



Filed Electronically

26 July 2023

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Doucet:

**Re: Broadcasting Notice of Consultation CRTC 2023-138 – *The Path Forward: Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content* (BNC 2023-138)
Reply submission of the Canadian Association of Broadcasters (CAB)**

1. As the national voice of Canadian small, medium, and large Canadian privately-owned and controlled radio, television, and discretionary broadcasters, both independent and vertically integrated, including services operating under 9.1(1)(h) distribution orders, the CAB is pleased to provide the following reply comments concerning BNC 2023-138, the Canadian Radio-television and Telecommunications Commission's (the Commission or CRTC) call for comments on a modernized regulatory framework.¹

Overview

2. As noted in BNC 2023-138, on 27 April 2023, the *Online Streaming Act* (the Streaming Act) came into force.² This legislation made several key amendments to the *Broadcasting Act* (the Act) to “account for the impact Internet audio and video services have had on the Canadian broadcasting system.”³

¹ *The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content*, Broadcasting Notice of Consultation CRTC 2023-138, 28 June 2023.

² *Ibid.*, at paragraph 1.

³ *Ibid.*

3. As the CAB highlighted in its initial submission in this proceeding, Canadian broadcasters are facing significant structural challenges as a result of intense competition from online undertakings that, at present, are subject to no requirements relating to contributing to the achievement of the objectives of the *Act*. Consequently, there is a pressing need to recalibrate the contributions made by the various players in the Canadian broadcasting system. This situation has also been acknowledged by the Government in the *Regulatory Impact Analysis Statement* that accompanies the draft *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)* concerning the implementation of the *Streaming Act*⁴ (the Direction), noting that:

The long-term viability of Canadian broadcasters is . . . at risk, as these broadcasters face unfavourable market trends and an uneven regulatory regime that inhibits their ability to innovate, compete and serve communities.

4. One of the key aspects of the revised *Act* is that online undertakings are expected to invest in Canadian programming and to make it available to Canadians.⁵ However, in addition to the more general objectives in the *Act* relating to supporting the creation of Canadian programming using predominantly Canadian resources, the *Streaming Act* introduced other important changes, including introducing new objectives relating to how the Canadian broadcasting system can meet the needs of Canada's Indigenous peoples, Black and racialized Canadians, Canadians living in Official Language Minority Communities (OLMCs) and Canadians from other equity deserving groups. Furthermore, the *Act* now makes specific reference to the importance of news and current events programming as a key element of Canadian broadcasting policy.
5. Of equal importance is what the *Streaming Act* repealed – specifically, Section 3(1)(s), which specified that private broadcasters should “contribute significantly to the creation and presentation of Canadian programming”. This section was the underpinning for the regulatory obligations which currently apply to many of the CAB's members.⁶ Under the new *Act*, private broadcasters are now required to contribute “in an appropriate manner to the creation and presentation of Canadian programming”.
6. In light of all of these changes, in its initial submission, the CAB put forward a fair, equitable and flexible proposal designed to balance the various objectives set out in the *Act* and highlighted by the Commission in BNC 2023-138. The CAB's proposed framework addresses the following considerations:

⁴ Canada Gazette, Part I, Volume 157, Number 23: *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*. Available at: <https://canadagazette.gc.ca/rp-pr/p1/2023/2023-06-10/html/reg1-eng.html>.

⁵ *Supra*, Note 1, at paragraph 7.

⁶ See *Reconsideration of the decisions relating to the licence renewals for the television services of large French-language private ownership groups*, Broadcasting Notice of Consultation CRTC 2017-428, 5 December 2017, at paragraph 2.

