



*Sent by email*

November 23, 2016

Hon. Mélanie Joly, PC, MP  
Minister of Canadian Heritage  
House of Commons  
Ottawa, ON  
K1A 0A6

Dear Minister:

Thank you for providing this opportunity to comment on critical issues affecting the future of Canadian content in a digital world.

FRIENDS of Canadian Broadcasting is an independent watchdog for Canadian content on radio, television and online. By policy, we are not affiliated with any broadcaster or political party. Approximately 364,000 Canadians support our watchdog role, research, advocacy and grassroots action – defending and enhancing the quality and quantity of CanCon in the audio-visual system. We follow the activities of private and public broadcasters, distributors, the broadcast regulator and the federal government in its broadcasting policy purview.

In the course of our first 32 years, we have tracked the digital transition to its present state, including trends towards increasing imports of foreign content and exports of Canadian content. Our views are guided by clear evidence that the internet does not favour local or distinctly Canadian content of professional quality. In our judgment, three issues stand above all others in negatively affecting Canadian viewers' and listener' access to Canadian programming on all platforms:

- a crisis in local television – particularly news,
- a regulatory environment that places consumer choice ahead of citizens' access to quality Canadian content, and
- a profound cancer in the governance of our national public broadcaster.

This submission focuses on these three matters and concludes with a policy recommendation that addresses the question of resources for Canadian content.

Where appropriate, we include links to detailed research, analysis and policy recommendations located on [friends.ca](http://friends.ca).

### ***Local News***

That local news is under threat in Canada – and with it, Canadian democracy – is not in dispute. The numbers show a sea of red ink, indicating that many Canadian media are on the financial brink. While the loudest cries of alarm come from the country’s large media groups, less powerful, independently-owned newspapers and television stations in small and medium-sized markets face a more acute financial crisis.

A recent Nordicity/Miller study projects that up to 29 local TV stations in small and medium markets will fade to black by 2020, if action is not taken. These are located in cities such as Kamloops, Prince Albert, Thunder Bay, Timmins, Rivière du Loup, Val-d’Or, Moncton and St. John’s. When a station closes in a large market, viewers can turn to alternative sources of local news, but outside the biggest cities, losing their local television station deprives citizens of their most important source of local news. And any reader of local newspapers in smaller centres can attest to the decline in local content.

<http://www.friends.ca/files/PDF/nordicity-miller-report-on-future-of-local-tv-final.pdf>

Bell Canada, owners of a network of 30 local CTV2 stations has advised the CRTC that it could close as many as 20 of its local stations by September 2017. And the Coalition of Small Market Independent Television Stations (SMITS), that represents independent TV stations in small and medium-sized markets, has warned the Commission that station closures are likely.

In the absence of CRTC action, viewers in 20+ already underserved small markets in Canada will be affected by the closure of their stations as early as 2017, according to the Nordicity/Miller study. Counting medium-sized markets, almost 30 communities are forecast to lose their local stations. One hundred hours of local programming weekly will be permanently lost, including local news and information programs that are central to life in smaller Canadian communities.

In addition to harsh business realities, a number of policy decisions by the CRTC and the previous federal government have made matters worse for local TV in Canada.

At its peak in 2012, the *Local Program Improvement Fund* – introduced by the CRTC in 2009 in recognition of the headwinds then faced by local TV – pumped almost \$112 million into local TV and local programming in Canada. However, the CRTC phased out the LPIF in 2014, based on an apparent (and as it turned out, very short-lived) “general rebound in the aggregate advertising revenues of conventional television stations”.

The CRTC decided to eliminate simulcast on the Super Bowl effective Q1 2017. According to evidence tabled with the Commission, the negative revenue impact of eliminating simulcast on live events such as the Super Bowl on CTV alone is \$40 million annually, and this estimate does not take into account the negative downstream effects on small market affiliates and the promotion of Canadian and other programming.

On August 14, 2015, the former Government endorsed a plan to repatriate broadcast spectrum (600 MHz) in sync with the U.S. However, unlike the U.S., the Harper government offered no compensation to affected Canadian broadcasters who were losing their local frequencies. As a result, Canadian local broadcasters face a one-time cost of as much as \$500 million over the next few years to relocate their over-the-air (OTA) channels, at no benefit to them, so spectrum can be sold to wireless operators.

