Responding to the New Environment:
Review of the Canadian Communications Legal Framework

Submission by
Professor Michael Geist
Canada Research Chair in Internet and E-commerce Law
University of Ottawa, Faculty of Law
Centre for Law, Technology and Society

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A. Overview

I am a law professor at the University of Ottawa where I hold the Canada Research Chair in Internet and E-commerce Law and serve as a member of the Centre for Law, Technology and Society. I focus on the intersection between law and technology with an emphasis on digital policies. I submit these comments in a personal capacity representing only my own views.

Given the breadth of this review and the myriad of issues raised by communications policy, this submission eschews the specific questions raised by the panel in favour of a broader approach that seeks to identify the appropriate underlying policy for communications regulation in Canada in the digital environment. Canada's regulatory approach should be guided by a single, core principle: **communications policy, whether telecommunications or broadcasting, is now – or will soon become - Internet policy**. As the shift from "plain old telephone service" and cable to fibre, wireless and satellite unfolds, the next generation of communications law and policy is fundamentally about the Internet in Canada.

While some may recommend a single communications statute, the policy objectives of telecommunications and broadcast do not mesh well. Telecommunications regulation is primarily about competition and consumer protection. The rules are designed to foster affordable network access, effective consumer rights through transparency and redress, and to prevent the temptation of vertically-integrated telecom giants to grant their own content preferential treatment. Broadcast policy, on the other hand, is chiefly a cultural policy document designed to maximize the benefits of broadcast spectrum in a world of scarcity. In that analog world, the "broadcast system" features policies such as licensing requirements, Canadian content (Cancon) contribution mandates, public broadcaster support, and simultaneous substitution policies as a means to encourage the creation of Canadian content and to safeguard broadcast space for domestic content.

The broadcast world of scarcity has given way to a world of abundance, however, with no channel limits nor restrictions on the ability for anyone to "broadcast" or distribute their content to a national or international audience. The regulatory world therefore no longer needs to rely on the policies of scarcity. Instead, the key ingredients to encourage cultural choice and to provide incentives for creativity include universal, affordable access, a level regulatory playing field, robust competition, and appropriate limits on communications regulation.

This emerging communications world is mediated through the Internet and communications regulatory choices are therefore fundamentally about regulating or governing the Internet. This submission identifies four goals that should guide Canadian communications law and regulation:

1. **Universal, affordable access to the network**, which by definition means access to telecommunications and culture
2. A **level playing field**, in which policy safeguards equality of opportunity and access
3. **Regulatory humility**, which recognizes the limits of communications law and regulation
4. Fostering **competitiveness** in the communications sector

B. Executive Summary

This submission eschews the specific questions raised by the panel in favour of a broader approach that seeks to identify the appropriate underlying policy for communications regulation in Canada in the digital environment. Canada's regulatory approach should be guided by a single, core principle: communications policy, whether telecommunications or broadcasting, is now – or will soon become - Internet policy. This emerging communications world is mediated through the Internet and communications regulatory choices are therefore fundamentally about regulating or governing the Internet. This submission identifies four goals that should guide Canadian communications law and regulation:

1. **Universal, affordable access to the network**
2. **Level regulatory playing field**
3. **Regulatory humility**
4. **Fostering competitiveness in the communications sector**

Universal Affordable Access to the Network

In a world in which Internet access is the gateway to communications, culture, commerce, education, and community participation, the single most important policy goal of communications legislation is universal, affordable Internet access. This submission discusses five issues central to a developing a legislative framework premised on universal, affordable Internet access.

The challenge associated with the Canadian access issue is well-known: a large geographic footprint that makes providing access to some rural and remote communities challenging, competitive shortcomings that have left Canada with an intractable digital divide that results in adoption rates that lag behind access rates, and regulatory and government policies that have consistently failed to achieve the goal of universal, affordable access. The panel should deliver a clear statement in support of universal access at the more ambitious speeds. Moreover, it should recommend mandated broadband obligations in support of affordability, limits on data caps, prioritization of adoption rates to close the digital divide, and establish a clear timeline for all stakeholders on achieving the universal, affordable access goal.

New policy measures to enhance Canadian wireless competition are also needed. The panel should recommend policies that support greater wireless competition. These include encouraging foreign investment, continuing to set aside spectrum for new entrants and smaller providers, and opposition to further marketplace consolidation on competition grounds. Moreover, a mandated MVNO policy, which would support nimble, low-cost competitors leading to more innovative pricing and services, is long overdue.

The panel should also recommend the implementation of a new policy direction that requires all decisions be assessed through the lens of their impact on affordable access. Policies that are likely to increase consumer costs on Internet access should be reviewed with goal of amendment to develop cost-neutral alternatives. Moreover, the Commission should be required to develop an

Internet access impact assessment, akin to a privacy impact assessment, to fully explain the implications of decisions on the foundational goal of affordable access.

The panel should recommend binding consumer protection rules, truth in advertising requirements, safeguards against unfair charges or above-market roaming fees, mandated service disclosure requirements, and clear options for redress for aggrieved consumers. Transparency and a complaints mechanism are important, but the communications law framework should strengthen current consumer protections.

Ensuring that the affordability issue is an integral part of the policy process should not be limited to the policy direction. Effective and fair regulatory and consultative processes depend upon a myriad of perspectives and voices, particularly for those groups who often find themselves under-resourced and under-represented. The panel should recommend the establishment of consistent, stable funding for public interest participation in regulatory and policy proceedings. This should include the possibility of multi-year support for established organizations and proceeding-specific support for all eligible groups.

Level Playing Field for Policy: Equality Of Opportunity And Access

The Internet offers remarkable opportunities for all Canadians to create, communicate, and engage in civic activities. While Canadian communications law has long sought to identify "policy objectives" for the broadcast or telecom system, the Internet is far bigger than either of those systems. The panel should instead ensure that Canadian law offers a level playing field from a policy perspective thereby prioritizing equality of opportunity and access for all.

Despite the political affirmations of support for net neutrality, the panel should recommend an unequivocal legislative direction to support and enforce net neutrality.

A level playing field for policy should also include measures to enhance competition in the provision of access services. Given the enormous advantages wielded by incumbent providers, Canada suffers from insufficient competition, which leads to high prices, low usage rates relative to other developed countries, and affordability concerns for consumers with low household income. The panel should recommend a mandated MVNO system and an enhanced third-party access model that seeks to eliminate delays, establishes benchmarks for access, and features independent reviews of reported problems in facilitating consumer access.

The emergence of new online audio and video services has sparked considerable debate over whether or how to regulate services that typically fall outside the current regulatory framework. The panel should ensure that like is treated as like, with sufficient differentiation to treat similar services in an equivalent manner for regulatory purposes.

Humility In Regulation: Recognize The Limits Of Communications Law And Regulation

The Internet is not the equivalent of the broadcasting system and efforts to cast it as such for regulatory purposes are enormously problematic. Indeed, this submission argues that the panel should recognize the importance of regulatory humility as a fundamental principle, guided by the

view that communications law should not be used as a regulatory mechanism when other, more appropriate regulatory or legal tools are available nor should it be relied upon as a critical funding mechanism to support other policy objectives.

Humility in regulation touches on numerous issues, but this submission is limited to two types: (i) overlapping regulation that engages issues such as freedom of expression, copyright and privacy; and (ii) cross-subsidization, in which communications law is used to subsidize policy goals in other sectors such as the sustainability of the media and support for Canadian cultural production.

There is unquestionably a need for laws that address expression online that are consistent with the Canadian Charter of Rights and Freedoms. However, speech regulation through communications law licensing or other mandated requirements cannot be easily justified when there are other, more appropriate and less invasive avenues to address online expression. The panel should therefore recommend that communications law defers to generally applicable laws to the maximum extent possible when addressing expression online.

The panel should reject any effort to revive a site blocking system within Canadian communications law, leaving the issue to copyright policy makers. Consistent with the benefits of reducing overlapping regulation, the panel should also recommend the elimination of privacy rules within Canadian communications law accompanied by a more robust, enforceable PIPEDA that could be used to address privacy safeguards within the sector.

Cultural cross-subsidization has been a hallmark of the Canadian communications system, with mandated contributions from broadcasters and broadcast distributors (BDUs) used to support the creation of Cancon. Rather than expanding the cross-subsidization approach, however, the panel should recommend its gradual elimination. This does not mean that there should not be public support for Cancon. Cancon support remains an important ingredient in a vibrant Canadian cultural sector. Rather, public support such as grants, tax benefits, and other measures should come from general revenues as a matter of public policy, not through cross-subsidization.

The panel should recommend emulating the government's support for the media sector, which rightly adopts the position that if the media needs public support and the government believes it is in the public interest to do so, funding should come from general revenues as part of broader government policy, not through cross-subsidization and a myriad of levies that run counter to other policy goals such as affordable Internet access and marketplace innovation.

