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Via E-mail

October 20th, 2022

Mr. Vincent Labrosse
Procedural Clerk
Standing Senate Committee on Transport
and Communications
The Senate of Canada
Ottawa, Ontario
K1A 0A4

Dear Mr. Labrosse:

Re: Submission by the Canadian Association of Broadcasters Concerning the Study of *Bill C-11, An Act to Amend the Broadcasting Act and to Make Related and Consequential Amendments to Other Acts*

1. The Canadian Association of Broadcasters (CAB) is pleased to file the following comments on and proposed amendments to *Bill C-11: an Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts* (Bill C-11). As the national voice of Canada's private broadcasters, the Senate's study of Bill C-11 is of paramount importance to the CAB's member companies.

2. The CAB appeared before the Committee on September 15th, 2022. This submission builds on its testimony and responds to certain proposals that other parties have made to the Committee. More specifically, these comments address the following issues:

   - The importance of the amendments to Section 3(1)(i)(v) of the *Broadcasting Act* (the Act) included in the version of Bill C-11 passed by the House of Commons;
   - Why introducing language relating to "terms of trade" is unnecessary;
   - How the current amendments to Sections 3(1)(f) and (f.1) and 5.2(a.1) of the *Act* perpetuate a two-tier regulatory system pursuant to which Canadian broadcasting undertakings are subject to more onerous rules while foreign services are required to make a lesser contribution, if they are required to make one at all; and
   - That the current language in Section 9.1(1) and related sections will severely limit the Canadian Radio-television and Telecommunications Commission's (Commission or CRTC) ability to implement the broadcasting policy objectives set out in the *Act*.

3. Each of these issues is discussed in detail below. Given Bill C-11's importance for Canadian broadcasting policy going forward, the CAB urges the Senate to adopt the recommendations contained herein and pass this legislation on an expedited basis.

Section 3(1)(i)(v) Properly Recognizes the Changing Dynamics in the Canadian Production Sector

4. The House approved version of Clause 5.2 proposes to amend Section 3(1)(i)(v) of the *Act* to read as follows:

> (i) the programming provided by the Canadian broadcasting system should
>
> (v) include the greatest possible contribution from the Canadian production sector, whether it is independent or affiliated with or owned by a broadcasting undertaking.

This amendment expands Section 3(1)(i)(v) to apply to all types of Canadian programming, not just programming from the independent production sector (as is the case in the current *Act*). It rightly recognizes that in a Canadian broadcasting system characterized by unlimited competition from around the world, telling stories made and owned by Canadians should be the primary policy objective, without regard to the corporate structure of the Canadian company making the production.

5. However, in their appearances before the Committee, several representatives of the Canadian independent production community advocated that this section should be amended to revert to the existing language in the *Act*. The President and Chief Executive Officer of the Canada Media Producers Association (CMPA) outlined the rationale behind this position as follows:

> . . . the [House]committee's amendment reflects a misunderstanding of why the act specifically calls for a contribution from the independent production sector. At its core, it is about programming diversity. That is the underlying policy rationale.
>
> Not all of the programming should be both created and distributed by broadcasters; at least some of it should be provided by producers that are independent from those broadcasters. A specific reference to the independent production sector ensures a greater diversity of voices and broader representation and participation in the production of Canadian programming. It also counsel [sic] balances the overwhelming dominance of broadcasters.[1]

6. Unfortunately, these statements are flawed and inaccurate. It is important to highlight that independent production is, first and foremost, a business model undertaken by specific companies, not a genre of programming *per se*. The creative resources involved in these productions (*i.e.,* directors, writers, performers) are not employees, but freelancers that move from project to project. Independent production does not, in and of itself, bring diversity to

[1] Transcript of Appearance by Reynolds Mastin of the Canadian Media Producers Association before the Standing Senate Committee on Transport and Communications (September 15th, 2022).

the Canadian broadcasting system. It is a model that benefits a certain class of business, many of which are large and well-financed. For example, Boat Rocker – a CMPA member – is a publicly-traded company with a market capitalization of more than $150 million that is controlled by Fairfax Financial Holdings Ltd.

