Responding to the New Environment: A Call for Comments - Comments of the Canadian Communication Systems Alliance, Inc.

APPENDIX A – Responses to Questions in Panel's Terms of Reference

1.1 Are the right legislative tools in place to further the objective of affordable high quality access for all Canadians, including those in rural, remote and Indigenous communities?

Answer: CCSA considers that the *Telecommunications Act* and the *Radiocommunication Act* are sufficiently technologically neutral, as written today, to support the stated objectives. In particular, it will be seen that the legislation currently gives the CRTC considerable flexibility to design its own broadband funding programs to address, among other things, those precise objectives.

1.2 Given the importance of passive infrastructure for network deployment and the expected growth of 5G wireless, are the right provisions in place for governance of these assets?

Answer: The legislation, as interpreted by the Courts, has opened the door to inefficient and, to some degree, conflicting regulation by the CRTC, on the one hand, and provincial and territorial jurisdictions, on the other. Introduction of 5G technology, which involves attachment of telecommunications facilities to a greatly expanded number and to new types of passive support structures, will exacerbate existing issues with inconsistency of attachment terms, conditions and rates. Such issues can be expected to slow deployment and to increase the cost of network upgrades and expansions. Due to higher proportionate attachment costs, that is especially true in relation to networks in low-density and geographically challenging markets.

The CRTC should be given clear, exclusive jurisdiction over support structure attachment matters so as to lend consistency to decision-making in this area, to apply the CRTC's extensive expertise in this area and to ensure that telecommunications attachment policies are governed by the objectives of the *Telecommunications Act*.

See: Discussion at paragraphs 118-148 of CCSA's main brief.

2.1 Are legislative changes warranted to better promote competition, innovation, and affordability?

Answer: This question is posed in the context of the *Telecommunications* and *Radiocommunication Acts*. In CCSA's view, the *Telecommunications Act*, designed as it is as economic regulation, is well-suited to deal with the issues of competition, innovation and affordability. The s. 7 objectives of that *Act*, in particular, give the CRTC a clear mandate to act in support of those objectives. The *Telecommunications Act* also

gives the CRTC substantially the powers of a superior court with respect especially to remedies of the type needed to deal quickly and effectively with competitive issues as they arise.

The *Broadcasting Act*, which is designed primarily as cultural legislation, does not create such a clear mandate to deal with competitive issues as between private parties engaged in broadcasting activities. Indeed, some parties regularly argue that the CRTC has no authority, under the *Broadcasting Act*, to intervene in the commercial relations and agreements between private parties. In particular, the CRTC lacks the authority, under the *Broadcasting Act*, to impose timely, effective interim remedies in response to an ongoing competitive issue.

To address those shortcomings, the *Broadcasting Act* should be amended to:

- give the CRTC clear authority to make regulations, under s. 10, which govern commercial relationships and agreements among actors in the marketplace, as required to respond to potential anti-competitive behaviours;
- repeal s. 18(1)(d);
- re-word s. 12(3) to ensure that it applies to any person affected by a mandatory order issued under s. 12(2); and
- authorize the CRTC to award Administrative Monetary Penalties by including in the *Act* provisions which mirror ss. 72.001 to 72.003 of the *Telecommunications Act*.

See: Discussion at paragraphs 7-69 of CCSA's main brief.

3.1 Are current legislative provisions well-positioned to protect net neutrality principles in the future?

Answer: CCSA considers that the CRTC has been able, under the terms of the *Broadcasting* and *Telecommunications Acts*, as written today, to implement effective, enforceable policies for the protection of net neutrality. Those policies have been applied effectively in CRTC decisions. No legislative changes are required.

4.1 Are further improvements pertaining to consumer protection, rights, and accessibility required in legislation?

Answer: Under the existing legislation, the CRTC has implemented binding codes of conduct for mobile wireless and television service providers and is in the process of

implementing a code of conduct for Internet Service Providers. Those codes set out robust protections in relation to consumer rights and accessibility of services. Those codes are back-stopped by access for Canadian consumers to the services of the Commission for Complaints for Telecom-Television Services. No legislative changes are required.

5.1 Keeping in mind the broader legislative framework, to what extent should the concepts of safety and security be included in the Telecommunications Act/Radiocommunication Act?