With respect to film and television production, the panel should recommend implementing a level playing field with regard to taxation by supporting the application of sales taxes and general income taxes to Internet services. These taxes of general application should be applied to all businesses doing business in Canada with the resulting revenues available to help fund support programs for Canadian content creation. While supporting the application of general taxes, the panel should reject the implementation of new taxes or mandated contributions on OTT services and Internet providers, the latter of which would increase the costs of access counter the foundational policy of affordable, universal access. Extending the cross-subsidization

model to the Internet raises significant concerns associated with both over-regulation and increased Internet access costs.

Fostering Competitiveness in the Communications Sector

When the Broadcasting Act was crafted, broadcasters occupied a privileged position, since the creation of video was expensive and the spectrum needed to distribute it scarce. As a result, the government established a licensing system complete with content requirements and cultural contributions designed to further a myriad of policy goals. Yet among the more than 40 policy goals found in the current law, the word "competition" does not appear once. The absence of competition may have made sense when there was little of it, but in today's world of abundance featuring a seemingly unlimited array of content and distribution possibilities, fostering competition among broadcasters and BDUs is essential to long-term marketplace success.

The panel should recommend several reforms that would help solidify the competitiveness of the sector. These include the removal of foreign ownership restrictions, enhancing consumer choice, the gradual elimination of simultaneous substitution, and limitations on the CBC's acceptance of digital advertising to decrease overlap with the private sector advertising-based models. The submission does not recommend the elimination of mandated contributions by broadcasters and BDUs given the ongoing benefits those sectors enjoy, though it recognizes that the impact of those contributions is likely to diminish over time.

A. Universal, Affordable Internet Access

In a world in which Internet access is the gateway to communications, culture, commerce, education, and community participation, the single most important policy goal of communications legislation is universal, affordable Internet access. In fact, given the widespread use of both broadband and mobile Internet services, the policy goal should be to ensure affordable access of broadband services in the home and mobile services at other times. This submission discusses five issues central to a developing a legislative framework premised on universal, affordable Internet access.

i. Broadband Access

The challenge associated with the Canadian access issue is well-known: a large geographic footprint that makes providing access to some rural and remote communities challenging, competitive shortcomings that have left Canada with an intractable digital divide that results in adoption rates that lag behind access rates, and regulatory and government policies that have consistently failed to achieve the goal of universal, affordable access.

The broadband access challenge was most recently addressed by the CRTC's 2016 Talk Broadband ruling, which declared Internet access a universal service objective, shifting funding for local voice services to the Internet, and setting dramatically increased Internet speed targets for all Canadians.[1] The decision was understandably greeted with euphoria from many groups, who celebrated the confirmation of Internet broadband connectivity for all as a foundation of Canadian digital policy.

Support for the decision stemmed from more than just declaring Internet access a basic service, however. After years of middling broadband goals, the CRTC stepped forward with a speed target worthy of a country that wants to see itself as an innovation leader. The target of 50 Mbps download and 10 Mbps upload changed the Canadian conversation on broadband as the days of debating the sufficiency of speeds one-tenth as fast are now over.

Most importantly, the decision marked a fundamental shift in Canadian communications regulation as decades of prioritizing voice access moved to the Internet. Shifting the local voice service subsidy to broadband Internet access took the essence of a policy borne decades ago designed to ensure that all Canadians had basic voice connectivity and updated it to reflect how Canadians communicate today.

Yet despite the optimism associated with the initial decision, there remain challenges in need of addressing. The Commission has seemingly backtracked in recent months on its ambitious speed targets, settling for slower speeds as part of a gradual transition. **The panel should deliver a clear statement in support of universal access at the more ambitious speeds.**

Moreover, affordability goes hand-in-hand with access, yet the CRTC largely punted the issue, noting that "a comprehensive solution to affordability issues will require a multi-faceted

[1] Telecom Regulatory Policy CRTC 2016-496: https://www.crtc.gc.ca/eng/archive/2016/2016-496.htm

approach, including the participation of other stakeholders." That places much of the responsibility on the government, but it was open to the CRTC to push the providers harder on affordability.

The funding model for broadband – $100 million per year from the local voice subsidy and another $250 million over five years from telecom revenues that include Internet services – creates a useful source of funding that promises to expand access and enhance competition. Yet the CRTC admits that even more money will be needed, telling Innovation, Science and Economic Development Minister Navdeep Bains that "meeting the nation's broadband challenges will require billions of dollars over many years to come."

Given that the CRTC largely avoids imposing new regulatory requirements, more than just money will be required to meet Canada's broadband challenge. **The panel should recommend mandated broadband obligations in support of affordability, limits on data caps, prioritization of adoption rates to close the digital divide, and establish a clear timeline for all stakeholders on achieving the universal, affordable access goal**.

ii. Mobile Internet Access

Few policy issues have proven as frustrating as the state of Canadian wireless competition, which has a direct link to pricing and usage. For the better part of a decade, Conservative and Liberal governments have grappled with overwhelming evidence that Canadian consumers pay some of the highest prices for wireless services in the world. The solution has always seemed obvious: more competition. Yet despite repeated efforts to nudge the market and regulator toward a more competitive environment, the needle has barely moved.

The latest failed effort was sparked by Minister Bains' June 2017 request to the CRTC to reconsider a decision on how regional and smaller wireless companies access wholesale roaming services from larger providers.[2] Given the significant capital costs in building new networks from scratch (even giants Bell and Telus joined forces to build a shared network), the government was hoping that it could facilitate more competition through a mandated mobile virtual network operator model (MVNO). MVNOs typically do not own spectrum or network infrastructure. Instead, they purchase network access at wholesale rates from existing operators and offer it to consumers with their own retail pricing.

The CRTC slammed the door shut on mandated MVNOs for the foreseeable future in a 2018 decision.[3] While its ruling offered up some affordability measures in the form of new, low-cost, data-only wireless alternatives that it wants carriers to offer, the decision was an unmistakable rejection of the government's preferred policy measure. Moreover, the subsequent decision on low-cost, data only wireless plans pales in comparison to service plans offered in other countries.

[2] Order in Council 2017-0557
[3] Telecom Decision CRTC 2018-97, online at < https://crtc.gc.ca/eng/archive/2018/2018-97.htm>

The effect of wireless competitiveness has a direct link to Internet usage and affordability in Canada. The most recent CRTC Communications Monitoring Report shows that Canadians spend more than $1 billion per year on overage fees alone despite efforts by some consumers to ration usage in light of high prices.[4] Moreover, the latest ISED commissioned report on comparative wireless pricing found that Canadian prices are either the highest or second highest among the reviewed countries.[5] Not only are the prices high, they are typically falling more slowly than in those other countries. In other words, the gap between Canada and other countries on wireless affordability is growing, not shrinking.

New policy measures to enhance Canadian wireless competition are therefore needed. **The panel should recommend policies that support greater wireless competition**. **These include encouraging foreign investment, continuing to set aside spectrum for new entrants and smaller providers, and oppose further marketplace consolidation on competition grounds. Moreover, a mandated MVNO policy, which would support nimble, low-cost competitors leading to more innovative pricing and services, is long overdue**.

iii. Affordable Universal Access Policy Direction

For more than a decade, the CRTC's work has been subject to a government policy direction developed by then-Industry Minister Maxime Bernier. The Bernier policy direction requires the CRTC to:

(i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and
(ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;[6]

The panel should recommend the implementation of a new policy direction that require all decisions to be assessed through the lens of their impact on affordable access. Policies that are likely to increase consumer costs on Internet access should be reviewed with goal of amendment to develop cost-neutral alternatives. Moreover, the Commission should be required to develop an Internet access impact assessment, akin to a privacy impact assessment, to fully explain the implications of decisions on the foundational goal of affordable access.

iv. Consumer Protection and Affordability

The communications law framework should feature robust consumer protection rules to address

[4] CRTC Communications Monitoring Report 2018, online at < https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2018/index.htm#4.0>
[5] Price Comparisons of Wireline, Wireless and Internet Services in Canada and with Foreign Jurisdictions - 2018 Edition, online at < http://www.ic.gc.ca/eic/site/693.nsf/eng/00169.html

[6] Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives (SOR/2006-355), online at < https://laws-lois.justice.gc.ca/eng/regulations/SOR-2006-355/FullText.html>

ongoing concerns with affordable access. While the current law relies heavily on the ombudsman approach through the Commissioner for Complaints for Telecommunications-Television Services, **the panel should recommend binding consumer protection rules, truth in advertising requirements, safeguards against unfair charges or above-market roaming fees, mandated service disclosure requirements, and clear options for redress for aggrieved consumers**. Transparency and a complaints mechanism are important, but the communications law framework should strengthen current consumer protections.

v. Public Participation in the Regulatory Process

Ensuring that the affordability issue is an integral part of the policy process should not be limited to the policy direction. Effective and fair regulatory and consultative processes depend upon a myriad of perspectives and voices, particularly for those groups who often find themselves under-resourced and under-represented. Indeed, many of the public interest organizations that participate in hearings and consultations are now stretched to the financial breaking point. The government provides limited, if any, support for public interest advocacy, meaning these groups must self-fund participation. Unlike the U.S., which has developed a reasonably resourced civil society, Canadian groups are struggling badly under the weight of increased policy demands with no accompanying fiscal support.