7. The current language of the legislation reflects a modern policy understanding of today's competitive broadcasting environment, one that is focused on the growth and sustainability of Canadian content creation. The legislation recognizes that due to the growing presence of foreign streaming services in the market, broadcasting policy must focus on the importance of retaining copyright ownership in Canadian programming, not on whether the Canadian program is produced by an "affiliated" or "independent" Canadian production company. Those types of distinctions, if they were ever relevant, are based market conditions that no longer exist and, if perpetuated, will serve only to undermine Canadian broadcasters' ability to compete against global distribution platforms in the Canadian market. This will directly impact Canadian broadcasters' $2.1 billion annual investment in Canadian programming.[2]

8. Today, there are essentially no barriers to enter the Canadian market. Canada's broadcasters compete daily with foreign media behemoths. Contrary to what CMPA alleged in its appearance, Canadian broadcasters are not dominant players in the market, but are dwarfed by extremely well-capitalized foreign competitors. More than ever, Canadian broadcasters need the ability to innovate, which includes the ability to own and equitably benefit from programs that they develop, finance, produce, and air.

9. It is also important to highlight that, contrary to CMPA's statement during its appearance, the current language in Section 3(1)(i)(v) does not suggest that all Canadian content will be produced by broadcasters going forward. Rather, it states that all Canadian programming must be produced by Canadians, which has been, and must continue to be, a core tenet of Canadian broadcasting policy and correctly shifts the emphasis from supporting specific production business models to supporting all Canadian productions.

10. Notwithstanding the foregoing, we do note that certain independent producer groups have highlighted a discrepancy between the French and English versions of Section 3(1)(i)(v). The French version reads: "faire appel au maximum aux producteurs canadiens". By contrast, the English version reads: "include the greatest possible contribution from the Canadian production sector" and speaks about "broadcasting undertakings" generally, without limiting it to Canadian broadcasting undertakings.

11. These groups are concerned that the English-language text could be interpreted to include programs filmed in Canada, but that are not Canadian (*i.e.,* produced, on location, in Canada and owned by foreign services). For example, in response to questions from Senator Miville-Dechêne at Committee, the President of Muse Entertainment acknowledged this to be his primary concern with Section 3(1)(i)(v):

> If I may, first of all, the biggest problem is in the English translation of that text. The English translation uses the word "production sector" as opposed to the French words "producteur Canadienne." I don't understand who did that translation, and I believe that the text was actually drafted in French first, but if it

[2] CRTC, Communications Management Inc.

> was properly translated from French to English, then I would have partially less objection to that clause. That would certainly help the definition enormously. I don't see why that change can't be made, to use the word "Canadian producers" as opposed to "Canadian production sector." The words "Canadian production sector" include any enterprise that produces programming in Canada. Companies like Amazon, Netflix and Disney have all been recognized by the CRTC as companies that are producing in Canada, and their programming is accepted by CAVCO, the Canadian Audio-Visual Certification Office, as productions that qualify programming for broadcast in Canada. They are recognized.[3]

12. To address independent production companies' concerns, and in the interest of supporting all *Canadian* productions (as the House rightly intended), the CAB would support amending this clause as follows to clarify the issue:

> (v) include the greatest possible contribution from ~~the~~ Canadian produc<u>ers</u> ~~tion sector~~, whether ~~it is~~ independent or affiliated with or owned by a <u>Canadian</u> broadcasting undertaking.

13. We believe amending the language in this manner would strike an appropriate balanace, address independent producers' concerns and give effect to Parliament's original intent, which is to prioritize Canadian-owned programming. We urge the Senate to adopt it for that reason.

Including a Specific Reference to Terms of Trade in Bill C-11 is Unnecessary

14. During their appearance before the Committee, representatives from the CMPA also proposed an amendment to Section 9.1(1) of the *Act* to specifically give the CRTC the authority to impose a "terms of trade" agreement between broadcasters and independent producers. For the reasons outlined below, the CAB respectfully submits that such an amendment is not only unnecessary, but also unwarranted.

15. Terms of trade refers to a set of baseline conditions that must be applied in negotiations between buyers and sellers of content. Historically, the Commission used it powers under the existing *Act* to require the major Canadian television groups to adhere to a terms of trade agreement with the CMPA or the Association québécoise de la production médiatique (APQM) (depending on the language of operation). Consequently, the CAB does not understand why a specific reference to a regulation-making power relating to terms of trade would now be needed. In 2015, after a comprehensive consultation, the Commission announced that it would no longer require adherence to terms of trade agreements in the future as they do not "support the long-term health of the industry as whole" amid a situation that is "no longer tenable". These findings are even more accurate today than they were seven years ago, yet independent producers are asking Senators to turn back the clock without providing any compelling evidence.