Answer: CCSA is not aware of any constraints which the current legislation might place on the regulator's authority or ability to establish policies, as needed, to respond to safety or security concerns. The CRTC's enforcement of CASL is an example of effective enforcement of such policies. CCSA has no specific recommendations for legislative amendment in this area.

6.1 Are the right legislative tools in place to balance the need for flexibility to rapidly introduce new wireless technologies with the need to ensure devices can be used safely, securely, and free of interference?

Answer: In CCSA's view, ISED has the flexibility and the authority it requires, under the *Radiocommunication Act*, to establish and enforce effective spectrum management policies. CCSA has no specific recommendations for legislative amendment in this area.

CCSA's members, like many other network providers, are deeply concerned with the impact that the present patchwork of jurisdiction over telecommunications attachments to passive support structures is having – and will continue to have – on the network providers' ability to deploy network upgrades and new builds quickly and cost-effectively. This issue will become increasingly critical as 5G roll-outs require placement of transmitters on a great many new passive support structures.

To respond to this issue, ss. 43 and 44 of the *Telecommunications Act* should be amended to give the CRTC exclusive jurisdiction to regulate the terms and rates for attachment of telecommunications facilities to support structures, regardless of whether such structures are owned by federal, provincial or municipal undertakings.

See: Discussion at paragraphs 118-148 of CCSA's main brief.

7.1 Is the current allocation of responsibilities among the CRTC and other government departments appropriate in the modern context and able to support competition in the telecommunications market?

Answer: CCSA has no specific recommendations for legislative amendment regarding the allocation of responsibilities among the CRTC and other government departments.

7.2 Does the legislation strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?

Answer: CCSA considers that the legislation, as written today, maintains an effective balance between the operation of the CRTC as an effective, independent regulator and the federal departments with an oversight role which includes powers to require the regulator to reconsider its decisions, conduct inquiries and provide reports. CCSA has no specific recommendations for legislative amendment in this respect.

8.1 How can the concept of broadcasting remain relevant in an open and shifting communications landscape?

Answer: The change from "broadcasting" to delivery of content through a direct relationship between the content provider and the end customer will have profound implications for how the cultural objectives of the *Broadcasting Act* should be applied.

In a world in which the last mile distributor acts only as a conduit through which customers access content but does not actually select, purchase or aggregate content for presentation to the viewer, that last mile distributor no longer acts, in any sense, as a "gatekeeper" within the system.

Rather, the content provider, itself, becomes the arbiter of what content will be available to its direct customer and at what price that content will be available.

In that environment, the last mile distributor becomes little more than a "pipe" for transmission of the content to the viewer. As such, the concept of the Broadcasting Distribution Undertaking as the curator and purveyor of a "closed garden" offering of paid video content will gradually become an anachronism.

Rather, those last mile distributors eventually will operate only as "carriers", whose role is to provide access, through their physical networks, to a range of applications including voice, data and video transmission.

In that scenario, it will become necessary to apply the existing legislation in a new and different way.

On the one hand, content legislation – that is, the *Broadcasting Act* – with all of its cultural objectives, will still apply to any undertaking that originates or provides content

to consumers, be it a linear television channel, an on-demand service that offers content assets on an individual basis or a community channel.

On the other hand, telecommunications legislation regulates the activities of all carriers, including ISPs that provide viewers only with access to video or "broadcasting" content over their networks.

As the delivery model transitions from "broadcasting" through BDUs to a direct relationship between the content provider and the end user – in which the ISP acts only as a "pipe" – it will not be sufficient to place obligations relating to affordability, efficient delivery and reasonable packaging terms solely on BDUs.

Instead, the legislation will need to impose some of those obligations onto the content providers who, increasingly, will own the direct relationship with the end users of their content.

The *Broadcasting Act* should amended to create new obligations on "programming undertakings" as set out below.

A new s. 3(1)(t.1) should be added to the *Act*, as follows:

> programming undertakings, to the extent they host programming for direct delivery to Canadians
>
> (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
>
> (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,
>
> (iii) should make access to their programming available on a non-discriminatory basis to all broadcasting distribution undertakings and carriers.

A new s. 3(1)(t.2) should be added to the *Act*, as follows:

> programming undertakings should, where they provide programming services to broadcasting distribution undertakings or carriers pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services.

See: Discussion at paragraphs 149-177 of CCSA's main brief.

8.2 How can legislation promote access to Canadian voices on the Internet, in both official languages, and on all platforms?