- The sustainability of the Canadian owned and controlled broadcasting system must be identified as a priority and named as one of the Commission’s key objectives for the new contribution framework.
 - The Commission must urgently take this opportunity to recalibrate the contribution framework to ensure that foreign online streamers make meaningful and equitable contributions to the Canadian broadcasting system, and to reduce the regulatory burden of Canadian radio and television broadcasters.
 - Initial contribution requirements should apply only to **standalone** online undertakings, and not those undertakings affiliated or associated with Canadian radio and television services, which already make significant contributions to the broadcasting system, regulatory obligations which have become unrealistic in today’s media landscape.
 - The overall financial contribution requirement for large standalone online undertakings – initially defined as undertakings earning more than \$50 million from broadcasting activities in Canada – must be established now.
 - The entire contribution requirement of standalone online undertakings should be directed to third-party Canadian funds that support Canadian and Indigenous production and other important public policy objectives, and divided into four funding ‘buckets’:
 - Support for Canadian audiovisual programming – like the Canada Media Fund (CMF) and the certified independent productions funds (CIPFs) – or musical content (for example, FACTOR/Musicaction and Radio Starmaker Fund/Fonds RadioStar);
 - Support for the production of news and information programming;
 - Support for Indigenous programming and producers and the production activities of Canadians from Black or other racialized communities, Canadians of diverse ethnocultural backgrounds, or other equity seeking groups including producers with disabilities and producers who self-identify as 2SLGBTQI+; and
 - Support for public policy objectives, including funds that support public participation in Commission proceedings (for example, the Broadcast Participation Fund (BPF)), accessibility initiatives (including the Broadcasting Accessibility Fund (BAF), and other public interest objectives (such as community channels and 9.1(1)(h) services).
7. The CAB’s proposals recognize that the *Act* contains competing priorities and would ensure equitable contributions from the various players in the system in furtherance of the *Act*’s multiple objectives.
8. In reviewing the submissions filed by the various interveners, it appears certain groups have chosen to ignore Parliament’s intent when it passed the *Streaming Act*. More specifically, and not surprisingly, representatives of the foreign streaming services and tech giants have attempted to argue that the consideration of contributions by online undertakings is premature at this stage and should be contingent on further processes to be conducted at some point in the future.

9. At the other end of the spectrum, many of the guilds, unions and associations representing the production community have taken the perspective that bringing online undertakings into the regulated broadcasting ecosystem simply means more funding for their members with no adjustments to any of the Commission’s policies affecting licensed broadcasters notwithstanding the fact that the entire media landscape has shifted as a result of massive disruption from online providers.
10. As outlined in detail below, the CAB has developed a balanced proposal that will ensure fair, equitable and immediate contributions by online undertakings, while addressing critical structural issues in the Canadian radio and television sector. The CAB continues to believe that the Commission’s objectives for this proceeding need to be:
 - bringing large streaming services into the regulatory fold as quickly as possible;
 - recalibrating obligations for existing broadcasters so they better reflect market realities and the provisions in the new *Act*; and
 - ensuring sustainable funding for the types of programming identified in the broadcasting policy for Canada and in need of the most support.

Foreign streaming services have been able to operate in Canada without any obligations for years – that must end now

11. In their submissions, foreign streaming services and technology companies voiced opposition to various aspects of the Commission’s proposed contribution framework. More specifically:
 - they are opposed to the concept of contributing money to third party funds, especially due to the fact that they are unclear if they would be able to access those funds⁷;
 - they don’t agree with having specific contribution requirements, arguing that they should be able to structure their contributions in a way that best meets their individual business objectives⁸;
 - they consider investments in foreign “service productions” that are filmed in Canada as a significant and measurable contribution to the achievement of the objectives of the *Act*⁹; and
 - they frame the concept of interim obligations as premature as they could prejudge the overall framework the Commission may implement in steps 2 and 3 of this proceeding and the Commission has yet to review the definition of a “Canadian program”¹⁰.

⁷ Intervention by Apple Canada Inc., at paragraph 10; Intervention by MPA – Canada, at paragraphs 27-29;

⁸ Intervention by MPA – Canada, at paragraph 35.

⁹ *Ibid.*, at paragraph 43.

¹⁰ Intervention by Apple Canada Inc., at paragraph 10; Intervention by MPA – Canada, at paragraph 9.