In fact, even when there are programs that provide compensation for expenditures related public participation, processing delays can still leave groups in limbo. The current CRTC policies designed to allow public interest groups and individuals to receive compensation for their participation costs can drag on for years, forcing groups to carry hundreds of thousands of dollars of financial obligations arising from hearings that have long since concluded. **The panel should recommend the establishment of consistent, stable funding for public interest participation in regulatory and policy proceedings**. This should include the possibility of multi-year support for established organizations and proceeding-specific support for all eligible groups.

B. Level Playing Field for Policy: Equality Of Opportunity And Access

The Internet offers remarkable opportunities for all Canadians to create, communicate, and engage in civic activities. While Canadian communications law has long sought to identify "policy objectives" for the broadcast or telecom system, the Internet is far bigger than either of those systems. Instead, **the panel should ensure that Canadian law offers a level playing field from a policy perspective**, thereby prioritizing equality of opportunity and access for all. This submission highlights three issues central to a level playing field: net neutrality, competition, and treating similar services in an equivalent manner.

i. Net Neutrality

Canada has emerged as a world leader in supporting net neutrality with clear endorsements from both political leaders and the CRTC. For example, Minister Bains responded to recent U.S. developments by affirming that "Canada will continue to stand for diversity and freedom of expression. Our government remains committed to the principles of net neutrality."[7] Former Canadian Heritage Melanie Joly was similarly a notable proponent of net neutrality. Despite pressure from some cultural groups to abandon net neutrality by mandating preferential treatment of Canadian content, Joly affirmed that the principle remains at the core of Canadian cultural policy, noting "we will continue to champion the Internet as a progressive force and an open space without barriers. As a government, we stand by the principle of net neutrality."[8]

The Canadian commitment to net neutrality has also been endorsed at the regulatory level. The foundation of Canadian policy lies in several CRTC decisions that restrict practices such as managing Internet traffic to limit speeds for some applications or creating pricing plans that "zero rate" certain content that does not count as part of monthly data consumption caps. Moreover, Canadian law features clear safeguards against unjust discrimination, undue preferences or controlling the content of communications.

Despite the political affirmations of support for net neutrality, **the panel should recommend an unequivocal legislative direction to support and enforce net neutrality**. Indeed, there has been some discussion about the need for "flexibility" in implementing net neutrality rules that could undermine a core principle aimed at preserving equality of access and opportunity. For example, CRTC Chair Ian Scott told the International Institute of Communications last year:

The Telecommunications Act provides the CRTC with the tools and flexibility to establish and enforce a net neutrality framework. The framework we have built over the past 10 years will likely be tested as needs and technology continue to evolve. There may indeed be situations relating to public safety or security, telemedicine or self-driving cars where a certain flexibility will be required and should therefore be maintained in the legislation[9].

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[7] Canada and the U.S. stand divided at the crossroads of net neutrality: https://www.theglobeandmail.com/report-on-business/rob-commentary/canada-and-the-us-stand-divided-at-the-crossroads-of-net-neutrality/article37053783/.
[8] Ibid.
[9] Scott speech, 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>

Those comments are consistent with non-neutral applications. Last year, Rogers told the Standing Committee on Access to Information, Ethics and Privacy that neutrality rules should not be strictly applied for faster 5G wireless services:

Rogers believes that by virtue of section 27(2) of the Telecommunications Act, the CRTC has all the necessary tools it needs to protect net neutrality in a fast-changing environment, while maintaining the flexibility to adapt to future changes occasioned by new technologies. As an example, the next evolution of wireless service, known as 5G, may require a flexible approach to ensure continued innovation. With 5G, certain services will require different levels of connectivity. For example, connected cars and remote medical services will require higher reliability and lower latency levels than networked parking meters.[10]

The call for greater net neutrality flexibility was not adopted by the committee, as it recommended that net neutrality be enshrined in the law to "prevent any further erosion." The latest calls for net neutrality flexibility bear a striking resemblance to older campaigns from many of the same companies opposed to a policy that would restrict their ability to establish a two-tier Internet. In fact, researchers have noted that abandoning net neutrality could harm telemedicine, raising the prospect of two-tier tele-health care with faster networks for deeper pocketed providers or patients. Similar doubts have been raised with respect to autonomous cars, with experts noting that such vehicles are likely to use unlicensed spectrum known as the Dedicated Short Range Communications band to communicate.[11]

The calls for a non-neutral Internet have also been raised in the context of Canadian cultural policy, with some arguing for prioritization of Canadian content on the network rather than a level playing field. Other recommendations have included mandating that domestic content not count against monthly data caps. For example, the issue was raised during the CRTC zero rating hearing as Canadian Media Producers Association (CMPA) argued that:

the Commission should be open to considering ways in which differential pricing practices related to Internet data plans could be used to promote the discoverability of and consumer access to Canadian programming.[12]

The CRTC rightly rejected the argument, concluding that "any benefits to the Canadian broadcasting system would generally not be sufficient to justify the preference, discrimination, and/or disadvantage created by such practices." Indeed, abandoning net neutrality in order to support Canadian content would raise of host issues including the prospect of increased surveillance of Internet usage, unenforceable regulations, and diminished value of Canadian content.

During the development of the CRTC's Internet traffic management practices in 2009, cultural groups such as the CFTPA (predecessor to the CMPA), ACTRA, the Canadian Media Guild, the

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[10] ETHI evidence, online at < http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/meeting-91/evidence>

[11] https://www.theverge.com/2017/7/18/15990092/comcast-self-driving-car-net-neutrality-v2x-ltev

[12] Why Violating Net Neutrality is not a Smart Way to Promote Canadian Content: http://www.michaelgeist.ca/2017/05/violating-net-neutrality-not-smart-way-promote-canadian-content/.

Documentary Organization of Canada, and the Canadian Conference of the Arts all supported the view that the CRTC should require "as a condition of service that ISPs refrain from employing any traffic management practice that discriminates on the basis of application or protocol." If anything, a level playing field is today more important given that a media giant such as Netflix would be granted even greater power in a system that permits zero rating since it would have the financial ability to buy access unavailable to Canadian players.

Beyond the issue of a level playing field, some commentators seem to hope that making Canadian content cheaper by reducing or eliminating data costs will increase its marketplace success. Yet the more likely outcome will be that Canadian content will be viewed not as cheaper, but rather as content that can only find an audience if the government requires that it be distributed for free. Consigning Canadian content to the mandatory free lane would send a signal that it can't compete.

A system treating all Canadian content as data free would require Internet providers to engage in widespread surveillance of all user Internet activity, identifying the content of the bits running on their network. The system would eliminate private viewing, discourage the use of virtual private networks to protect privacy, and add huge costs to network services. In other words, free Canadian bits would actually be very costly, paid for in lost privacy and increased Internet access costs for all since ISPs would pass along the added costs to consumers.

ii. Competition in Access Services

A level playing field for policy should also include measures to enhance competition in the provision of access services. Given the enormous advantages wielded by incumbent providers, Canada suffers from insufficient competition, which leads to high prices, low usage rates relative to other developed countries, and affordability concerns for consumers with low household income. As noted above, **the panel should recommend a mandated MVNO system**.

The need for pro-competitive reforms to level the playing field is not limited to wireless services, however. In 2015, the CRTC rejected opposition from large cable and telecom providers by ordering them to offer independent Internet providers wholesale access to emerging high-speed fibre networks.[13] The decision on wholesale access was part of a long-running battle pitting telecom giants such as Bell and Telus against upstart providers like TekSavvy and Distributel. Recognizing the advantages held by incumbent providers who enjoy direct connections to consumers (the so-called "last mile"), Canadian regulations foster a more competitive environment by requiring the incumbents to grant independent providers sufficient access to allow for alternative consumer choice.

Despite those efforts, third-party access has been beset by regulatory delays, questionable pricing claims, and persistent efforts by incumbents to hamstring independent providers. The **panel should recommend an enhanced third-party access model that seeks to eliminate delays, establishes benchmarks for access, and features independent reviews of reported problems in facilitating consumer access**.