Answer: In CCSA's view, this question is about the CRTC's implementation and execution of policies consistent with the objectives already set out at s. 3 of the *Broadcasting Act*. The *Act*, as written, is agnostic as to the platforms used to deliver broadcasting content and, as such, the question of access to Canadian voices, in both official languages is not limited to delivery "on the Internet".

Consistent with CCSA's answer to Question 8.1, as the content delivery model evolves to one in which content providers have the direct relationship with the end user with respect to use of their content – and as the role of regulated BDUs diminishes – it will become necessary to look to the content providers to ensure that the *Act*'s cultural objectives are satisfied.

The cultural objectives set out in the *Act* today are sufficient to their purpose. While the regulator's ability to impose cultural obligations on content providers that operate under the Digital Media Exemption Order may require review and adjustment at some point in the future, the *Act* gives the CRTC sufficient authority to do that. For those reasons, CCSA has no recommendations for legislative amendment other than those set out in its response to Question 8.1.

9.1 How can the objectives of the Broadcasting Act be adapted to ensure that they are relevant in today's more open, global, and competitive environment?

Answer: The cultural objectives set out in the *Act* today are sufficient to their purpose. CCSA has no recommendations for amendment to the objectives at s.3 of the *Act*.

9.2 Should certain objectives be prioritized? If so, which ones? What should be added?

Answer: The cultural objectives set out in the *Act* today are sufficient to their purpose. CCSA has no recommendations for amendment to the objectives at s.3 of the *Act*.

9.3 What might a new approach to achieving the Act's policy objectives in a modern legislative context look like?

Answer: CCSA sees no need for amendment to the legislated objectives and, as stated above, considers the balance between the independent regulator and the overseeing ministries as being appropriate. CCSA considers that the current approach, in which the independent regulator has the authority and flexibility to create policies in response to

technological and social developments – under the ambit of technologically neutral legislation – remains both appropriate and workable.

10.1 How can we ensure that Canadian and non-Canadian online players play a role in supporting the creation, production, and distribution of Canadian content?

Answer: CCSA foresees a gradual transition away from delivery of content packaged by BDUs and toward an environment in which content providers have the direct relationship with the end user with respect to use of their content and ISPs provide the "pipes" though which end users access the content. The gradual diminution of the base of regulated BDUs will lead to some reduction of the total available funding for Canadian content creation.

Where an ISP provides only the transmission path and a generic navigation or recommendation engine, it does not by those functions, alone, take part in the selection, origination or packaging of content. As such, the ISP has no role to play in contributing to the *Act*'s policy objectives.

It is not appropriate to impose Canadian content funding obligations on ISPs who act only as carriers of broadcasting and, as such, are excluded from application of the *Broadcasting Act* by s. 4(4) which provides that "this Act does not apply to a telecommunications common carrier, as defined in the Telecommunications Act, when acting solely in that capacity."

CCSA notes that it remains open to Government to apply the Canadian content funding and exhibition obligations to all content providers – Canadian and non-Canadian – who sell their content to Canadian consumers and who benefit from their activity in the Canadian content marketplace.

See: Discussions at paragraphs 70-95 and178-190 of CCSA's main brief.

10.2 How can the CRTC be empowered to implement and regulate according to a modernized Broadcasting Act in order to protect, support, and promote our culture in both official languages?

Answer: CCSA considers that the CRTC has the necessary authority and flexibility to protect, support, and promote our culture in both official languages under the *Broadcasting Act*, as written today.

10.3 How should legislative tools ensure the availability of Canadian content on the different types of platforms and devices that Canadians use to access content?

Answer: CCSA considers that the technologically neutral legislation that we have today is sufficient to the purpose of ensuring that Canadian content is available on different types of platforms and devices.

To CCSA's members, the critical aspect of this question is the timely and equitable availability of rights, from the content providers, to distribute content to all platforms at the same time as the content providers give other distributors or direct end users such rights. That is a question of competitive equity which underscores the need to ensure that the regulator has an effective toolkit for timely resolution of competitive issues in the marketplace.

See CCSA's answer to Question 2.1 above. To supervise a fair rights market which ensures affordable access to content on all platforms to all Canadians, the regulator must be empowered to intervene quickly and effectively in matters involving withholdings of multi-platform distribution rights for competitive reasons. While it is not a matter for legislative amendment, *per se*, it is critical that the provisions of the existing *Wholesale Code* remain binding on content providers.