16. While CMPA has made unsubstantiated claims that its members are disadvantaged in rights negotiations, this is hardly the case with Canadian broadcasters. In fact, producers often

[3] Transcript of Appearance by Michael Prupas of Muse Entertainmnet/Quebec English-Language Production Council before the Standing Senate Committee on Transport and Communications (September 28th, 2022).

give Canadian broadcasters – even though broadcasters green light and pay to develop the show – lesser rights than they give to foreign streamers, who generally become involved later in the financing process. Competition for top tier content has never been more competitive than it is today, and it is Canadian broadcasters, with operations generally restricted to the domestic market, who are disadvantaged in bidding wars with global players. What independent production companies really want is to codify a set of rules that restricts Canadian broadcasters from benefitting from the international distribution of programs they have played a central role in financing, developing, and producing. This will further harm Canadian broadcasters, who are already in a precarious position.

17. Moreover, there is little evidence to suggest that terms of trade agreements have resulted in a significant increase in production volume in countries where they have been introduced. While CMPA gave anecdotal evidence that, in the United Kingdom, terms of trade "tripled the size of the independent production sector in less than a decade", the truth is that the success of the British production sector in recent years had everything to do with the introduction of an aggressive tax credit program for high-end productions that cost more than one million pounds per episode.[4] Furthermore, terms of trade agreements are only in place for a subset of broadcasters operating in the United Kingdom – public service broadcasters. And Senators need look no further than Canada for evidence that these agreements are unnecessary – since the CRTC eliminated them in 2017, the Canadian independent production sector continued to see significant annual growth.

Bill C-11 Should Not Continue to Perpetuate a Two-Tier Regulatory System

18. At present, Canada's private broadcasters are subject to onerous obligations and significant regulatory oversight. In contrast, streaming services, most of which are foreign owned, have effectively no requirements to operate in this country. While Bill C-11 seeks to formally bring online undertakings into the Canadian broadcasting system, the text still opens the door to an inequitable two-tier system in some places. For example, Clause 3(4) proposes to amend the *Act* to include the following language in Sections 3(1)(f) and (f.1):

> (f) each Canadian broadcasting undertaking shall employ and make maximum use, and in no case less than predominant use, of Canadian creative and other human resources in the creation, production and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;
>
> (f.1) each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve;

[4] Sweney, Mark. "Tax breaks and talent fuel UK's creative industry boom: TV and film production, led by shows such as Netflix's The Crown, is surging ahead despite Brexit fears." *The Guardian*. October 29th, 2016.

19. In addition, Clause 5(1) proposes to add Section 5(2)(a.1) to the *Act*, requiring that the Canadian broadcasting system should be regulated and supervised in a flexible manner that:

> (a.1) takes into account the nature and diversity of the services provided by broadcasting undertakings, as well as their size, their impact on the Canadian creation and production industry, particularly with respect to employment in Canada and Canadian programming, their contribution to the implementation of the broadcasting policy set out in subsection 3(1) and any other characteristic that may be relevant in the circumstances;

20. The language in these sections differ greatly from what was originally proposed in Bill C-10, the precursor to Bill C-11. That bill treated all broadcasting undertakings, Canadian and foreign, the same for the purposes of Section 3(1)(f), simply stating that they should "make use of Canadian creative and other resources in the creation and presentation of programming to the extent that is appropriate for the nature of the undertaking". Moreover, the language in Section 5(2)(a.1) instructed the Commission to regulate the system in a "fair and equitable" manner.

21. Unfortunately, the current language in Bill C-11 threatens to entrench what is already an unsustainable situation. As noted earlier, Canadian broadcasters are competing with global media giants for programming, subscribers, advertising revenue and audiences. These foreign services already have significant advantages given their international reach. There is no policy rationale to subject them to a lesser set of regulatory obligations. Yet, inexplicably, Canadian broadcasting policy is purporting to continue to favour foreign services over Canadian ones.

