Comments of Shaw Communications Inc. in

Response to call for comments on

Canadian Content in a Digital Age

November 25, 2016

Executive Summary

Shaw Communications Inc. (**Shaw**) is a connectivity company that exists to connect our customers to the world and everything in it. We proudly provide internet and voice connectivity, broadcasting distribution and relay services and, through Freedom Mobile, wireless connectivity to residential and business customers. Shaw agrees with the Minister of Canadian Heritage (**Minister**) that to advance the success of Canadian content in the digital era, "Canada will need strong, adaptable and competitive businesses that are able to manage risk effectively, diversify revenue and attract investment from many sources, including private investment."

Shaw submits that consideration of any proposed measure to support and promote Canadian content should be guided by the fundamental importance of the continued growth of strong networks in Canada, ongoing network and platform innovation, and the creation of optimal conditions for universal access to broadband connectivity. Networks are the bedrock of the digital economy, including the cultural economy; ensuring that they are robust and accessible to all Canadians is critical to Canada's success and to the well-being of its citizens as creators, consumers and citizens.

As demonstrated by Shaw's own evolution as a company and the extensive contributions it has made since it was established over forty years ago, network providers (including broadcasting distribution undertakings, internet service providers and wireless service providers) play a key role in the fulfillment of Canadian public policy goals. It would undermine the attainment of both cultural and economic policy objectives were any new measures introduced to increase the content support obligations of broadcast distributors, or to apply a Canadian content levy to internet service providers, wireless service providers, or their customers.

Shaw strongly believes that measures undertaken to support and promote Canadian content should focus on the creation of content that appeals widely to domestic and international audiences. Subject to limited exceptions, ensuring the attractiveness of Canadian programming to broad domestic audiences is critical to reinforcing Canadians' commitment to such content; to increasing the potential for its economic success, both nationally and internationally; and to strengthening of Canada's brand. To that end, Shaw advocates a focus on audience success as the primary criterion for access to support measures; a reduction in Canadian content "points" required to secure funding from the Canada Media Fund to widen the appeal of programming and drive export opportunities; and changes to funding regimes that would permit increased ownership of content by well-capitalized broadcasters.

Finally, any modifications to policy in support of Canadian content in the digital world should ensure a fair and level playing field as between Canadian and non-Canadian companies and platforms. Broadcast distributors compete aggressively in the current digital market and serve Canadians in 11.2M homes. Television continues, overall, to draw the largest audiences to Canadian content. As such, contributions by BDUs and their customers to the production and exhibition of Canadian programming should support programming whose first window of exhibition is within the licensed Canadian broadcasting system. Similarly, tax measures, such as

s. 19.1 of the *Income Tax Act*, should be applied fairly and in a manner that supports Canadian media and public policy objectives.

Shaw's suggestions are intended to create a viable Canadian production sector, sustained by programming with tremendous popular appeal and robust Canadian networks. We are optimistic that the Minister's consultation will enable Canadian content creators to seize opportunities offered by the digital world.

The Importance of Networks to Public Policy Objectives for Canadian Content and the Digital Economy

1. Shaw appreciates the opportunity to provide our comments and recommendations in response to the consultation initiated by the Minister of Canadian Heritage concerning *Canadian Content in a Digital World*. The Minister, in conducting this review, has highlighted the interdependence of culture, innovation, the digital economy, democratic values and social inclusivity in the digital environment. Given these interdependencies and the global reach of the internet, we agree that an inflexible and protectionist approach to the creation of Canadian content is no longer appropriate.

2. Shaw concurs with the Minister's general proposition that the cultural policy toolkit should: focus on support, promotion and export; incentivize risk-taking; be platform-agnostic; and promote economic growth.

3. At the same time, such an approach to the promulgation of Canadian content can only succeed if implemented hand-in-hand with public policy that promotes:

    - the growth of robust Canadian networks, continuing network and platform innovation, and optimal conditions for universal access to broadband connectivity;

    - the production of popular Canadian programming through the development of a well-capitalized and sustainable Canadian production community, without adding to the public and private sector costs associated with the support system already in place; and

    - a strong commitment to a fair and level playing field as between Canadian and non-Canadian companies, and as between platforms.

4. In re-thinking how best to advance the success of Canadian content and Canada's brand, the importance of maintaining and growing strong broadcast distribution and broadband networks must remain a central focus. No measure should be introduced that would increase the costs of connectivity to Canadians, create any disincentive to the expansion of networks and Canadians' access, or divert resources needed by network companies to build capacity and drive innovation.