12. As noted above, the issue of whether online undertakings, specifically those operated by large multinational companies, will be required to invest in Canadian programming has been decided. The issues raised by the streamers and tech companies need to be taken for what they are – an attempt to further delay and frustrate Parliament’s clear intent and the introduction of a fair and equitable contribution regime.
13. As the CAB highlighted in its initial submission, there is no public policy rationale for delaying contributions by large standalone online undertakings or phasing them in. These services are generating hundreds of millions (if not billions) of dollars from the Canadian market and have been doing so for years. They are large, sophisticated companies that have been well aware for some time that Canada was in the process of modernizing its broadcasting regulatory framework. Allowing these services to continue to operate with no regulatory requirements while still subjecting licensed Canadian broadcasters to heavy obligations further extends the unlevel playing field the Government referenced in the introduction to the *Direction*. Although the CAB agrees that obligations imposed on online undertakings don’t necessarily have to be set at the historical levels of traditional broadcasters, they must be equitable. Moreover, to suggest, as Apple Canada has,¹¹ that somehow Canadian services have an advantage over streaming services given policies such as foreign ownership restrictions and that online undertakings are in their infancy, is simply absurd. This may have been true decades ago, when the Canadian broadcasting system was a “walled garden” and the Commission truly governed market entry, but not today, where foreign streaming services compete directly with licensed broadcasters for programming, advertising, subscribers, and listeners.
14. Furthermore, the fact that certain streaming services may pay a large proportion of revenues in royalties¹² is a function of offering certain features to users (*i.e.*, permitting songs to be downloaded and enjoyed offline), and not a reason why such undertakings should not be required to make contributions to the broadcasting system commensurate with the benefits they extract. Radio and pay audio services also pay a significant amount in royalties, and still have significant programming and production expenses. For example, in 2022, Canadian radio stations devoted an amount equal to nearly 40 per cent of their revenues to programming and production.
15. While the Commission has acknowledged that it intends to conduct proceedings to review how Canadian content is defined, the fact that the review has not yet occurred is not a reason to delay imposing obligations on large online undertakings. The CRTC has clearly stated that it is considering the option of an initial base contribution to specified funds. For the purposes of this contribution requirement, the definition of Canadian programming is irrelevant and, in fact, a complete red herring.

¹¹ Intervention by Apple Canada Inc., at paragraph 29.

¹² *Ibid.*

16. Furthermore, there are existing definitions of Canadian content, which all Canadian broadcasting undertakings understand and comply with, and which are applied by Canadian funds like the CMF and by CIPFs. Should those definitions change in the future, any obligations could be adjusted accordingly in Steps 2 and 3 of this proceeding. That said, based on the submissions the foreign streaming services filed, it would appear that their expectation is that any revised definition would recognize “service productions” as Canadian and would permit the intellectual property rights in a production to be held by a non-Canadian entity. Given Section 10(1.1) of the *Act* and the Government’s policies relating to Canadian programming, it is highly unlikely that any such productions would qualify as Canadian.
17. The CAB acknowledges that the question of whether foreign online undertakings should have access to funds to which they contribute is a legitimate concern. However, it is important to recognize that the point of a third-party production fund is not to simply put money in so the same party can take an equal amount of money out. In fact, most funding for the CMF, CIPFs and the Independent Local News Fund (ILNF) comes from broadcasting distribution undertakings (BDUs) who are unable to access any of those funds for their own purposes, and most of it goes to producers of content and not directly to broadcasters.
18. As the CAB highlighted in its initial submission, there are good reasons why large standalone online undertakings should be required to contribute to third party funds. It is the most effective way to ensure that new money being injected into the system is managed in the best interests of that system, does not unduly impact the Canadian rights market, and that the contributions of foreign companies are directed to fully qualified content initiatives and public policy objectives. The nature of the proposals these entities have put forward in this proceeding only reinforces the validity of these arguments and the need to direct their contributions to Canadian funds.
19. Finally, a flexible regulatory framework does not mean that services have complete discretion over how and what they contribute to the system. The foreign services appear to consider this process to be a negotiation where they outline what they are prepared to do as “a take it or leave it” proposition. However, the establishment of contributions will be through public processes where the Commission is tasked with balancing various interests to develop a framework the best achieves the objectives in the *Act*.
20. For all of these reasons, the CAB reiterates its view that the Commission must impose meaningful – not partial or interim – financial obligations on standalone online undertakings in Step 1 of this proceeding.¹³

¹³ In its initial submission, the CAB proposed that online undertakings operating like BDUs (virtual BDUs like Amazon Channels) should be required to devote 5 per cent of their Canadian gross annual revenues to specified funds; for online undertakings that operate like audiovisual programming undertakings (like Netflix and Disney+), the requirement would be 20 per cent; and for online audio undertakings, the number would be 4 per cent.

A modernized regulatory framework regarding contributions must consider the needs of all stakeholders, not just the wants of certain members of the creative community

21. In their submissions, many of the guilds, unions and associations representing producers, writers, directors and actors took the position that:

- the modernization of the contribution framework is about bringing the foreign players into the system, not adjusting the *status quo* for traditional broadcasters;¹⁴
- all of the funds should go to support the creation of Canadian programming, largely in specific genres, such as programs of national interest (PNI), with no additional support for news¹⁵; and
- the vast majority, if not all, of the monies directed to third-party funds should go to the CMF¹⁶.