22. To survive, Canadian broadcasters must have equitable conditions to compete in the new broadcasting landscape. The original intent behind this legislation was to ensure that those who benefit from the Canadian broadcasting system contribute to it. There is no reason why that contribution should be dissimilar to the one that domestic players make. Consequently, the CAB is proposing the following amendments:

> (f) each ~~Canadian~~ broadcasting undertaking shall ~~employ and make maximum use, and in no case less than predominant use, of Canadian creative and other human resources~~ make a significant contribution to ~~in~~ the creation, production and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;
>
> ~~(f.1) each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve;~~
>
> (a.1) is fair and equitable as between ~~takes into account the nature and diversity of the services provided by~~ broadcasting undertakings, taking into

account the nature of the services they provide ~~as well as their size, their impact on the Canadian creation and production industry, particularly with respect to employment in Canada and Canadian programming, their contribution to the implementation of the broadcasting policy set out in subsection 3(1)~~ and any other difference between the undertakings ~~characteristic~~ that may be relevant in the circumstances;

Bill C-11 Must be Amended to Bring Virtual Broadcasting Distribution Undertakings Under the Commission's Regulatory Purview

23. The current *Act* provides the Commission broad jurisdiction to regulate the relationship between programming services and broadcasting distribution undertakings (BDUs). This includes the power under Section 9(1)(h) to make orders requiring BDUs to carry programming services on such terms as the Commission deems appropriate. In the past, the Commission has used this power to mandate the carriage of public interest channels like APTN, CPAC and AMI. The Commission also has the authority under Section 10(1)(g) to make regulations concerning the carriage of programming services. These powers are essential as the current regulated BDU ecosystem plays a central role in supporting the broader public policy objectives in the *Act*. Most Canadians pay to receive television services in some form or another and those revenues help to ensure programming services can make a significant contribution to the system, including supporting Canadian programming.

24. However, the BDU ecosystem is evolving. Virtual BDUs (VBDUs) like Amazon Channels – streaming services that aggregate channels provided by other parties that are delivered over the Internet – are now available and many Canadians are choosing to abandon their traditional BDU services for a VBDU. In fact, it is expected that as technology continues to evolve, most Canadian BDUs will transition to a VBDU model, in whole or in part, and this transition has already begun.

25. Unfortunately, Bill C-11 does not extend the Commission's current powers in the *Act* to VBDUs. Section 9.1(1)(i) under Clause 10 of Bill C-11, only gives the Commission the authority to require a VBDU to carry a programming service, but not to set the terms and conditions of such carriage. Moreover, Section 10(1)(g) of the *Act*, which Bill C-11 does not seek to amend, only gives the Commission the power to make regulations concerning the carriage of programming services by distribution undertakings (VBDUs fall under the definition of online undertaking, which is specifically carved out of the definition of distribution undertaking). If these sections are not amended, the Commission's ability to regulate the broadcast distribution sector will be severely limited going forward.

26. The CAB notes that the Chairperson of the CRTC highlighted these concerns in his appearance before the Committee on June 22nd, 2022. Moreover, the issue was raised by numerous other parties, including the Independent Broadcasters Group, AMI and APTN. The CAB supports their positions and is proposing the following amendments to Section 9.1(1)(i) and 10(1)(g) of the *Act*, as well as deleting 9.1(9) and (10), which become redundant:

> 9.1 (1) The Commission may, in furtherance of its objects, make orders imposing conditions on the carrying on of broadcasting undertakings that the Commission considers appropriate for the implementation of the broadcasting policy set out in subsection 3(1), including conditions respecting

(i) a requirement, with~~out~~ terms or conditions, for a person carrying on an online undertaking that provides the programming services of other broadcasting undertakings in a manner that is similar to a distribution undertaking to carry programming services, specified by the Commission, that are provided by a broadcasting undertaking;

~~Good faith negotiation~~

~~(9) The person carrying on an online undertaking to whom an order made under paragraph (1)(i) applies and the person carrying on the broadcasting undertaking whose programming services are specified in the order shall negotiate the terms for the carriage of the programming services in good faith.~~

~~Facilitation~~

~~(10) The Commission may facilitate those negotiations at the request of either party to the negotiations.~~

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

(g) respecting the carriage of any foreign or other programming services ~~by distribution undertakings~~;

Conclusion

27. Bill C-11 is a critical piece of legislation that will help bring Canada's broadcasting policy framework into the 21st century. As a result, it should be forward looking and supportive of the Canadian broadcasting system's long-term success. The amendments CAB has proposed herein, which are summarized in Appendix "A", are necessary to ensure that happens.