11.1 Are current legislative provisions sufficient to ensure the provision of trusted, accurate, and quality news and information?

Answer: CCSA has no specific recommendations on matters relating to the accuracy and quality of news programming.

11.2 Are there specific changes that should be made to legislation to ensure the continuing viability of local news?

Answer: While CCSA has no specific legislative amendments to recommend in this area, it does wish to note that, especially as the major broadcast networks retreat from spending on the creation and exhibition of local news, there is an increasingly meaningful opportunity to support creation and exhibition of local news programming on community channels. Such "hyper local" content fits extremely well with the legislated objectives related to local expression and reflection.

CCSA members continue to operate and to launch new community channels as a means of community service, of differentiating their offerings from those of their competitors and of connecting with their customers. Increasingly, those community channels are becoming diverse offerings of local news, sports and other community information, often delivered through associated apps to end users' devices outside the home. A legislative review should consider whether new means could be used to encourage such activities.

12.1 How can the principle of cultural diversity be addressed in a modern legislative context?

Answer: CCSA considers that the *Broadcasting Act*, as written, effectively supports cultural diversity. CCSA has no specific recommendations for legislative amendment in this respect.

13.1 How should the mandate of the national public broadcaster be updated in light of the more open, global, and competitive communications environment?

Answer: For this question and Questions 13.2 through 13.6 below, CCSA has no recommendations to offer concerning the national public broadcaster.

13.2 Through what mechanisms can government enhance the independence and stability of CBC/Radio-Canada?

13.3 How can CBC/Radio-Canada play a role as a leader among cultural and news organizations and in showcasing Canadian content, including local news?

13.4 How can CBC/Radio-Canada promote Canadian culture and voices to the world, including on the Internet?

13.5 How can CBC/Radio-Canada contribute to reconciliation with Indigenous Peoples and the telling of Indigenous stories by Indigenous Peoples?

13.6 How can CBC/Radio-Canada support and protect the vitality of Canada's official languages and official language minority communities?

14.1 Does the Broadcasting Act strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?

Answer: CCSA considers that the legislation, as written today, maintains an effective balance between the operation of the CRTC as an effective, independent regulator and the federal departments with an oversight role which includes powers to require the regulator to reconsider its decisions, conduct inquiries and provide reports. CCSA has no specific recommendations for legislative amendment in this respect.

14.2 What is the appropriate level of government oversight of CRTC broadcasting licencing and policy decisions?

Answer: CCSA considers that the existing legislation provides an appropriate level of government oversight.

14.3 How can a modernized Broadcasting Act improve the functioning and efficiency of the CRTC and the regulatory framework?

Answer: In CCSA's view, the one fundamental deficiency in today's legislation is the absence, in the *Broadcasting Act*, of a toolkit for timely and effective adjudication of commercial issues and disputes and, especially, instances of anti-competitive behavior by the large, vertically-integrated media companies.

See: See CCSA's answer to Question 2.1.

14.4 Are there tools that the CRTC does not have in the Broadcasting Act that it should?

Answer: In CCSA's view, the one fundamental deficiency in today's legislation is the absence, in the *Broadcasting Act*, of a toolkit for timely and effective adjudication of commercial issues and disputes and, especially, instances of anti-competitive behavior by the large, vertically-integrated media companies.

See: See CCSA's answer to Question 2.1.

14.5 How can accountability and transparency in the availability and discovery of digital cultural content be enabled, notably with access to local content?

Answer: Content providers will, increasingly, be the curators and gatekeepers of the content which they make available directly to Canadian consumers. Increasingly, last mile distributors will rely on generic navigation and recommendation tools provided by their hardware and middleware suppliers as an integral element of their distribution networks. Such tools will promote the end user's access to as much content as possible and facilitate the end user's navigation of that massive store of content from all sources.

Over time, the navigation and recommendation tools will base their returns of content asset titles more and more on the habits of individual end users, without intervention from the last mile distributor. With end users driving the discovery of content that is relevant to them, imposition of culturally based rules on the navigation and recommendation tools is unlikely to be a useful strategy.

For those reasons, accountability and transparency in the availability and discovery of digital cultural content can be enabled, primarily, by imposition of obligations relating to the *Broadcasting Act's* cultural objectives directly on the content providers that benefit from selling broadcasting content into the Canadian marketplace.

See: Discussion at paragraphs 149-177 of CCSA's main brief.