On June 15, 2016, the CRTC announced a new policy framework for local and community television. The centrepiece of this policy is a reallocation of broadcast distribution undertaking (BDU) contributions from community TV to private local TV news, including a contribution of \$20 million annually to a new Independent Local News Fund (serving independent local TV stations) and up to \$65 million to vertically integrated local TV stations. Unfortunately this new regime does not come into effect until September, 2017, and at a total of no more than \$85 million annually will not even make up for an average year's revenue shortfall.<sup>1</sup>

The CRTC's decision has been described as calling the fire department over a home fire, and having it show up the following week with a garden hose.

While government policy in Canada has hobbled local TV, it's a completely different story south of the border. In the U.S., a series of measures enacted over the past fifty years has strongly protected local broadcaster programming rights (and thereby content producer intellectual property rights), allowed negotiated fees from carriers and guaranteed recompense for spectrum relocations. Canada has chosen not to implement such measures, or has pulled back where such protections formerly existed. As a result, U.S. local broadcasters face a far more financially-secure future – and markets for content producers have remained robust.

Local television, especially local news, is very popular with Canadians. A September 2015 [Nanos Research survey](#) found that Canadians value local TV highly, especially local news, and want their federal MP to work to keep it strong. Nine in ten (92%) of those surveyed either agree (78%) or somewhat agree (14%) that local TV news is valuable to them. Eighty-five per cent of surveyed Canadians either disagree (74%) or somewhat disagree (11%) with the statement that they wouldn't care if local news broadcasts on TV were no longer available to them.

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<sup>1</sup> The average annual revenue loss for of private TV broadcasters over the 2011 to 2015 period was \$95 million per year according to CRTC Statistical Summaries.

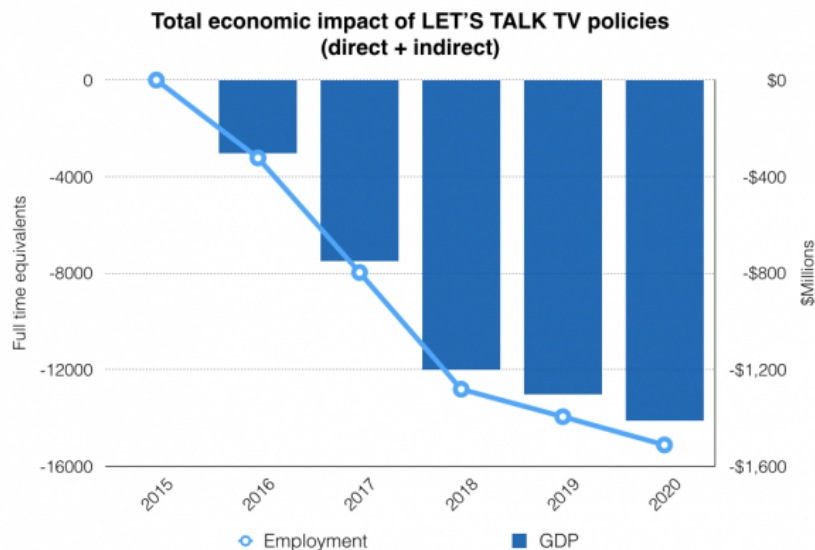
Nine in ten respondents either agree (73%) or somewhat agree (17%) that their federal Member of Parliament should work to keep local broadcasting strong in their community. Three-quarters of those surveyed agree (48%) or somewhat agree (27%) that they trust the CRTC to make decisions that will ensure their local TV station is not forced to close.

The gap between CRTC decisions and needed action grows with every passing day.

### ***Creators and Citizens vs. Consumers – Lets Talk TV***

A first-of-its-kind independent economic forecast shows that regulatory changes espoused by the Harper government and adopted in last year’s CRTC *Let’s Talk TV* announcements will likely lead to the loss of more than 15,130 Canadian jobs and take \$1.4 billion from the Canadian economy annually by 2020. This loss has nothing to do with technological change, and will greatly harm the future viability of local television news throughout Canada.

Co-authored by the economic and media consulting firm Nordicity and Peter H. Miller, the 100-page study – *Canadian Television 2020: Technological and Regulatory Impacts* – also forecasts that these CRTC decisions will likely result in a \$400 million annual drop in spending on Canadian programs by 2020 – an 18% decline – and accelerate the impact of technological change while weakening Canadian broadcasters.