28. We urge the Senate to adopt these recommendations and pass Bill C-11 on an expedited basis.

29. All of which is respectfully submitted.

Yours sincerely,

Kevin Desjardins
President
Canadian Association of Broadcasters

Appendix "A" – Summary of CAB Recommendations

Current Language	Proposed Amendment
3(1) It is hereby declared as the broadcasting policy for Canada that (f) each Canadian broadcasting undertaking shall employ and make maximum use, and in no case less than predominant use, of Canadian creative and other human resources in the creation, production and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources; (f.1) each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve; (i) the programming provided by the Canadian broadcasting system should (v) include the greatest possible contribution from the Canadian production sector, whether it is independent or affiliated with or owned by a broadcasting undertaking;	3(1) It is hereby declared as the broadcasting policy for Canada that (f) each ~~Canadian~~ broadcasting undertaking shall ~~employ and make maximum use, and in no case less than predominant use, of Canadian creative and other human resources~~ make a significant contribution to ~~in~~ the creation, production and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources; ~~(f.1) each foreign online undertaking shall make the greatest practicable use of Canadian creative and other human resources, and shall contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve;~~ (i) the programming provided by the Canadian broadcasting system should (v) include the greatest possible contribution from ~~the~~ Canadian produc~~ers tion sector~~, whether ~~it is~~ independent or affiliated with or owned by a Canadian broadcasting undertaking;
5(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that (a.1) takes into account the nature and diversity of the services provided by broadcasting undertakings, as well as their size, their impact on the Canadian creation and production industry, particularly with respect to employment in Canada and Canadian programming, their contribution to the implementation of the broadcasting	5(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that (a.1) is fair and equitable as between ~~takes into account the nature and diversity of the services provided by~~ broadcasting undertakings, taking into account the nature of the services they provide ~~as well as their size, their impact on the Canadian creation and production industry, particularly with respect to employment in Canada and~~

policy set out in subsection 3(1) and any other characteristic that may be relevant in the circumstances;	~~Canadian programming, their contribution to the implementation of the broadcasting policy set out in subsection 3(1)~~ and any other difference between the undertakings ~~characteristic~~ that may be relevant in the circumstances;
9.1 (1) The Commission may, in furtherance of its objects, make orders imposing conditions on the carrying on of broadcasting undertakings that the Commission considers appropriate for the implementation of the broadcasting policy set out in subsection 3(1), including conditions respecting	9.1 (1) The Commission may, in furtherance of its objects, make orders imposing conditions on the carrying on of broadcasting undertakings that the Commission considers appropriate for the implementation of the broadcasting policy set out in subsection 3(1), including conditions respecting
(i) a requirement, without terms or conditions, for a person carrying on an online undertaking that provides the programming services of other broadcasting undertakings in a manner similar to a distribution undertaking to carry programming services, specified by the Commission, that are provided by a broadcasting undertaking;	(i) a requirement, with~~out~~ terms or conditions, for a person carrying on an online undertaking that provides the programming services of other broadcasting undertakings in a manner similar to a distribution undertaking to carry programming services, specified by the Commission, that are provided by a broadcasting undertaking;
Good faith negotiation	~~Good faith negotiation~~
(9) The person carrying on an online undertaking to whom an order made under paragraph (1)(i) applies and the person carrying on the broadcasting undertaking whose programming services are specified in the order shall negotiate the terms for the carriage of the programming services in good faith.	~~(9) The person carrying on an online undertaking to whom an order made under paragraph (1)(i) applies and the person carrying on the broadcasting undertaking whose programming services are specified in the order shall negotiate the terms for the carriage of the programming services in good faith.~~
Facilitation	~~Facilitation~~
(10) The Commission may facilitate those negotiations at the request of either party to the negotiations.	~~(10) The Commission may facilitate those negotiations at the request of either party to the negotiations.~~
10 (1) The Commission may, in furtherance of its objects, make regulations	10 (1) The Commission may, in furtherance of its objects, make regulations
(g) respecting the carriage of any foreign or other programming services by distribution undertakings;	(g) respecting the carriage of any foreign or other programming services ~~by distribution undertakings~~;