporting a competitive industry rather than relying on restrictive and heavy-handed policy obligations. It is imperative that Canada's broadcasting sector be allowed to innovate to the maximum extent feasible if it wishes to ensure its continued relevance for years to come.

9.3 *What might a new approach to achieving the Act's policy objectives in a modern legislative context look like?*

581. Please see our answers to questions 9.1 and 9.2.

TELUS Response

Support for Canadian Content and Creative Industries

10.1 *How can we ensure that Canadian and non-Canadian online players play a role in supporting the creation, production and distribution of Canadian content?*

TELUS Response

582. As noted in TELUS' answer to question 8.1, TELUS is proposing that, under a new Broadcasting legislative framework, market players be classified into two categories.

583. "Programming service" would replace "programming undertaking" and "network", and would refer to any entity that exercises control over programming in Canada –whether domestic or foreign.

584. "Content aggregator" would capture the concept of the current "broadcasting distribution undertaking", and be defined as a service that aggregates content by licensing it on a non-exclusive basis for distribution to consumers.

585. Under TELUS's proposed framework, programming services would continue to be required to invest in Canadian content, as a quid pro quo for the control they exercise over the availability of programs in Canada. Furthermore, foreign services such as Netflix and Amazon Prime would also qualify as "programming services", as they hold control over programming that is distributed in Canada. Under TELUS' proposed new rules, foreign programming entities that reach a certain Canadian subscriber threshold would need to be authorized to operate in the Canadian market and would be required to fulfil certain policy objectives commensurate with their access to the Canadian market (see Section 3.3.4).

586. As noted in Section 3.3.2, TELUS proposes to abandon the prescriptive and highly burdensome licensing framework for content aggregators in favour of a flexible, incentive-

based regime. Under this regime, content aggregators would be able to register commitments to invest in and distribute Canadian content, in exchange for access to certain privileges that would help offset the effect of those obligations on their ability to compete. Under this new framework, TELUS believes foreign content aggregators should be treated no differently than Canadian content aggregators. Rather, foreign content aggregators should be regulated in the same permissive fashion, and afforded the same opportunity to voluntarily assume obligations that further Canadian cultural goals in exchange for regulatory privileges.

587. Accordingly, TELUS sees the regulatory approach it has proposed as a “win-win” for Canadian broadcasting. It will ensure that foreign programming services that have activities in Canada compete on an even footing with their Canadian competitors.

Democracy, News and Citizenship

11.1 Are current legislative provisions sufficient to ensure the provision of trusted, accurate, and quality news and information?

TELUS Response

588. As noted in Section 4.7, TELUS believes that an informed citizenry is essential to the democratic process, and that the creation of accurate and diverse news should be an objective for public funding. While TELUS agrees with the Panel that the proliferation of false information is a threat Canadian democracy, it would caution the Panel against legislative overreach, and submits that many policies aimed at combating false news – particularly those emanating from social media – fall outside the purview of the *Broadcasting Act*.
589. Government has rightfully recognized that a large part of the answer to this thorny problem is the creation of “good news” to combat the “fake news”. To this end, in the 2018 Fall Economic Statement, the Government committed close to \$600M over five years to support Canadian journalism in all its forms. The measures to support Canadian journalism consist of three initiatives: allowing non-profit news organizations to act as registered charities,

introducing a new refundable tax credit to support original news content creation, and introducing a new temporary non-refundable tax credit to support subscriptions to Canadian digital news media.³⁷⁴

590. TELUS also addresses the need for journalistic integrity principles in the context of addressing concerns relating to the extreme vertical integration of Canada's media industry. As discussed in greater detail in Section 3.4 above, TELUS remains concerned with the way in which the ownership of media assets provides vertically integrated entities with the ability to exert influence on news and informational programming to the benefit of their own corporate interest and the detriment of competitors. It is important for Canadians to access unbiased information, and the ever-rising level of vertical integration in the Canadian media landscape provides certain news programming organizations with the incentive to act in ways benefiting themselves and their shareholders as opposed to consumers. As a result, legislative and regulatory levers must be developed to uphold Canadians' right to access unbiased news, and curb the ability of vertically integrated firms to unduly influence their news programming organizations.
591. Ultimately, in regards to the proliferation of fake news on social media, TELUS notes that much of this content would not be captured by the legislative framework for the the broadcasting system. TELUS nevertheless recognizes that this form of communication raises important concerns that should be addressed by government outside of the broadcasting framework.
592. To this end, TELUS notes the recent Report of the Standing Committee on Access to Information, Policy and Ethics,³⁷⁵ and supports the recommendation of the committee with regard to enacting regulation to obligate social media:

- to clearly label content produced automatically or algorithmically (e.g. by 'bots');

³⁷⁴ See references in Section 3.1.1.

³⁷⁵ Report of the Standing Committee on Access to Information, Privacy and Ethics, "*Democracy under threat: Risks and solutions in the era of disinformation and data monopoly*", December 2018.

- to identify and remove inauthentic and fraudulent accounts impersonating others for malicious reasons;
- to adhere to a code of practices that would forbid deceptive or unfair practices and require prompt responses to reports of harassment, threats and hate speech and require the removal of defamatory, fraudulent, and maliciously manipulated content (e.g. “deep fake” videos); and
- to clearly label paid political or other advertising.³⁷⁶

11.2 Are there specific changes that should be made to legislation to ensure the continuing viability of local news?

TELUS Response

593. TELUS believes that no legislative changes are necessary. Market forces may indeed result in the private element increasing its support for local programming as discussed in see Section 3.3.3.1 of this submission. However, to the extent there remain concerns that commercial programming services will not continue to create sufficient local programming, or locally reflective programming, this responsibility should fall on the public broadcaster. See Section 3.3.3.1.

Cultural Diversity

12.1 How can the principle of cultural diversity be addressed in a modern legislative context?

TELUS Response

594. TELUS recognizes that cultural diversity is a growing concern in the digital world. The federal government has made cultural diversity a priority, as exemplified the government’s recent issuance of a “Joint Declaration on Cultural Diversity and the Digital Space,” signed with the government of France.

³⁷⁶ *Ibid*, at section entitled “Potential Regulatory Solutions”.

595. As noted in TELUS's response to Section 3.3.1, in order for Canada's broadcasting system to flourish in the digital era, broadcasting policy objectives for private sector market players must focus on the creation and production of home-grown programming for the purposes of commercial success, domestically and globally. While TELUS believes that successful audiovisual products ought to reflect Canada's cultural diversity, TELUS believes that cultural diversity should not be enshrined as a public policy objective for the "private" element of Canada's broadcasting system. To the extent that cultural diversity is not sufficiently reflected in Canada's audiovisual productions, then a cultural diversity objective targeted towards the public broadcaster could be considered.

National Public Broadcaster

13.1 How should the mandate of the national public broadcaster be updated in light of the more open, global, and competitive communications environment?

TELUS Response

596. A more open, global, and competitive communications environment has led to fragmentation in the broadcasting market, as broadcasters must now compete with new platforms and sources of content from around the world for the attention of Canadian viewers. This new environment requires some adjustment to the role of public and private broadcasters in Canada.
597. As mentioned above at Section 3.3, private broadcasters should continue to be required to invest in Canadian content. However, their contribution to Canadian content should focus on the production of content that can compete for the attention of audiences and attain commercial success, both domestically and globally.
598. Concomitantly, the mandate for the national public broadcaster should be updated to include those important cultural goals that cannot be met through reliance on market forces. Where a competitive free market cannot support the production of programming of national interest, the public broadcaster should receive the necessary funding to create high quality programming to fill that gap.

13.2 Through what mechanisms can government enhance the independence and stability of CBC/Radio-Canada?

TELUS Response

599. The independence and stability of the national public broadcaster requires, at a minimum, stable and predictable funding for program production, which should be provided either from general taxation revenues or from a dedicated levy payable by all Canadians (similar to the “television licence fee” that helps support the U.K. public broadcaster).
600. In assessing possible means for support, Government should reject any calls to shift the burden of funding Canadian content to telecommunications providers, aka an “ISP tax”. A fulsome discussion on why such a tax would constitute bad public policy is provided in Section 3.5.