22. The CAB submits that each of these positions is flawed.

The regulatory obligations of Canadian broadcasters are unsustainable and must be addressed as part of this proceeding

23. As BCE Inc. notes in its intervention, of the three industry sectors impacted by the passage of the *Streaming Act* – Canadian broadcasters, Canadian producers, and foreign online undertakings – only one of them is in crisis.¹⁷ The Government has acknowledged that the long-term viability of Canadian broadcasters is at risk and that the current regulatory environment impedes their ability to compete. In fact, the *Direction* itself is entitled the “Sustainable and Equitable Broadcasting Regulatory Framework”. Moreover, in BNC 2023-138, the Commission notes the following:

The ways in which Canadians consume and create content have been changing for some time. Online services and platforms have been adopted by viewers and listeners across the country and the consumption of traditional television and radio services is declining. This decline means that many of the Commission’s existing policy and regulatory tools have become less effective in supporting the policy objectives of the former Broadcasting Act.¹⁸

[Emphasis added.]

24. Notwithstanding this clear guidance, certain representatives from the creative community have taken the position that the Commission’s objective for this proceeding should be bringing online undertakings – both standalone and those affiliated with licensed Canadian broadcasters – into the system without the need to look at the Canadian media landscape in its entirety. For example, in its submission, the Canadian Media Producers Association (CMPA) notes:

¹⁴ See, for example, intervention by the CMPA, at paragraph 6;

¹⁵ See, for example, the interventions by the CMPA, Directors Guild of Canada, ACTRA and AQPM.

¹⁶ *Ibid.*

¹⁷ Intervention by BCE Inc., at paragraph 25.

¹⁸ *Supra*, Note 1, at paragraph 12.

Services that benefit must contribute their fair and equitable share to the creation and production of Canadian programming. That must remain a core principle. So, first and foremost, the Commission's process must be about levelling up the playing field. But, in doing so, there is no policy rationale in applying lower regulatory standards to foreign online undertakings. Similarly, this should not be an opportunity for Canadian broadcasting undertakings to reduce their existing obligations and contributions to the Canadian broadcasting system.¹⁹

25. In other words, the CMPA (and others) is suggesting that any obligations imposed on Canadian broadcasters should remain unchanged. In its initial submission, the CAB provided detailed evidence concerning the fragile state of the Canadian radio and television market, clearly demonstrating that the Commission's current regulatory model cannot continue. None of the representatives of the creative community provided any such information, other than to state that any requests by broadcasters for more equitable obligations should be ignored.
26. Many in the creative community suggested that initial base contributions for all online undertakings should be set at five per cent of revenues, with additional obligations being imposed at a later time. Given that licensed broadcasters have expenditure obligations ranging between 30 and 50 per cent of previous year's revenues at present, and the creative community are proposing that initial base contributions apply to online undertakings affiliated with these broadcasters from the outset, the CAB struggles to understand how such an obligation constitutes "levelling up the playing field" given that this represents an increase to, and not relief from, the existing contributions made by Canadian broadcasters (even if AQPM's proposal to levy an additional five per cent on standalone online undertakings is adopted). If anything, requiring affiliated online undertakings to make contributions without any change to the overall obligations Canadian broadcasters are subject to would perpetuate current inequities. It is for this reason that the CAB advocated that, as noted earlier, large *standalone* online undertakings should be subject to meaningful financial contribution requirements now. There is no need to phase in such obligations for large multinational companies taking billions out of Canada that have been aware of the changes coming to the market for some time.
27. We do acknowledge, however, that contributions to the system are not a zero-sum game. That is why the CAB put forward a model that would see online undertakings assume obligations commensurate with their presence in the Canadian market, beginning with the largest players, while financial contributions for broadcasters – specifically television and discretionary services – would be reduced to a comparable level. As outlined in the Armstrong Consulting research report appended to the CAB's initial submission, such an approach would result in more than \$1.7 billion in additional monies flowing into the system over the next three years.

¹⁹ Intervention by the Canadian Media Producers Association, at paragraph 6.