[13] Telecom Regulatory Policy CRTC 2015-326, online at < https://crtc.gc.ca/eng/archive/2015/2015-326.htm>

iii. Treating Similar Services in an Equivalent Manner

The emergence of new online audio and video services has sparked considerable debate over whether or how to regulate services that typically fall outside the current regulatory framework. While the issue of cross-subsidization is further examined later in this submission, the issue of treating similar services in an equivalent manner is addressed here. Many services may seem similar from a consumer perspective – audio content accessed via a licensed radio station or downloaded podcast or video content watched on a conventional broadcaster or through over-the-top (OTT) video provider – yet these services are not identical. The **panel should ensure that like is treated as like, with sufficient differentiation to treat similar services in an equivalent manner for regulatory purposes**.

The need for a level playing field is particularly important with respect to video services. Canadians can access similar content on conventional broadcasters (both over-the-air and specialty channels), hybrid services that are delivered through cable or satellite systems, and OTT services. While there may be a temptation to treat all the services as "video" and regulate accordingly, the reality is that there are significant differences between delivery mechanisms that may require different regulatory approaches.

The differentiated approach was evident in the CRTC's 2015 decision, in which the Commission created a new class of video on demand service known as a hybrid service that borrowed from both the regulated video on demand services and the Internet-based video services.[14] The policy goal was to encourage services such as CraveTV to compete in the Internet video space (or face conventional regulation and obligations). Rather than treat those services as conventional broadcast services (which some advocated in light of their delivery mechanism), the CRTC recognized that they were neither conventional broadcast nor pure OTT services. Under the hybrid model, the service does not face any Cancon contribution or spending requirements.

The same like vs. like applies to OTT service. While some compare OTT services to broadcasters or BDUs (arguing that the service feels similar to Canadian subscribers), the reality is that both Canadian broadcasters and BDUs are subject to mandated contributions as part of a regulatory quid pro quo in which they receive significant benefits for being part of the regulated system. Note that U.S. broadcasters – which provide a better analogy to U.S.-based Netflix as a broadcaster – face no such requirements, having never been subject to Cancon requirements despite their near-universal availability in Canada.

Indeed, the advantages enjoyed by BDUs and broadcasters that are not available to OTT services include:

- *Simultaneous Substitution*, which allows Canadian broadcasters to replace foreign signals with their own. The industry says this policy alone generates hundreds of millions of dollars in revenues for Canadian broadcasters.

[14] Broadcasting Regulatory Policy CRTC 2015-355 and Broadcasting Order 2015-356, online at < https://crtc.gc.ca/eng/archive/2015/2015-355.htm>

- *Must-Carry Regulations*, which require BDUs to include many Canadian channels on basic cable and satellite packages. These rules provide guaranteed access to millions of subscribers, thereby increasing the value of the signals and the fees that can be charged for their distribution.
- *Bundling Benefits*, that allow BDUs to bundle less popular Canadian channels with more popular U.S. signals, thereby guaranteeing more revenues to the Canadian broadcasters.
- *Copyright Retransmission Rules*, which create an exemption in the Copyright Act to allow BDUs to retransmit signals without infringing copyright. This retransmission occurred for many years without any compensation.
- *Market protection*, which has shielded Canadian broadcasters from foreign competition such as HBO or ESPN for decades.
- *Eligibility for Canadian Funding Programs and Tax Credits*, for which foreign OTT services are frequently ineligible.
- *Foreign Investment Restrictions*, which limits the percentage that foreign companies may own of Canadian broadcasters or BDUs and thereby reduces competition.
- *Unlimited Distribution Without Caps or Usage Charges*, unlike Internet-based services, whose subscribers often face high data costs for accessing those services.

A level playing field should account for all the relative advantages that Canadian law provides to broadcasters and BDUs in the case of video services. As such, ensuring equal opportunity means treating like services in a like manner for regulatory purposes.

C. Humility In Regulation: Recognize The Limits Of Communications Law And Regulation

The Canadian regulatory approach to communications – particularly broadcasting – has long been marked by a dizzying array of objectives. The current law features dozens of separate objectives ranging from foreign ownership restrictions to Canadian content to the availability of programming for a wide range of audiences. While the numerous objectives make the development of a cohesive broadcasting policy challenging, the law at least reflects a single Canadian system with a limited number of predominantly domestic actors. With the shift of communications policy to the Internet, that has changed. The Internet is not the equivalent of the broadcasting system and efforts to cast it as such for regulatory purposes are enormously problematic. Indeed, this submission argues that **the panel should recognize the importance of regulatory humility as a fundamental principle, guided by the view that communications law should not be used as a regulatory mechanism when other, more appropriate regulatory or legal tools are available nor should it be relied upon as a critical funding mechanism to support other policy objectives.**

It may be true that the broadcasting system is (or will soon be) the Internet, but the Internet is not the broadcasting system. Indeed, the CRTC's recent recommendation (reiterated in its submission to this panel)[15] to treat the Internet as indistinguishable from broadcast for regulatory purposes has sent the Commission down a deeply troubling path that is likely to result in less competition, increased consumer costs, and dubious regulation.[16]

The CRTC's own data demonstrates how the Internet may incorporate audio and video content but it supports far more activities that lie outside the communications and cultural spheres. For example, while it maintains that Internet access is "almost wholly driven by demand for audio and video content," it also notes that 75 per cent of wireless Internet traffic is not audio or video.[17] Internet use is about far more than streaming videos or listening to music. Those are obviously popular activities, but numerous studies point to the fact that they are not nearly as popular as communicating through messaging and social networks, electronic commerce, internet banking, or searching for news, weather, and other information.

From the integral role of the Internet in our education system to the reliance on the Internet for health information (and increasingly tele-medicine) to the massive use of the Internet for business-to-business communications, Internet use is about far more than cultural consumption. Any regulatory approach that envisions the Internet as little more than cable television and seeks to implement a taxation system akin to that used for cable and satellite providers should be rejected.

Indeed, there are several significant problems with viewing the Internet through the prism of a broadcasting system. First, the CRTC and supporters of the approach mistakenly think that since (a) broadcast is regulated and (b) broadcast is now the Internet, then (c) the Internet must now be

[15] https://crtc.gc.ca/eng/publications/reports/rp190110.htm
[16] https://crtc.gc.ca/eng/publications/s15/
[17] Ibid.

regulated like broadcast. However, given that the Internet is much more than just broadcast, regulatory proposals would invariably cover far more than the broadcasting sector.

As argued above, since the Internet is such an integral part of the daily lives of millions of Canadians, the starting point for communications regulation should be to ensure universal, affordable access. To the extent that the panel recommends new funding mechanisms arising from Internet use or the provision of Internet services, those recommendations would potentially undermine policy goals associated with affordable access. Moreover, assurances that the impact of new Internet taxes or fees would be "cost-neutral" ring hollow given that the growing number of Canadians who only rely exclusively on Internet access would be left with higher bills.

Humility in regulation touches on numerous issues, but this submission is limited to two types: (i) overlapping regulation that engages issues such as freedom of expression, copyright and privacy; and (ii) cross-subsidization, in which communications law is used to subsidize policy goals in other sectors such as the sustainability of the media and support for Canadian cultural production.

i. Overlapping Regulation

a. Freedom of Expression

The CRTC has long recognized the need to articulate the boundary between communications regulation and Internet content regulation. Indeed, its website notes that "*In Canada, services that broadcast over the Internet don't need a licence from the CRTC, as we exempted them from this obligation. We do not intervene on content on the Internet.*" This statement – we do not intervene on content on the Internet – appears at the very beginning of a page devoted to TV shows, movies, music and other content online. It may not be a regulatory statement, but it reflects how the CRTC sees itself and how it wants to be seen.

Communications regulation invariably crosses into content regulation and freedom of expression. The need for a licence to broadcast is a form of expression regulation given that it privileges some speakers over others. That regulatory model has been used to justify obligations that are placed on licensed broadcasters, effectively adopting a position that with privileged rights come public policy responsibilities.

As communications shifts to the Internet, however, the justifications for expression regulation within communications law become more suspect. The scarcity of spectrum arguments no longer apply as anyone can effectively disseminate their expression to a national or global audience. Seeking to impose regulations on that speech as a matter of communications law becomes highly problematic as it vests enormous powers over speech with an unelected communications regulator.

For example, proposals to create an Internet Piracy Review Agency raised last year would have turned the CRTC into a content regulator, requiring its agency to cast judgment on the legality of content found on foreign-based websites. The Commission has rightly recognized the concerns with content regulation if extended to the Internet. For example, the first request for mandated

website blocking involved a request in 2006 from Richard Warman to block two hate sites. Warman provided the Commission with expert evidence that the sites violated the Criminal Code. The Commission refused to issue the order, noting that it did not think it had the legislative power under Section 36 to issue blocking orders.[18]

This is not to say that the Internet is a "no law" land in which there are no laws or regulations that apply to online speech. In fact, laws of general application ensure that intellectual property rules apply to the Internet, defamation rules apply to the Internet, and the Criminal Code applies to the Internet. Moreover, the government recently negotiated the Canada-U.S.-Mexico Agreement that features provisions that directly address the liability of Internet companies for the expression of their users. Similarly, the government has tabled legislation that would govern some aspects of campaign advertising online.