5. Any notion that network providers reap the benefit of content distribution while making no meaningful contribution to content creation, production and dissemination is unfounded. The brief history of Shaw, set out below, demonstrates the breadth of our contributions as a broadcasting distribution undertaking (**BDU**) to Canadian creators, producers and consumers – some of which have been mandated, but many more of which have resulted from investment, innovation and competition.

6. Our corporate overview also highlights Shaw's evolution as a telecommunications service provider (**TSP**) – including our role as an internet service provider (**ISP**) and, now, a wireless service provider (**WSP**). As a TSP, Shaw has made critical contributions to Canada's digital economy through ongoing investments and innovations that have allowed Canadian households and businesses to access affordable, world-class digital infrastructure and high-value service offerings.

7. We respectfully urge the Government, as it considers new approaches to support and promote Canadian content, to take into account the full breadth of Shaw's contributions – and their significance to the realization of a wide range of public policy objectives.

Shaw's Contributions as a Connectivity Company

8. As a connectivity company, Shaw exists to connect our customers to the world and everything in it. At every step of the way, our activity has supported critical public policy objectives, and has enabled Canadians to benefit from and participate in their national broadcasting system, their digital economy and their democracy. To support our broadcasting distribution and telecommunications networks, we have invested over 2 million engineering hours to build a fibre network that spans over 860,000 km across Canada and the United States. Our hybrid fibre optic coaxial network provides one of the fastest broadband speeds in Canada, enabling internet speeds of up to 150 Mbps for download and 15 Mbps for upload in both rural and urban areas across our terrestrial network footprint.

9. This has enabled us to recently introduce Internet 150, a 1 terabit (**TB**) service delivered at those speeds, and available in every area where Shaw is offered – not just large cities or select neighbourhoods. The price of Shaw's Internet 150 is also affordable, at $49.90 per month for the first year (with the first month free for online orders in the case of customers who are new to Shaw services) and $79.90 for the second year, based on a two-year commitment. The 1 TB (or 1000 GB) data cap is more than enough to satisfy the usage demands (including the use of audio-visual content) of residential subscribers which, according to the CRTC's most recent monitoring report, downloaded an average of 93 GB of data monthly.[1] Furthermore, while Shaw employs data caps in its marketing of internet services, these are established as a means for us to manage our network and for consumers to choose what is best for them – we do not currently apply any overage charges when our customers exceed their data caps.

[1] CRTC, *Communications Monitoring Report – 2016* (October 2016), at 246 (**CRTC Monitoring Report**).

10. Shaw's brand promise is that our customers will not miss a thing, and our investments and innovations are designed and driven by what we learn from our close relationships with our residential and business customers. At each major step in our evolution as a company, we have brought our customers choice, value and innovation in broadcast distribution and telecommunications services, and have helped fulfill Canada's broadcasting and telecommunications policy objectives pursuant, in large part, to being fiercely competitive and innovative.

11. With respect to Canadian content in particular, in FY 2015, Shaw contributed approximately $72M to Canadian production funds. This included $55M to the Canada Media Fund (**CMF**), $12M to the Shaw Rocket Fund (which supports Canadian programming for children and youth), $3M to small-market independent broadcasters to support their local programming,[2] and $1.5M to the Aboriginal Peoples Television Network. Additionally, Shaw Cable funds and operates Shaw TV, through which it provides community access, and local and community television programming, across Shaw's footprint. In FY 2015, Shaw Cable directed $33.6M in funding to Shaw TV, consisting of over $20M in expenses solely attributable to the acquisition or production of local programming. In FY 2015, Shaw also made $708M in affiliation payments to Canadian specialty and pay services for the right to distribute the services on Shaw Cable and Shaw Direct, and $29M to copyright owners for the use of their programming in distant signals (pursuant to the Copyright Board's tariff for Retransmission of Distant Signals).

12. Shaw began as a cable television service provider over forty years ago, first offering service in Sherwood Park, Alberta in 1971. In addition to building the largest cable company in Western Canada (which currently serves 1.7M Canadian homes), we expanded our business, over time, to include radio and television broadcasting. This included purchasing the Global Television Network in 2010 when it was insolvent and increasing its production and exhibition of local programming.[3]

13. Shaw also expanded beyond cable by purchasing and committing ourselves to making Shaw Direct a successful Canadian, all-digital, direct-to-home (**DTH**) satellite service. While Shaw Direct has become a viable component of Shaw's network services, it took several years and an investment of $1.3B before the service became profitable. Shaw Direct offers service in both official languages and delivers programming to over 800,000 households across

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[2] In its *Policy Framework for Local and Community Television*, the CRTC replaced the Small Market Local Programing Fund with the Independent Local News Fund. *See* CRTC, Broadcasting Regulatory Policy 2016-224 (Ottawa, 15 June 2016) (**BRP 2016-224**).