The study’s authors have advanced proposals to reduce the negative economic impact of the CRTC’s decisions by as much as 75%: *“This would not, in our view, require ‘turning back the clock’ on all the Let’s Talk TV decisions. It would merely*

*require relatively minor ‘tweaking’ that recognizes Canadians as broadcasting policy has always recognized them – not merely as consumers, but as creators and citizens too.”*

Your government has abandoned Stephen Harper’s policy of denigrating the CBC. It should take the same approach to the CRTC’s *Let’s Talk TV* decisions. Under pressure from the former government, the Commission placed so-called consumer protection ahead of the cultural and democratic interests of citizens and creators in its decisions. The Nordicity/Miller study offers an indictment of the CRTC’s current leadership, based on solid economic analysis.

The study found the CRTC’s decisions regarding unbundling, over-the-top (OTT) TV and the predominance of Canadian programs are the primary drivers of this erosion. As of December 1<sup>st</sup>, all the Commission’s decisions will have been implemented.

The Commission has yet to release any economic assessment of the impact of the *Let’s Talk TV* decisions. This suggests a lapse in evidence-based decision making, associated with the former government and foresworn by yours.

<http://www.friends.ca/files/PDF/nordicity-miller-lets-talk-tv-economic-impact-forecast.pdf>

On April 21<sup>st</sup> I wrote to you on behalf of FRIENDS of Canadian Broadcasting to ask that you rescind the ‘mandate’ letter written to the Chair of the CRTC by your predecessor, James Moore on June 18, 2012.<sup>2</sup>

<http://www.friends.ca/files/PDF/05letter.pdf>

Several of former Minister Moore’s comments in that letter have no legal basis under the Broadcasting, Telecommunications or CRTC Acts, but appear to have been received as a governmental instruction to move the CRTC in the direction of ‘consumer’ interests, rather than the interests of Canadians as creators and citizens, as outlined in the statutes.<sup>3</sup>

As you know, this CRTC direction was reinforced in the October 16, 2013 Throne Speech: “*Our Government believes Canadian families should be able to choose the*

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<sup>2</sup> FRIENDS has yet to receive a reply to this April 21<sup>st</sup> letter.

<sup>3</sup> The only reference to ‘consumer’ in the Broadcasting Act is in Section 46 (1) (k), listing the powers of CBC/SRC: “produce, distribute and sell such consumer products as may seem conducive to the attainment of the objects of the Corporation”.

*combination of television channels they want. It will require channels to be unbundled, while protecting Canadian jobs.”*

There is an unmistakable and direct line between Moore’s letter and crucial elements of the Commission’s *Let’s Talk TV* decisions:

While there is no evidence that ‘consumers’ are better served through policies such as ‘skinny basic’, distributors are now taking advantage of their enhanced leverage over programmers, who have lost access rights and must now survive on a ‘pick-and-pay’ basis.

*Canal Argent*, Canada’s only French-language business channel, closed its doors on April 30<sup>th</sup> – an early casualty of this faux ‘consumer’ orientation. Launched in 2005, the channel dropped from 950,000 subscribers in 2011 to 440,000 in 2015, due to less favourable bundling, a steady decline presaging the *Let’s Talk TV* decisions, and accelerated by their anticipated implementation. It is noteworthy that seasoned and well-esteemed journalists such as Michel Morin and Andrew McIntosh were casualties of this decision.

*Avis de Recherche*, a unique Québec-based public safety/public-interest specialty service launched in 2004 also now faces imminent closure. Without carriage protections that were eliminated by the Commission effective September 2015, this service is about to fade to black. This is despite strong support from victims and victims-rights groups, and endorsements from police forces across Canada, including the RCMP’s Montreal Division, which indicated that resolution of at least 34% of its ‘unlawfully at large’ cases was directly attributable to *ADR*.

FRIENDS regards these services as canaries in the coal mine for other Canadian channels that will shutter because of the CRTC’s *laissez-faire* approach, including vulnerable independent local TV stations in all parts of Canada, as well as specialty services.

Rescinding the 2012 Moore mandate letter – without replacement – would have sent a powerful message that your government expects the CRTC to conduct itself in the manner described in the Broadcasting and Telecommunications Acts, through a broad holistic lens, consistent with historical precedent: a lens that recognizes Canadians as citizens, creators and consumers – not just the latter.