There is unquestionably a need for laws that address expression online that are consistent with the Canadian Charter of Rights and Freedoms. However, speech regulation through communications law licensing or other mandated requirements cannot be easily justified when there are other, more appropriate and less invasive avenues to address online expression. **The panel should therefore recommend that communications law defers to generally applicable laws to the maximum extent possible when addressing expression online**.

b. Copyright

Last year, the CRTC was seized with a classic example of overlapping regulation as a consortium of organizations asked the CRTC to support the creation of an Internet Piracy Review Agency that would facilitate the establishment of a website blocking system. The Commission rejected the application on jurisdictional grounds. For example, with respect to application of Section 24(1) of the Telecommunications Act, it noted:

the proposed regime requires sections 24 and 24.1 of the Telecommunications Act to be interpreted in a way that creates a direct purposive and contextual conflict with the Copyright Act. Moreover, such an interpretation of the jurisdiction granted to the Commission by the Telecommunications Act runs contrary to the principle of interpreting sections harmoniously with related legislation.[19]

It concluded by stating:

in the case of the proposed regime, which relates at its heart to the enforcement of the Copyright Act in the absence of a specific enforcement mechanism established by Parliament, any link to the policy objectives in the Telecommunications Act is tenuous, such that the Commission cannot support a finding of jurisdiction. In light of all the above, the Commission determines that it does not have the jurisdiction under the Telecommunications Act to implement the proposed regime and, consequently, it will not consider the merits of

[18] https://crtc.gc.ca/eng/archive/2006/lt060824.htm
[19] Telecom Decision CRTC 2018-324, online at <https://crtc.gc.ca/eng/archive/2018/2018-384.htm>

implementing the regime. The Commission therefore denies the FairPlay Coalition's application.[20]

The CRTC rightly identified the conflicting overlap between its legislative mandate and copyright law in that case. The **panel should reject any effort to revive a site blocking system within Canadian communications law, leaving the issue to copyright policy makers**.

First, the issue remains one that is fundamentally about copyright. Indeed, the recent copyright review conducted by the Standing Committee on Industry, Science and Technology heard from several witnesses on the merits of site blocking. While a final recommendation from the committee is still forthcoming, reform of the Copyright Act, not reform of Canadian communications law is the appropriate venue to consider the issue.

Second, the CRTC proceeding into site blocking earlier this year led to thousands of submissions that identified serious concerns with the practice. For example, the United Nations Special Rapporteur for Freedom of Expression raised concerns regarding the implications for freedom of expression, noting:

"While the enforcement of copyright law may be a legitimate aim, I am concerned that website/application blocking is almost always a disproportionate means of achieving this aim. Blocking an entire website/application will not only restrict allegedly infringing activity, but also cut off access to all legitimate content on that website or uses of that application."[21]

Technical groups cited problems of overblocking. One of the best-known cases of over-blocking arose in Canada in 2005, when Telus unilaterally blocked access to a pro-union website without a court order during a labour dispute. In doing so, it simultaneously blocked access to an additional 766 websites hosted on the same computer server.[22] The real danger is that this is not ancient history. For example, in 2013, UK ISPs blocked access to around 200 legitimate websites including Radio Times. The blocking occurred as a result of a court order targeting two file sharing websites. In fact, OFCOM, the UK communications regulator, anticipated the over-blocking issue in 2010 study that noted:

"We believe that IP address based site blocking is not granular and is likely to lead to over-blocking. This may undermine the confidence in any site-blocking scheme, and create significant liability risks for service providers. The over blocking property is a by-product of sites sharing IP addresses."[23]

Website blocking would also increase consumer costs and hamper competition. Experience in other countries suggests that site blocking systems run into the millions of dollars. Larger ISPs in the UK disclosed their approximate costs in a 2014 case. For example, Sky Broadband spent

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[20] Ibid.
[21] <https://services.crtc.gc.ca/pub/ListeInterventionList/Documents.aspx?ID=272698&en=2018-0046-7&dt=i&lang=e>
[22] https://www.cbc.ca/news/canada/telus-cuts-subscriber-access-to-pro-union-website-1.531166
[23] < http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-6-blocking-legitimate-websites/>

over 100,000 pounds (costs described as "six figures") to develop a website blocking system solely for IP right infringing website injunctions in 2011 and spent thousands more each month on monitoring costs. British Telecom spent over a million pounds on a DNS web-blocking system in 2012 and required more than two months of employee time on implementation. EE spent more than a million pounds on its website blocking system and over 100,000 pounds every month for operations.[24]

A mandated blocking system applied to all ISPs in Canada would have an uneven impact that would undermine competition. Larger ISPs would face new costs but might find it easier to integrate into existing systems (some already block child pornography images), whereas hundreds of smaller ISPs would face significant new costs that would affect their marketplace competitiveness. In fact, larger ISPs might ultimately benefit from higher fees passed along to subscribers and reduced competition.

Moreover, given that the starting principle for net neutrality is the right for users to access content and applications of their choice, blocking content is prima facie a net neutrality violation. While there is some debate over the issue depending on how such a system might be designed, website blocking without the full due process that comes from court orders – as was contemplated in the proposal rejected by the CRTC – would violate Canadian net neutrality rules.

c. Privacy

The critical link between privacy and communications has emerged as one of the most important communications law policy issues of our time. Whether the need for transparency reports from telecom providers, targeted advertising programs that collect and use massive troves of user data that cut across telecom and broadcast, set-top box data collection on viewing habits, locational data stemming from wireless telecom usage, or Internet-based tracking, the personal information gleaned from Canadians' communications activities have great economic value and carry significant risks if misused or abused. The current Canadian communications legal framework for privacy is inconsistent at best, with privacy safeguards embedded in the Telecommunications Act but none included in the Broadcasting Act.

Those privacy provisions (or the absence of such provisions) all predate the enactment of the Personal Information Protection and Electronic Documents Act (PIPEDA), Canada's private sector privacy law. While the statutes co-exist, the reality is that the Office of the Privacy Commissioner of Canada (OPC), which is charged with enforcing PIPEDA, is better suited to address privacy concerns. The OPC has more resources and expertise on privacy-related matters.

Communications-related issues have been a hallmark of PIPEDA complaints since the inception of the law. The very first complaint, filed within minutes of the law taking effect, involved Telus and the public listing of telephone numbers.[25] Since that time, the OPC has been engaged in

[24] < http://www.michaelgeist.ca/2018/04/crtcblockingsubmission/>
[25] < https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2003/pipeda-2003-178/>

many high profile privacy cases touching on communications law, including Bell's Relevant Advertising Program that brought together a wide range of personal information data points such as viewing habits, Internet activities, social graphs, and geo-location information.[26] Moreover, the OPC has been actively engaged in working with the sector on issues such as lawful access and the standardization of transparency reporting.

While there are inadequacies in PIPEDA (notably the absence of order making power) and some potential advantages to having the CRTC address privacy related matters (for example, concerns associated with deep packet inspection that arose during the hearings that led to the Internet traffic management practices), the overlap between PIPEDA and Canada's communications law framework should be eliminated by leaving privacy issues to the privacy law of general application. This approach will provide increased certainty on privacy matters and allow the regulator to focus more narrowly on communications policy. Consistent with the benefits of reducing overlapping regulation, **the panel should therefore recommend the elimination of privacy rules within Canadian communications law accompanied by a more robust, enforceable PIPEDA that could be used to address privacy safeguards within the sector**.

ii. Cultural cross-subsidization

Cultural cross-subsidization has been a hallmark of the Canadian communications system, with mandated contributions from broadcasters and BDUs used to support the creation of Cancon. Given that background, creator groups and the CRTC have promoted expanding the subsidy system to Internet-based providers. This submission argues the proposals are both unnecessary and ill-conceived. **Rather than expanding the cross-subsidization approach, the panel should recommend its gradual elimination**. Although broadcasters and BDUs should continue to participate in the mandatory system, their participation is a function of the quid pro quo described above in which they directly benefit from the regulatory framework in a way that OTT services and ISPs do not.

This does not mean that there should not be public support for Cancon. Cancon support remains an important ingredient in a vibrant Canadian cultural sector. Rather, public support such as grants, tax benefits, and other measures should come from general revenues as a matter of public policy, not through cross-subsidization. The submission examines two sectors, highlighting how the government has embraced a public policy support in the case of media sector, an approach that should be emulated for the film and television production sectors.

a. Media Sector

The challenges faced by the Canadian media sector have been well-chronicled for several years. The struggles to adapt to heightened competition in the digital environment – the local paper now competes with a myriad of alternative choices – has led to layoffs, closures, and intense lobbying for a bailout. Those proposals have included cross-subsidization models, with some calling for link taxes or other forms of payment from Internet platforms. The government largely resisted the lobbying efforts, but last year announced plans to supplement its support for the

[26] < https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2015/pipeda-2015-001/>

struggling media industry with a $50 million fund alongside a trio of tax policy reforms: the prospect of charitable donations to non-profit journalism organizations, a refundable tax credit to support labour costs for news organizations, and a non-refundable tax credit for Canadians that subscribe to Canadian digital news media.