[3] As part of Shaw's "tangible benefit" commitments in connection with the acquisition of Canwest in 2010, we committed $45M to create and broadcast new morning shows on Global affiliates in Regina, Saskatoon, Winnipeg, Toronto, Montreal and Halifax. These local morning shows continue to be produced and broadcast by their current owner, Corus Entertainment Inc.. Furthermore, post-acquisition, Shaw initiated the production of the current events show *The West Block*, which remains in production. *See* CRTC, Broadcasting Decision 2010-782, *Change in effective control of Canwest Global Communications Corp.'s licensed broadcasting subsidiaries* (Ottawa: 22 October 2010) (**BD 2010-782**) at paras. 35, 46-49.

Canada – giving Canadians in rural and remote areas the same breadth of broadcasting service as their urban counterparts in Vancouver, Calgary, Toronto and Montreal. In addition to facilitating access, the Shaw Direct network helped curtail the black market for American DTH services by providing an effective Canadian alternative at a critical time in the evolution of our national broadcasting system. Shaw Direct also introduced dynamic competition to cable, created a vast new market of television households for Canadian pay and specialty services, and incented Canadian cable companies to digitize. In 2013, Shaw invested approximately $300M in a new satellite (Anik G1) to offer increased choice in local and high definition services.

14. Shaw Direct continues to play a unique role in providing local and regional broadcasting stations to over 31,500 Canadian households that had formerly relied on over-the-air transmissions of such stations but lost access when their local broadcasters decided that they would not convert analog transmitters to digital. To households in these areas, Shaw Direct provides free satellite receivers and antennas, free installation and a free localized satellite service. While $15M was budgeted to this initiative as part of a tangible benefits commitment, Shaw Direct's execution of the program has exceeded the mandated commitment[4] – a reflection of Shaw's dedication to ensuring that Canadians could continue to access local broadcasting following the digital transition.

15. In addition, Shaw operates a signal transport and broadcast relay service that facilitates the distribution of television and radio services to small cable companies throughout Canada (including systems in rural areas and the far North). These services have been an important partner of indigenous broadcasters, in particular enabling them to deliver their services across the widespread geographical areas where their audiences reside.

16. In 1996, Shaw began to offer internet services to customers in our cable footprint and, in 2005, launched a competitive wireline telephone service. We have since expanded the value of our internet service by building the Shaw Go WiFi network, which has 85,000 access points for the benefit of our customers. Many of these access points are also made available on an open and complimentary basis in key public spaces. The service has also provided critical infrastructure during times of local emergency. For example, it was made available on a wide-open basis during the 2013 Calgary flood and the 2016 Fort McMurray wildfire.

17. In 2016, we also enhanced the value of our cable and DTH services by offering our cable and satellite customers "FreeRange TV", Shaw's OTT app that enables our customers, at no additional charge, to access their home television experience on tablets and laptops, anywhere in Canada. All necessary rights clearances have been obtained from copyright owners in order to make this service available. FreeRange TV provides our cable and satellite customers with an additional incentive to remain tuned to the Canadian broadcasting system.

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[4] BD 2010-782, *supra* note 3 at para. 35.

18. Recently, Shaw pivoted to being a pure connectivity company, completing a series of strategic transactions that included acquiring data centres (in 2014), which we continue to grow, and Freedom Mobile[5] (in 2016). Contemporaneously with the purchase of Freedom Mobile, we sold Shaw's broadcast media assets to Corus Entertainment Inc. (**Corus**). While Shaw and Corus are under common control, they are separate publicly-traded companies with separate management teams.

19. Shaw's acquisition of Freedom Mobile marks the introduction of a fourth major carrier in the wireless space. The rebranding of Freedom Mobile reflects our commitment to customers' freedom to connect and communicate, and freedom from excessive and unfair prices. As part of our commitment to aggressive competition with incumbent wireless carriers, Shaw has invested $250M to upgrade Freedom Mobile 3G radio equipment in British Columbia and Alberta, and to rolling out a network upgrade to LTE. Our new LTE network will be available in Toronto and Vancouver on November 28 and in Calgary, Edmonton and Winnipeg by Spring 2017.