### ***Reforming the Governance of our National Public Broadcaster***

Under successive governments, CBC/SRC’s governance has been dominated by partisan political appointees. Stephen Harper abused this appointment power to an unprecedented degree. Some of Harper’s OIC appointments are scheduled to serve until 2020. Entering the second year after the general election, here is the face of the Board and CEO of Canada’s national public broadcaster:



8 OF 10 MEMBERS OF THE CBC BOARD OF DIRECTORS HAVE DONATED TO THE CONSERVATIVE PARTY



In your presence, Justin Trudeau promised on September 22<sup>nd</sup>, 2015, that “the process for CBC/Radio-Canada Board of Directors appointments must be reviewed, to ensure merit-based, independent appointments”.

CBC must be allowed to operate freely from political interference that comes from partisan political appointments to positions on its Board, including CBC’s President and CEO. The practice of patronage appointments must be replaced with a non-partisan, arm’s-length process that will ensure the best and brightest are selected to lead our national public broadcaster.

The current Board should be abolished to make way for a new, merit-based and independent leadership. That new Board, not your government, should have the ability to hire and fire CBC’s President.

FRIENDS has offered the Prime Minister a road map to assist him to honour his pledge in the form of a 8,300-word legal opinion from two of Canada’s leading broadcasting and media lawyers, Peter H. Miller and Brian MacLeod Rogers, published on July 6, 2016.

<http://www.friends.ca/pub/13997>

Here is a précis prepared by FRIENDS:

Pursuant to the *Broadcasting Act*, the CBC Board is composed of a maximum of 12 members appointed by the Governor in Council (GIC ) “during good behaviour”, including the Chairperson and President. While subject to approval by the GIC for appointment and dismissal, the Chairperson and President of the Corporation are not required to be Order in Council appointments.

The CBC Board currently has two vacancies. Of the current Harper government appointed ten-member board, eight members have historically been Conservative Party donors.

On September 22, 2015, in his then-capacity as leader of the Liberal Party, Justin Trudeau committed to review the process of appointing CBC Board

members to ensure they are “merit-based and independent”. On February 25, 2016, the Liberal government announced a new GIC appointment process, “one where an open, transparent, and merit-based selection process will support Ministers in making appointment recommendations for positions within their portfolio.”

The appointment process for CBC directors, including the Chairperson and President, has been subject to various reviews and recommendations over the last two decades.

The 1991 *Broadcasting Act* introduced certain safeguards to better ensure the independence of the CBC. These included:

- The power of the Board to fill a vacancy in the office of President, with an officer of the Corporation, for up to sixty days, without GIC approval; and
- A general declarative statement, and specific financial provision, that in pursuing its mandate CBC shall “enjoy freedom of expression and journalistic, creative and programming independence”.

Unlike the governance of public broadcasters in other Western jurisdictions, the *Broadcasting Act*, 1991 did not, however:

- Introduce an open, transparent, merit-based Board appointment process;
- Establish any specific qualification criteria for directors, such as required expertise or a test for independence; or
- Provide the Board with effective hiring and firing power over the President.

The clear and demonstrable failure of the current appointment process to ensure that directors are truly independent of government calls for such measures to now be taken.

The Government’s new GIC appointment process provides an appropriate general framework. But the need for independence at the CBC, at the Board and staff level, necessitates selection criteria and safeguards that are unique to the Corporation, and, to ensure their permanence, enshrined in legislation.

Miller and Rogers make 14 specific transitional and permanent recommendations to revitalize and re-constitute CBC’s Board appointment process and governance structure.

As a transitional measure, they recommend that government immediately introduce a new appointment process to address vacancies, encourage existing partisan appointees to step down, and seek to secure a majority of non-partisan appointments.



For the longer term, they recommend that government move to re-constitute the CBC's governance structure through amendments to the *Broadcasting Act*, with a target date of December 31, 2017.

### **Transitional Recommendations – New Policies and Practices**

**Recommendation 1:** The government should proceed to fill vacancies on the CBC Board employing an expanded version of its new approach to GIC appointments (Recommendations 2 through 7, below). Consistent with the government's new approach to GIC appointments, candidates for director should be encouraged from all regions of Canada, employing recruitment strategies and outreach activities to reach qualified and diverse pools of candidates.

**Recommendation 2:** Director candidates should be required to possess experience in at least one of three general categories:

1. broadcasting, media and/or journalism;
2. financial or technical matters; and
3. cultural or creative industry experience, including music and film/TV production.

**Recommendation 3:** An appointments committee chosen from current or former Deputy Ministers, and Associate or Assistant Deputy Ministers of Canadian Heritage, Heads of Cultural agencies, and distinguished Canadians, such as recipients of the Order of Canada, should be formed to vet candidates and provide the Minister with a short list of recommended qualified names. The CBC Appointments Committee should be explicitly tasked with recommending a Board comprised of a majority of non-partisan members.