The $50 million granting fund was described in the following manner:

Budget 2018 announced $50 million over five years to support local journalism in under-served communities, helping to ensure that Canadians continue to have access to informed and reliable civic journalism. Starting in 2019-20, independent, not-for-profit organizations will have additional government support to create open source news content under a creative commons licence. This will allow local news organizations to access the content produced for free, helping to bolster local news coverage as organizations struggle with reduced capacity[27].

The public support model will assist in the creation of local news content based on the quid pro quo that the resulting content is then openly and freely available for others to use and disseminate. Creators are fully compensated upfront for their work and the public can then use or reuse the result.

The tax credits also provide a public source of support for the industry.[28] The charitable donation approach is common in the U.S. and the tax credit for subscriptions might entice some to subscribe to digital media. While the labour tax credit has raised concerns about government interference with an independent media, the approach is better than many of the alternatives that were based largely on visions of either cross-subsidization or increased regulation designed to make Canadian news services more competitive by making the competition less so.

Instead, the government is focused on using its most effective tools in the toolkit – grants and tax policy – to create incentives to invest in the sector and continue the shift to digital. **The panel should recommend emulating this approach, which rightly adopts the position that if the media needs public support and the government believes it is in the public interest to do so, funding should come from general revenues as part of broader government policy, not through cross-subsidization and a myriad of levies that run counter to other policy goals such as affordable Internet access and marketplace innovation.**

b. Film and Television Production

Much like the media sector, there have been similar calls in recent years for cross-subsidization models for film and television production in Canada. However, unlike the media sector, film and television production has been thriving in the digital age. According to the latest data from the CMPA, the total value of the Canadian film and television production sector exceeded $8 billion last year, over a billion more than has been recorded in any year over the past decade.[29] In fact,

[27] < https://budget.gc.ca/fes-eea/2018/docs/statement-enonce/chap02-en.html?wbdisable=true>
[28] <https://www.theglobeandmail.com/politics/article-media-sector-gets-595-million-package-in-ottawas-fiscal-update/>
[29] "Economic Report on the Screen-Based Media Production Industry in Canada", (Ottawa: Canadian Media Producers Association, 2017), online: <www.primetimeinottawa.ca/wp-content/uploads/2018/02/Profile-2017.pdf>.

last year everything increased: Canadian television, Canadian feature film, foreign location and service production, and broadcaster in-house production.

Spending on Canadian content production hit an all-time high last year at $3.3 billion, rising by 16.1%. Notably, the increased expenditures do not come from broadcasters. In fact, the private broadcasters now contribute only 11% of the total financing for English-language television production. Their contribution is nearly half of what it was just three years ago (now standing at $236 million) in an industry that is growing. Yet despite the private broadcaster decline, money is pouring into the sector from distributors (who see benefits of global markets) and foreign financing (which has grown by almost $200 million in the past four years) leading the way. The sector remains heavily supported by the public, with federal and provincial tax credits now accounting for almost 30% of financing.

The increase in foreign investment in production in Canada is staggering. When Netflix began investing in original content in 2013, the total foreign investment (including foreign location and service production, Canadian theatrical, and Canadian television) was $2.2 billion. That number has more than doubled in the last five years, now standing at nearly $4.7 billion. While much of that stems from foreign location and service production that supports thousands of jobs, foreign investment in Canadian television production has also almost doubled in the last five years.

The increasing irrelevance of private broadcasters for financing Canadian television production is particularly pronounced in the fiction genre (ie. drama and comedy shows). This is easily the most important genre from an economic perspective, with $1.29 billion spent last year. Private broadcasters only contributed $59 million or five percent of the total. By comparison, foreign financing was $285 million. In sum, the data confirms that there has never been more money invested in film and television production in Canada.

Online video services are experiencing rapidly expanding revenues, now generating more than $1 billion per year. In fact, two Canadian online video services – CraveTV and Club illico – are estimated to have earned $373 million last year, up from just $13 million four years earlier.

Despite the absence of a fiscal emergency, the film and production sector has argued that OTT services such as Netflix should face mandated contributions much like broadcasters and BDUs. The debate has frequently devolved in a confusing array of "Netflix tax" demands that have covered everything from digital sales taxes to Internet access taxes. This submission argues that the **panel should recommend implementing a level playing field with regard to taxation by supporting the application of sales taxes and general income taxes to Internet services**. These taxes of general application should be applied to all businesses doing business in Canada with the resulting revenues available to help fund support programs for Canadian content creation. With the gradual shift away from cross-subsidization, general revenues will emerge as the central source of funding for government-backed cultural policy.

While supporting the application of general taxes, **the panel should reject the implementation of new taxes or mandated contributions on OTT services and Internet providers**, the latter of which would increase the costs of access counter the foundational policy of affordable, universal access. Extending the cross-subsidization model to the Internet raises significant

concerns associated with both over-regulation and increased Internet access costs. For example, by effectively regulating foreign audio or video services that touch Canada, the regulatory model would cover foreign media organizations, podcasters, and video game makers. It is unclear on what grounds Canada should be entitled to regulate these entities, but that is precisely where its regulatory logic ultimately leads. In fact, faced with the prospect of Canadian regulation, some of those services could decide to geo-block Canadian users, concluding that a relatively small market was not worth the regulatory costs and hassles.

Moreover, the taxation (or mandated contributions) for cable and broadcast to support Canadian content production are at least premised on the fact that a cable subscription provides little other than access to broadcast content. The Internet offers a limitless array of possibilities that have nothing to do with broadcasting, rendering the policy link far more tenuous. Governments can (and do) support the creation of Canadian content through grants, tax credits, and other subsidies, but foisting support on a monthly internet or wireless bill stretches the definition of the conventional broadcast system beyond recognition.

1. General Taxes: Digital Sales Tax and Income Tax

As noted above, this submission supports **a panel recommendation to implement a digital sales tax.** Finance Minister Bill Morneau recently confirmed that Canada is awaiting an international agreement on digital sales taxes before implementing any domestic reforms.[30] Morneau indicated the government would support a quick resolution of the issue – the current deadline is 2020 – but that a provincial digital sales tax in Quebec, which took effect on January 1, 2019, will not spark a matching federal tax until the global issues are resolved.

Creating a global sales tax system that requires foreign providers to register and remit sales taxes is fraught with complexity. Registration requirements alone create new costs that some businesses may be unwilling to bear. In order to avoid burdening small businesses, countries may set a revenue threshold before registration and collection requirements kick in. In fact, some businesses may simply decide to avoid or block the taxing market altogether, leading to services that either decline to sell locally or which increase their prices to account for the regulatory cost burden.

The sales tax issue has been framed by some as a "tax holiday" for Internet companies, yet the reality is that when applicable, sales taxes are paid by consumers, not the companies. Companies resident in Canada are merely required to collect and remit the applicable sales taxes. The tax does not come out of earnings or represent a gain for the companies, who act as intermediaries by collecting the sales tax and remitting it to the government. Sales tax is applied to digital services by companies with a digital presence in Canada. That means there is no sales tax when subscribing to Netflix directly from the company, but there is for those who subscribe through Apple iTunes. The difference is that Apple has a physical presence in Canada, whereas Netflix does not.

[30] <https://www.theglobeandmail.com/politics/article-canada-wont-act-alone-on-new-tax-rules-for-digital-giants-morneau/>

Quebec launched its digital sales tax in January 2019, but the provincial plan raises significant enforcement challenges and compliance costs that will exceed actual payments for some businesses. Those challenges were highlighted at a 2016 hearing at the Standing Committee on Canadian Heritage, where officials stated:

E-commerce sales by foreign-based companies can present a challenge for proper sales tax collection. Foreign-based Internet vendors' businesses with no physical presence in Canada are generally not required to collect GST/HST on their sales. Instead, in the case of physical goods that are purchased online and shipped to Canada by post or courier, the applicable customs duties and GST/HST would generally be collected by the Canada Border Services Agency at the time the goods are imported.

In cases other than the importation of physical goods, the GST/HST legislation imposes a general requirement to self-assess the tax. For businesses that would be entitled to recover any tax payable by claiming input tax credits, there is generally no requirement to self-assess tax on such imports. The challenges related to the proper collection of sales tax on digital supplies by foreign-based vendors are not unique to Canada. It's a difficult issue for all jurisdictions with a sales tax.[31]

The issue is not new. The prospect of extending GST/HST emerged as an issue in 2014 when the Conservative government raised the idea in its budget and launched a public consultation on the matter.[32] For all the talk of an unfair playing field or lost revenues, the extension of sales taxes to foreign digital providers appears to be a question of when, not if. In the meantime, Canadians anxious to pay the sales tax on digital services such as Netflix need not wait for governments to act since the law allows for self-reporting of the applicable sales tax.