The programming supported by the CMF is one area needing support but not the only area

28. Representatives from the creative community – the CMPA, Directors Guild of Canada (DGC), the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the Association québécoise de la production médiatique (AQPM) and others – generally advocate that all monies contributed by online undertakings should be directed to a small number of independently produced programming genres, specifically PNI, with certain carve outs for equity seeking groups. They also recommend that the CMF be principally responsible for distributing the funds.
29. These parties have missed the point of this exercise. Supporting independently produced PNI is not the *only* priority outlined in the new *Act*. In fact, while the *Act* does state that the Canadian broadcasting system should provide a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity²⁰ and that is varied and comprehensive²¹, it does not specifically mandate programming from any of the categories the creator groups have highlighted. In contrast, other types of programming have been referenced explicitly, including news programming. For example, the *Streaming Act* introduced a new section that specifies that the programming provided by the system should:
- . . . include programs produced by Canadians that cover news and current events – from local and regional to the national and international – and that reflect the viewpoints of Canadians, including the viewpoints of Canadians, including the viewpoints of Indigenous persons and of Canadians from Black or other racialized communities and diverse ethnocultural backgrounds . . .*²²
30. As such, it is important to recognize that the *Act* identifies a number of different priorities. Funding Canadian programming from a wide variety of genres should be one of the objectives of a modernized contribution framework. It just can't be the only one.
31. As has been well documented, news and current affairs programming is in dire need of stable and sustained support. The emergence of online streaming platforms has had a direct impact on Canadian broadcasters and their ability to fund professional journalism, as a result of both the significant shift of advertising to online platforms, as well decreases in BDU subscriptions, with a concomitant impact on their contributions to the ILNF.
32. Several interveners highlighted the crisis facing news. FRIENDS, like the CAB, argued that local and national news should be a priority recipient of base contributions from online undertakings²³. Unifor also supported funding being directed to news programming.²⁴

²⁰ *Broadcasting Act*, S.C. 1991, c.11, s.3(1)(d)(ii).

²¹ *Ibid.*, s.3(1)(i)(i).

²² *Ibid.*, s.3(1)(i)(ii.1).

²³ Intervention by FRIENDS, at paragraph 58.

²⁴ Intervention by Unifor, at paragraphs 40 and 41.

33. The substantial reductions in BDU subscribers caused by online platforms has also had an impact on BDU contributions to the CMF and CIPFs. While the Government has backstopped the CMF, that hasn't happened for CIPFs. And public interest services, which rely almost exclusively on BDU funding to operate, have also seen a corresponding reduction in revenues. In addition, the *Act* also identifies other priorities, such as improving the way in which the system serves Indigenous, Black and racialized communities and other equity deserving groups, and not just in terms of the production of programming.
34. The Commission is tasked by the *Act* with balancing all of these objectives, which is what the CAB's funding model achieves.
35. To reiterate, the CAB is proposing that contributions by standalone online undertakings be directed to four "buckets":
- A. Support for Canadian audiovisual programming – like the CMF and CIPFs) – or musical content (for example, FACTOR/Musicaction and Radio Starmaker Fund/Fonds RadioStar);
 - B. Support for the production of news and information programming;
 - C. Support for Indigenous programming and producers and the production activities of Canadians from Black or other racialized communities, Canadians of diverse ethnocultural backgrounds, or other equity seeking groups including producers with disabilities and producers who self-identify as 2SLGBTQI+; and
 - D. Support for public policy objectives, including funds for public participation in Commission proceedings (for example, the BPF), accessibility initiatives (including the BAF, and other public interest objectives (such as community channels and 9.1(1)(h) services).
36. With respect to bucket "C", the CAB notes the submissions of representatives of Indigenous and Black creators, and the importance of specific funding directed to such groups and managed by them. In particular, we support the certification of the Indigenous Screen Office (ISO) as a CIPF as a mechanism to support production by the communities it represents.
37. While it is reasonable to debate how much funding should be directed to each bucket, the initiatives the CAB has identified as worthy of support should not be in question. A modernized approach to regulatory contributions cannot only go to one of these categories. These are the priority areas identified in the *Act* and should form the basis of the framework the Commission adopts.

Conclusion

38. The CAB welcomes this process to establish a modernized contribution framework for the Canadian broadcasting system. As CAB outlined in its initial submission, that framework must be fair and equitable and help to ensure a sustainable Canadian broadcasting system, one that is Canadian owned and controlled, as mandated by the *Act*. As noted herein, that cannot be achieved if standalone online undertakings continue to have regulatory advantages over their licensed Canadian competitors or if the model the Commission chooses to adopt overemphasizes the wants of one segment of the market while ignoring the needs of everyone else.
39. The CAB appreciates the opportunity to provide these comments and looks forward to elaborating on our proposals at the November 2023 public hearing.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'K. Desjardins', with a stylized flourish at the end.

Kevin Desjardins
President
Canadian Association of Broadcasters

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