**Recommendation 4:** As an interim measure, the government should invite current Board members who individually or collectively do not meet the selection criteria to step down.

**Recommendation 5:** As a further interim measure, the government should consider dismissal of the Chairperson and/or President *in that capacity*. Such dismissal should take precedence over the dismissal of other directors, in the event that the Chairperson, President or Board did not have the confidence of the government in terms of plans for expenditures of an increased CBC parliamentary appropriation.

**Recommendation 6:** In the event of a vacancy in the position of President, the following three-phase appointment process should be followed:

1. Nominations are first vetted by the third-party Appointments Committee created under Recommendation 3, that then provides a list of qualified candidates to both the GIC and the CBC Board;
2. The Board provides a short list of a minimum of three eligible candidates, with recommendations to the Governor in Council;
3. The Governor in Council selects a President from the short list, who is then appointed by the Board.

**Recommendation 7:** As a further interim measure, in the event that a sufficient number of Board members do not resign to bring the number of partisan members to less than 50%, the government should consider dismissal of sufficient partisan directors to meet this criterion.

#### **Medium-Term Recommendations:**

Amendments to the Broadcasting Act **Recommendation 8:** Within eighteen months, the government should amend the *Broadcasting Act* to formally establish a new appointment process and overhaul the CBC Board. Recommendations 2, 3 and 6 would form part of the amendments to the Act. We also recommend a rule be added to Recommendation 3 to require that a minimum of two directors possess each area of experience.

**Recommendation 9:** In furtherance of ensuring experienced directors as set out in Recommendation 8 above, the conflict of interest provisions set out in section 38(1) should be amended to permit a minority of Board members to be engaged in broadcasting, production, or music, or have a pecuniary or proprietary interest therein, but to avoid any direct conflict by requiring disclosure of any such interests prior to appointment and recusal on any decisions that affect those interests.

**Recommendation 10:** Consideration should be given to providing specific requirements on partisan appointments, such as the following:

- No more than 50% of Board members should have a partisan background.
- For every partisan government member, there should be an equal number of members from other political parties.

**Recommendation 11:** CBC director appointments should remain 'during good behaviour' rather than 'at pleasure', and remain eligible for a five-year term, renewable at the option of the GIC.

**Recommendation 12:** Consideration should be given to reducing the size of the CBC Board of Directors from 12 to nine. Consideration should also be given as to whether section 36(5) of the Act (which allows an incumbent director to continue in office until a successor is appointed) should be rescinded.

**Recommendation 13:** The CBC Board should explicitly be made responsible for approving the goals, policies and long range plans of the CBC, as well as evaluating their implementation. The President should be made explicitly responsible for general management and supervision of staff, and to develop long-term strategies for recommendation to the Board.

**Recommendation 14:** The CBC's requirement for journalistic, creative and programming independence, set out in Section 46(5) and section 52(1) of the *Broadcasting Act*, and Section 68.1 of the *Access to Information Act*, should be made a direct obligation of directors.

<http://www.friends.ca/brief/14247>

On September 21<sup>st</sup>, you told the House of Commons "... in the next few weeks, we will be introducing the new consultation process for appointments to the Board of Directors of CBC/Radio-Canada". We look forward to that announcement.

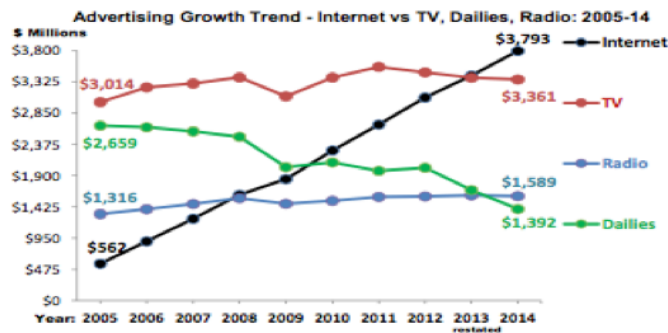
### ***Policy Recommendation – Resources for Canadian Content***

Recent changes in the advertising market threaten the future of Canadian media.

In the 1960s and 70s, Parliament recognized the threat of foreign media to the viability of Canadian media and introduced measures to prevent the tax deductibility of advertising expenditures in foreign-owned publications and broadcasters.