In addition to the application of a digital sales tax, all companies (Internet or otherwise), should pay taxes on profits made in Canada. While the income tax issue is an important one, it is not a digital tax issue per se. Rather, it reflects ongoing corporate tax challenges that implicates all multinational companies that strategically structure themselves in the most tax advantageous manner. The debate on the issue is not limited to Canada with countries around the world struggling with the same question.

The issue was raised at the Senate committee, with a CRA official commenting:

It is also important to understand the current corporate tax system, which is essentially based on the notion of permanent establishment, which is a traditional concept. For example, when a company does business in another country and has employees and plants in that country, it clearly has a permanent establishment. The general concept of taxation is based on these notions.

A company that does business in another country and sells digital products does not necessarily have a physical presence. Consequently, some important questions arise with respect to income taxation. The key question is whether these permanent establishment concepts on which tax

[31] <http://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-41/evidence>
[32] <https://www.thestar.com/business/2015/01/23/is-the-digital-taxman-headed-to-canada-geist.html>

treaties are based still represent the best way to tax those businesses and to determine whether value is being created in the source country by those electronic transactions. If that is the case, one must determine the approach that should be used to tax properly, but also to ensure that the ultimate result is not double taxation of the business in question.

This therefore requires discussions at the international level, such as those currently being held at the OECD, for example. I think the OECD communiqués attest to the fact that the various OECD members have agreed to take time to analyze this question. The ideal solution is to come up with joint and coordinated options or new standards to prevent double taxation.[33]

In other words, the income tax question is not limited to Canada nor to technology companies. There is a general consensus on the need to address income tax standards to ensure fair taxation without double payment in multiple jurisdictions.

2. Mandated OTT Taxes: The "Netflix" Tax

Proponents of a mandated Netflix contribution typically rely on three arguments: (i) failure to impose fees and regulation on foreign providers represents an "existential threat" to Canadian creative industries since they argue it will lead to reduced spending on production in Canada; (ii) there is a need to "level playing field" for Canadian services competing against foreign providers; and (iii) Europe is moving toward Netflix regulation and Canada should too.

First, as noted above, the Canadian film and television production industry does not face an existential threat as the sector has seen record spending in recent years.

Second, the most apt-comparison to Netflix is not to a broadcaster or BDU, but rather to competitive online video services. As previously discussed on the need for like-to-like regulation, these services, whether Canadian or foreign, are all subject to the same requirements, namely no mandated Cancon contributions. For example, Bell's CraveTV, which frequently promotes U.S. programming such as Seinfeld and the Sopranos, does not face any Cancon contribution or spending requirements. While some prefer the comparison to broadcasters or BDUs (arguing that the service feels similar to Canadian subscribers), as noted above, the reality is that both Canadian broadcasters and BDUs are subject to mandated contributions as part of a regulatory quid pro quo in which they receive significant benefits for being part of the regulated system.

The third argument for Netflix regulation is that Europe has introduced regulatory requirements on services such as Netflix and Canada should follow suit. While proponents argue that Europe envisions requirements that 30 per cent of the Netflix catalog constitute European programming, those rules are an apples to oranges comparison with Canada. First, the European rules, which do not take effect until 2020, rejected Europe-wide mandated payments, opting instead for optional system. In other words, there is no required European Union Netflix tax. The European Commission states:

[33] <https://sencanada.ca/en/Content/Sen/Committee/421/TRCM/36ev-54106-e>

The new rules clarify the possibility for Member States to impose financial contributions (direct investments or levies payable to a fund) upon media service providers, including those established in a different Member State but that are targeting their national audiences. This would be a voluntary measure for Member States, not an obligation at EU level.[34]

Second, the content requirements are continent-wide, not limited to a single country. The European requirement of 30 per cent incorporates all 28 European Union member states. Once spread across all member states, the requirement is not particularly onerous since it effectively envisions a few per cent per country of the overall catalog. The percentage of Canadian content on the Canadian Netflix is already comparable to the per-European country amount. In fact, the European Commission emphasizes:

We also need to pay attention to new market entrants and small players. The new rules also include a mandatory exemption for companies with a low turnover and low audiences. It could also be inappropriate to impose such requirements in cases where – given the nature or theme of the on-demand audiovisual media services– they would be impracticable or unjustified.[35]

The **panel should therefore reject calls to implement a Netflix tax or mandated contribution on OTT services**.

3. Internet Access Tax

A potential Netflix tax may garner the lion share of media attention, but the more harmful tax proposal comes from those advocating for a tax on Internet service providers that would have a real impact on all Internet use. As far back as 1998, the CRTC conducted hearings on "new media" in which groups argued that the dial-up Internet was little different than conventional broadcasting and should be regulated and taxed as such. In other words, groups have been arguing for new Internet taxes since before Google, Facebook, or Netflix.

An Internet tax is largely premised on the argument that ISPs and Internet companies owe their revenues to the cultural content accessed by subscribers and they should therefore be required to contribute to the system much like broadcasters and broadcast distributors. In fact, the CRTC said exactly that in its report on broadcasting last year:

there are numerous services in Canada that connect Canadians to content, whether through the Internet or broadcast networks, such as cable or satellite. Demand for these services is almost wholly driven by demand for audio and video content, yet the Canadian market for this content is only supported by BDUs, television programming and radio services.[36]

As discussed above, the reality is that Internet use is about far more than streaming videos or listening to music. Those are obviously popular activities, but numerous studies point to the fact that they are not nearly as popular as communicating through messaging and social networks, electronic commerce, Internet banking, or searching for information. Simply put, Internet use is

[34] http://europa.eu/rapid/press-release_MEMO-18-4093_en.htm>
[35] Ibid.
[36] Supra, note 16.

about far more than cultural consumption. Yet proponents of an Internet tax envisions the Internet as little more than cable television and wants to implement a taxation system akin to that used for cable and satellite providers.

There is no way around the fact that an Internet tax would make access less affordable, expanding the digital divide by placing Internet connectivity beyond the financial reach of more low-income Canadians. The tax would be particularly damaging in indigenous communities. The government's emphasis on affordability and innovation is a critical consideration. Minister Bains has acknowledged the broadband affordability problem:

Low-income Canadians spend a higher share of their household income on cellphone and Internet bills than high-income Canadians. So it's not surprising that only 6 out of 10 low-income households in Canada have Internet service. By contrast, virtually all households that earn $125,000 annually have it.

This digital divide is unacceptable. It represents a real barrier to continued prosperity for Canadians. Every child who's unable to do school assignments or download music online is one less consumer of your products and services. Each one of these children is potentially one less software developer for your industry – and one less job creator for our country.

We need every Canadian to be innovation ready- ready to spot opportunities, imagine possibilities, discover new ideas, start new businesses and create new jobs. All Canadians need access to high-speed Internet, regardless of their income level or postal code. Until we bridge this digital divide, Canadians will not reach their full potential.[37]

In light of the harmful effects, the government rejected an Internet tax proposal in 2017 on affordability grounds:

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 innovative, 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.[38]

Given the potential harms and the need to prioritize affordable access, **the panel should reject calls to establish an Internet access tax to support the creation of Cancon**.

[37] < https://www.canada.ca/en/innovation-science-economic-development/news/2017/06/2017_canadian_telecomsummit.html>
[38] < http://www.michaelgeist.ca/2017/10/government-rejects-call-internet-tax-conflicts-principle-affordable-access/>

D. Fostering Competitiveness in the Communications Sector

When the Broadcasting Act was crafted, broadcasters occupied a privileged position, since the creation of video was expensive and the spectrum needed to distribute it scarce. As a result, the government established a licensing system complete with content requirements and cultural contributions designed to further a myriad of policy goals. Yet among the more than 40 policy goals found in the current law, the word "competition" does not appear once. The absence of competition may have made sense when there was little of it, but in today's world of abundance featuring a seemingly unlimited array of content and distribution possibilities, fostering competition among broadcasters and broadcast distributors such as cable and satellite companies is essential to long-term success.

The panel should recommend several reforms that would help solidify the competitiveness of the broadcasting sector. These include the removal of foreign ownership restrictions, enhancing consumer choice, the gradual elimination of simultaneous substitution, and limitations on the CBC's acceptance of digital advertising to decrease overlap with the private sector advertising-based models. The submission does not recommend the elimination of mandated contributions by broadcasters and BDUs given the ongoing benefits those sectors enjoy, though it recognizes that the impact of those contributions is likely to diminish over time.

i. Remove Foreign Investment Restrictions in Broadcasting

While the link between broadcasting and Canadian culture is obvious, the connection between Canadian broadcasting ownership and Canadian culture is tenuous at best. Canadian law currently features both foreign ownership restrictions and content requirements. The foreign ownership rules generally limit licensees to 20 percent foreign ownership (up to 33 percent for a holding company). This covers all types of broadcasters including television, radio, and broadcast distributors.