13.3 How can CBC/Radio Canada play a role as a leader among cultural and news organizations and in showcasing Canadian content including local news?

TELUS Response

601. TELUS believes that the measures outlined above will ensure that CBC/Radio-Canada plays a role as a leader among cultural and news organizations and in showcasing Canadian content, including local news. In particular:
- it is important to expand the mandate of the public broadcaster to include responsibility for culturally important but commercially unviable programming, which may include local news programming;
 - it is important to ensure that our public broadcaster has the funding necessary to produce programming of high quality when fulfilling its mandate, and that this funding is both stable and predictable;
 - the public broadcaster must have the independence to make programming decisions without political interference; and

- the public broadcaster must be accountable to Canadians in the fulfilment of its mandate, which can be accomplished at least in part through oversight of its performance in this area by an independent regulator such as the CRTC.

13.4 *How can CBC/Radio-Canada promote Canadian culture and voices to the world including on the Internet?*

TELUS Response

602. TELUS believes that the distribution and financing partnerships entered into by CBC/Radio-Canada in recent years demonstrate its high potential for promoting Canadian culture and voices to the world. For example, with limited second-window distribution opportunities due to its lack of entertainment-based specialty TV channels, CBC/Radio-Canada turned to Netflix not long after its launch in Canada to essentially be its “second-viewing” or catch-up viewing platform. That relationship evolved to being co-financers of high-quality and big-budget drama series such as *Anne* and *Alias Grace*. Both of these productions are broadcast on CBC/Radio-Canada and available on-demand on CBC.ca, and streamed globally on Netflix outside of Canada.
603. TELUS submits that with appropriate, *i.e.* higher and more stable, levels of funding, CBC/Radio-Canada will be empowered to continue making the investments necessary to produce high quality Canadian programming, without needing to trade away the rights to global distribution of that programming. In this respect, TELUS takes note of an initiative described by CBC/Radio-Canada in its submission in support of the Government’s Creative Canada public consultation, in which it stated:³⁷⁷

We are currently involved in discussions and partnerships with other public broadcasters like Australia’s ABC and France Télévision to create a global digital Business to Business (B2B) marketplace that will allow us to reach each other’s content and distribution platforms. We have already shown, with our successful public broadcaster’s global conference in Montreal this September, that we

³⁷⁷ CBC/Radio-Canada, *A Creative Canada: Strengthening Canadian Culture in a Digital World*, November 2016, at p. 28; submission made to the Minister of Heritage in the Canadian Content in a Digital World Consultation.

can play a leadership role within this community. We are a natural bridge between Canadian producers and creators and an international network of broadcasters who share a set of values around quality, distinctiveness and public service.

13.5 How can CBC/Radio-Canada support and protect the vitality of Canada's official languages and official language minority communities?

TELUS Response

604. As discussed above, the public element of the Canadian broadcasting system should be entrusted with social and cultural public policy goals which are not met by a private element which is focussed on commercial success.
605. CBC/Radio-Canada can and does play an important role in the telling of Indigenous stories by Indigenous Peoples, and in contributing to reconciliation with Indigenous Peoples. For example, CBC/Radio-Canada's current contributions in this area include providing unique programming in at least eight Indigenous languages,³⁷⁸ reporting on the alleged abuse of Indigenous women at the hands of the police (for which it won the highest journalism award for public service journalism),³⁷⁹ and through the work of its business unit dedicated to Indigenous issues in connection with the unsolved cases of missing and murdered Indigenous women, which included the creation of multi-platform content such as interactive digital sites for each missing woman.³⁸⁰
606. Ensuring proper funding and a strong mandate that includes the creation of such programming of national interest is the best way to ensure that CBC/Radio-Canada can maintain and expand upon the important role it plays in contributing to reconciliation with Indigenous Peoples and to the telling of Indigenous stories by Indigenous Peoples.

³⁷⁸ *Ibid.* at p 7.

³⁷⁹ *Ibid.* at p 10.

³⁸⁰ *Ibid.*

13.6 How can CBC/Radio-Canada support and protect the vitality of Canada's official languages and official minority communities?