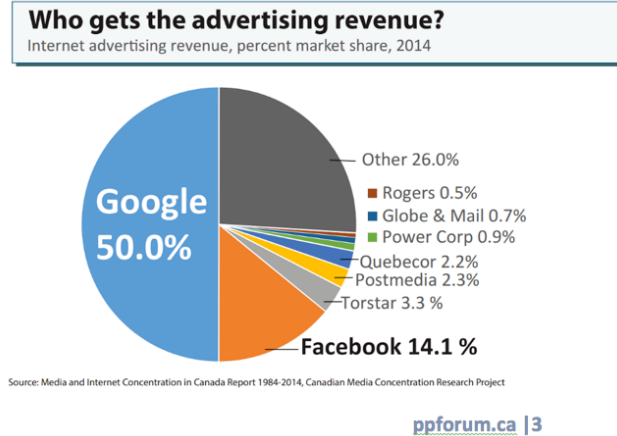
Section 19.1 was enacted in 1976. Its immediate result was to reduce Canadian ad spending on U.S. Border TV stations by \$10 million dollars, about 10% of that year's total TV ad buy. Since then – and until recently – Section 19 has underpinned the viability of Canadian media, keeping Canadian ad revenues largely in the hands of Canadian players.

Early this century, internet advertising began to take off in the Canadian market, growing from a total of \$562 million in 2005 to \$5.6 billion projected in 2016:<sup>4</sup>



<sup>4</sup> Internet Advertising Bureau (Canada) (IAB), 2015.

Today, more than \$5 billion dollars of Canadian ad spending is going to foreign-owned internet companies – approximately one-third of major media ad spend. That’s 90% of Canadian digital advertising.



Section 19 provides that advertising expenses in newspapers are deductible only if the ad is placed in an issue of a newspaper or publication that is edited and published in Canada, and is owned by a Canadian citizen or a corporation that is effectively owned by Canadians. Broadcast advertising expenses are not deductible if the ad is placed on a station or network whose content is controlled by an operator located outside Canada if the ad is directed primarily to a market in Canada.

In 1996 the Canada Revenue Agency issued an opinion<sup>5</sup> that a “web site is not a newspaper, a periodical or a broadcasting undertaking”. As is standard CRA practice, this opinion specifically left the door open to revision at some future date. It reflected the context of the early days of the internet twenty years ago, when web sites did not perform the functions of print media or broadcasting because of bandwidth limitations, and relied on definitions from the 1930s. And, of course, the only viewing platform then available was the personal computer, as mobile smartphones and tablets did not exist.

While this CRA interpretation may have been appropriate for 1996 technology, it no longer applies to current practice, where content is distributed over the internet to a wide range of devices, using a variety of technologies and program languages that enable video and audio. Where a 1996 web site could not provide broadcasting, newspapers and periodicals, the 2016 internet does. Hence a new interpretation of the Income Tax Act is required – one that acknowledges this reality.

In its opinion, the CRA noted that ‘newspaper’ was not defined in the Act. It therefore drew its definition from a contemporary version of Webster’s Dictionary,

<sup>5</sup> Income Tax Rulings and Interpretation Directorate, October 24, 1996.

as well as a 1935 court case. Its definition of 'broadcasting' derived from various references in the Act, as no other definition was then available.

Three years later, the CRTC, the body charged with interpreting the meaning of 'broadcasting' in Canadian law, defined broadcasting transmitted over the internet in its *New Media Exemption Order*. The Commission determined that broadcasting over the internet was indeed 'broadcasting', since the internet represented simply another form of telecommunication.<sup>6</sup>

Hence, the time has come for the CRA to update its interpretation and end the tax deductibility of ads placed on foreign-controlled digital platforms.

Doing so would respect the original intent of Section 19 by helping Canadian media – essential to our democracy and to our culture – at a time when they need it more than ever.

This proposal is unusual because it would boost the Consolidated Revenue Fund while defending Canadian media and hence, democracy. We intend to advance this idea in collaboration with Canadian media leaders and our supporters in coming months. Our hope is that you will see fit to urge your colleague, the Minister of Finance, to ask his officials to examine this recommendation.

Yours sincerely,



Ian Morrison  
Spokesperson

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<sup>6</sup> *The Commission notes that the definition of "broadcasting" includes the transmission of programs, whether or not encrypted, by other means of telecommunication. This definition is, and was intended to be, technologically neutral. Accordingly, the mere fact that a program is delivered by means of the internet, rather than by means of the airwaves or by a cable company does not exclude it from the definition of "broadcasting". (para 38)*