Many observers appear to assume that Canadian ownership and content requirements go hand-in-hand, fearing that a foreign owned broadcaster would be less likely to comply with Canadian content requirements. Yet there is little reason to believe this to be so. Foreign owned businesses face Canadian-specific regulations all the time – provincial regulations, tax laws, environmental rules, or financial reporting – and there is little evidence that Canadian businesses are more likely to comply with the law than foreign operators.

Cultural businesses may raise particular sensitivities, but broadcasters that are dependent upon licensing from a national regulator can ill-afford to put that licence at risk by violating its terms or national law. In fact, a review of other developed countries reveals that many have eliminated foreign ownership restrictions in their broadcasting sector but retain local content requirements. For example, Australia has no foreign ownership restrictions on broadcasters (Canwest was once the majority owner of one of its television networks), yet employs a wide range of local content requirements.

The same is true in many European countries – Germany has eliminated foreign ownership restrictions but retains daily regional programming requirements, Ireland has no foreign ownership restrictions but establishes programming requirements for each broadcast licensee, and the Czech Republic has dropped its foreign ownership restrictions but relies on broadcasting licences to mandate local programming.

In short, the cultural concerns associated with greater foreign ownership are vastly overblown. The **panel should recommend the elimination of foreign ownership restrictions in the licensed broadcasting sector**.

ii. Enhance Consumer Choice

Broadcasters and BDUs should be forced to compete more aggressively for viewers and original Canadian content. In the current environment, cable and satellite companies package hundreds of channels together in a confusing manner that leaves consumers frustrated with ever-increasing bills, while broadcaster competition is largely limited to outbidding one another for Hollywood hits.

Injecting competition into this environment would include enhancing pick-and-pay options for consumers that allow them to pay only for those channels they actually want. The CRTC's previous pick-and-pay efforts have generated limited success given the poor response from the cable and satellite operators. A **panel recommendation to establish more robust, mandated options would enhance consumer choice and drive increased competitiveness in the sector**.

iii. Elimination of Simultaneous Substitution

The **panel should recommend the gradual elimination of simultaneous substitution policies**. The policy was born decades before specialty channels, recording devices, and Internet streaming that have combined to render simultaneous substitution increasingly irrelevant. Recording television shows, watching them on demand, or subscribing to sports streaming packages largely eliminates the simultaneous substitution issue since Canadians control when and what they watch.

Moreover, while the Canadian industry has grown addicted to the revenues from licensing the relatively cheap U.S. programming that triggers the ability to block U.S. feeds through simultaneous substitution regulations, the policy arguably undermines the long-term success of the Canadian system and Canadian programming.

Simultaneous substitution generates some revenues that can be leveraged for mandatory Canadian content contributions, but it comes at a cost of losing of control over the Canadian programming schedule and effectively turning the Canadian broadcast system into a country-wide U.S. affiliate. Rather than focusing on original Canadian programming, Canadian broadcasters are beholden to the U.S. with hundreds of millions of dollars spent on the rights to non-Canadian programming and schedules largely dictated by U.S. networks.

iv. Limits to CBC Digital Advertising

One of the most contentious issues in recent years has been the CBC's emphasis on digital delivery of news content. Reconciling the need for the CBC to remain relevant by embracing digital delivery with the financial impact on private sector news services could be addressed by a **panel recommendation requiring the public broadcaster to adopt an ad-free approach to its online news presence**. That would ensure that it reaches digital audiences but does not directly compete with the private sector for advertising dollars.

While some have characterized CBC's role in providing digital news as an unfair, publicly-subsidized competitor to private news services that increasingly rely on paywalls and subscriptions to generate revenue, the industry's reliance on paywalls is precisely why the CBC should be offering a free, taxpayer-backed digital alternative. An informed electorate demands that all Canadians have access to reliable news and expert opinion without regard for their ability to pay for it. In a digital world filled with paywalls and concerns about fake news, the importance of a publicly-funded, freely available, trusted media institution is greater than ever and the CBC (now backed by hundreds of millions of extra tax dollars) is ideally suited to meet that need.

While the CBC should be responding to its audience with a strong digital news service, it does not follow that it should also compete for digital advertising dollars. Its total digital advertising revenues are relatively small (and they are even smaller - roughly $6 million - for the online news service) so the foregone earnings will not have a material impact on the CBC. However, there is a market effect of having the CBC compete for ad dollars that affects news organizations of all sizes. This includes large players like the Toronto Star and Postmedia as well as smaller, independent media for whom a loss of thousands in advertising can be significant. An ad-free online service would better justify the public investment in the public broadcaster, make for an enhanced user experience, and remove the concern that the CBC is harming private sector alternatives by competing for advertising dollars.

While these changes would dramatically shift the legal and regulatory environment for Canadian culture, the **panel could recommend an even bigger goal for the CBC to capture the public's imagination. That could include requiring the CBC to open its content for public reuse or embarking on a comprehensive digitization initiative that provides the foundation for a national digital library**.

Appendix A: Summary of Recommendations

Core Principle: Communications policy, whether telecommunications or broadcasting, is now - or will soon become - Internet policy.

Recommendations:

Universal, Affordable Internet Access

1. The panel should deliver a clear statement in support of universal access at the more ambitious speeds.

2. The panel should recommend mandated broadband obligations in support of affordability, limits on data caps, prioritization of adoption rates to close the digital divide, and establish a clear timeline for all stakeholders on achieving the universal, affordable access goal.

3. The panel should recommend policies that support greater wireless competition. These include encouraging foreign investment, continuing to set aside spectrum for new entrants and smaller providers, and oppose further marketplace consolidation on competition grounds. Moreover, a mandated MVNO policy, which would support nimble, low-cost competitors leading to more innovative pricing and services, is long overdue.

4. The panel should recommend the implementation of a new policy direction that require all decisions to be assessed through the lens of their impact on affordable access.

5. The panel should recommend binding consumer protection rules, truth in advertising requirements, safeguards against unfair charges or above-market roaming fees, mandated service disclosure requirements, and clear options for redress for aggrieved consumers.

6. The panel should recommend the establishment of consistent, stable funding for public interest participation in regulatory and policy proceedings

Level Playing Field for Policy: Equality Of Opportunity And Access

7. The panel should ensure that Canadian law offers a level playing field from a policy perspective.

8. The panel should recommend an unequivocal legislative direction to support and enforce net neutrality.

9. The panel should recommend an enhanced third-party access model that seeks to eliminate delays, establishes benchmarks for access, and features independent reviews of reported problems in facilitating consumer access.

10. The panel should ensure that like is treated as like, with sufficient differentiation to treat similar services in an equivalent manner for regulatory purposes.

Humility In Regulation: Recognize The Limits Of Communications Law And Regulation

11. The panel should recognize the importance of regulatory humility as a fundamental principle, guided by the view that communications law should not be used as a regulatory mechanism when other, more appropriate regulatory or legal tools are available nor should it be relied upon as a critical funding mechanism to support other policy objectives.

12. The panel should recommend that communications law defers to generally applicable laws to the maximum extent possible when addressing expression online.

13. The panel should reject any effort to revive a site blocking system within Canadian communications law, leaving the issue to copyright policy makers.

14. The panel should recommend the elimination of privacy rules within Canadian communications law accompanied by a more robust, enforceable PIPEDA that could be used to address privacy safeguards within the sector.

15. Rather than expanding the cross-subsidization approach, the panel should recommend its gradual elimination.

16. The panel should recommend emulating the government's approach to assistance to the media sector as funding should come from general revenues as part of broader government policy, not through cross-subsidization and a myriad of levies that run counter to other policy goals such as affordable Internet access and marketplace innovation.

17. The panel should recommend implementing a level playing field with regard to taxation by supporting the application of sales taxes and general income taxes to Internet services.

18. The panel should reject the implementation of new taxes or mandated contributions on OTT services and Internet providers

Fostering Competitiveness in the Communications Sector

19. The panel should recommend the elimination of foreign ownership restrictions in the licensed broadcasting sector.

20. The panel should recommend establishing more robust, mandated options to enhance consumer choice and drive increased competitiveness in the sector.

21. The panel should recommend the gradual elimination of simultaneous substitution policies.

22. The panel should recommend requiring the public broadcaster to adopt an ad-free approach to its online news presence.

23. The panel should recommend an even bigger goal for the CBC to capture the public's imagination. That could include requiring the CBC to open its content for public reuse or embarking on a comprehensive digitization initiative that provides the foundation for a national digital library.