TELUS Response

607. As discussed above, the public element of the Canadian broadcasting system should be entrusted with social and cultural public policy goals which are not met by a private element which is focussed on commercial success.
608. Accordingly, it should be made an expectation of the CBC that it support and protect the vitality of Canada's official languages and official language minority communities. Ensuring proper funding and a strong mandate that includes the creation of such programming of national interest is the best way to ensure that CBC/Radio-Canada can maintain and expand upon the important role in the achievement of Canada's broadcasting policy objectives.

Governance and Effective Administration

14.1 Does the Broadcasting Act strike the right balance between enabling government to set over policy direction while maintaining regulatory independence in an efficient and effective way?

TELUS Response

609. See TELUS' comments in Section 5, Theme D.

14.2 What is the appropriate level of government oversight of CRTC broadcasting licencing and policy decisions?

TELUS Response

610. See Sections 5.6 and 5.9.

14.3 How can a modernized *Broadcasting Act* improve the functioning and efficiency of the CRTC and the regulatory framework?

TELUS Response

611. See Section 5.11.

14.4 Are there tools that the CRTC does not have in the *Broadcasting Act* that it should?

TELUS Response

612. As set forth in Section 3.4, TELUS recommends that the CRTC be granted new powers to address the negative implications of vertical integration on Canada's broadcasting market. Vertically integrated Canadian communications companies have incentives to undermine certain broadcasting policy objectives in order to maximize the profitability of their more lucrative network operations. These incentives can stifle innovation and foreclose competition from both (1) competing content providers by disadvantaging carriage on their own networks; and (2) competing content aggregators/BDUs by refusing to negotiate commercially reasonable carriage rights for the content they control.
613. The CRTC has, over the years, imposed various safeguards on vertically integrated firms. However many of these safeguards have been challenged in court by vertically integrated firms – notably the Wholesale Code, which the Federal Court of Appeal recently deemed could not be implemented via an order pursuant to section 9(1)(h) of the *Broadcasting Act*.
614. TELUS believes it is more important than ever for the CRTC to enforce the safeguards that seek to protect the accessible, affordable and competitive distribution of diverse programming in Canada. A renewed *Broadcasting Act* must provide powers for the CRTC to make regulations and to impose licensing conditions on vertically integrated entities in order to address these concerns.

14.5 How can accountability and transparency in the availability and discovery of digital cultural content be enabled, notably with access to local content.

TELUS Response

615. As noted in section 3.3.2 of this submission, TELUS's new proposed framework would significantly reduce the regulatory burden affecting BDUs/content aggregators, in order to allow these players to better compete in the Canadian market. A notable feature of this new framework would be the elimination of licensing requirements for content aggregators, and their replacement by an incentive-based regime.
616. Under such an incentive-based regime, content aggregators would be able to register with the CRTC their commitment, for example, by way of a service agreement, to meet a number of obligations, such as agreeing to distribute culturally important programming services such as the public broadcasters.
617. In exchange, content aggregators would be permitted to access certain privileges that help offset the effect of those obligations on their ability to compete. The privileges of registered content aggregators would include, for example, the right to access to the *Copyright Act's* compulsory licensing regime for retransmission of over-the-air radio and television signals, and access rights to licensed Canadian programming services on commercially reasonable terms.
618. TELUS firmly believes that letting market forces play a prominent role the development of a content aggregation industry will allow Canada to have the best of both worlds – a robust market that offers Canadians ample choice in terms of services or business models that meet their preferences, and support for the Canadian broadcasting objectives.
619. A relaxed regulatory framework would nevertheless incorporate incentives for content aggregators to contribute to Canada's cultural sector, while providing the flexibility for different market players to adopt different business models. For instance, in exchange for distributing the public broadcaster's channels and implementing discoverability and promotional measures in relation to Canadian content, or contributing to the creation and

production of Canadian content, certain privileges would be secured. These privileges could include access to the retransmission regime under the *Copyright Act* and access to dispute resolution services of the CRTC to ensure commercially reasonable terms of distribution of licensed programming services.

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