20. Throughout its history, Shaw has made significant contributions to: the production and exhibition of Canadian and local programming; the introduction of dynamic competition in broadcast distribution, telephone, internet and wireless services, which has increased choice and value for our customers; and the development of robust networks and innovative network services for the benefit of Canadians and Canada's digital economy.

New or Increased BDU or ISP Levies Will Undermine Key Public Policy Objectives and Canadian Content

21. Any proposal to levy additional contributions in support of Canadian content from BDUs or TSPs and their customers would not serve Canadians – as consumers of content or as participants in the digital economy. Such a levy could well undermine their support for strong domestic content and would impede Canadians' access to robust, innovative and affordable network services.

BDU Levies or Charges

22. BDUs already provide extensive contributions to Canadian programmers and producers pursuant to their prioritized and predominant carriage of Canadian services; the construction and expansion of advanced digital broadcast networks that have afforded universal access to Canadians; and their CRTC-mandated revenue-based contributions to Canadian production funds.[6] Any additional charges or obligations imposed on cable and satellite companies would undermine the attractiveness of broadcast distribution services to the

[5] Previously known as Wind Mobile, rebranded on November 21, 2016.

[6] Total BDU contributions to production funds last year were $283.3M, in addition to the $152.6M in contributions to community channels devoted to the production of local programming. See CRTC Monitoring Report, *supra* note 1 at 198.

11.2M Canadian households that purchase those services[7] and negate the efforts of service providers to introduce innovations and network upgrades.[8] Given the current maximum price of $25 applicable to basic service, rate increases that would result from any increased BDU levy would be borne disproportionately by customers of discretionary services and could further incent cord-cutting or cord-shaving.

23. Cable and satellite companies comprise a mature business sector that has been experiencing diminishing subscribership and some diminished revenue due to competition from unregulated OTT services, such as Netflix (and foreseeably, Amazon, Hulu and others). Nevertheless, we remain aggressive competitors and are making extensive investments in innovative new services and platforms to add value to our product with a view to retain and, indeed, grow our customer base. These innovations include FreeRange TV (in January 2016) and the advanced X1 cable platform (which will be available across our cable footprint by the end of the current fiscal year) – both, providing top-in-class digital experiences and acting as strong incentives for our television customers to remain tuned to the Canadian broadcasting system.

24. Some parties may advocate new obligations and charges, such as retransmission consent pursuant to either *Copyright Act*[9] or *Broadcasting Act*[10] amendments – for example, to support broadcasters' exhibition of local programming.[11] Any such obligations could add billions of dollars to the cost structures of Canadian BDUs[12] while creating no new value for Canadians. Given the link between BDU revenues and their contributions to Canadian programming, as well as to their efforts to remain dynamically competitive and to maintain

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[7] CRTC Monitoring Report, *supra* note 1 at 188.

[8] For example, Shaw is currently investing in the development and roll-out of a new advanced cable platform, X1, by the end of fiscal year 2017, as a key part of its strategy to provide customers with advanced features and flexibility, reduce churn and maintain the competitiveness of its cable service.

[9] RSC 1985, c C-42 (***Copyright Act***).

[10] SC 1991, c 11 (***Broadcasting Act***).

[11] The compulsory licensing regime for the retransmission of distant signals under section 31 of the *Copyright Act* was introduced in order to implement Article 2006 of the *Free Trade Agreement between Canada and the United States of America*, SC 1988, c 65, Schedule, Part A, and incorporated into the *North American Free Trade Agreement*, 17 December 1992, 1994 Can TS No 2 (entered into force 1 January 1994) (***NAFTA***). The *Copyright Act* provides no right to broadcasters for compensation for the retransmission of their local or distant signals, nor the right to authorize or prohibit a BDU from retransmitting their signals. With respect to their retransmission of distant signals, BDUs are required to pay royalties to the copyright holders (including to local broadcasters who own local programming) for the works (i.e. programs, compilations of programs) carried in the distant signals. With respect to the retransmission of local signals, when the signal is retransmitted in accordance with the requirements of s. 31(2), BDUs are not required to compensate the copyright holders for the works carried in the local signal, nor the broadcasters for the retransmission of the local signal, based on the rationale that, *inter alia*, programming in such signals is available from broadcasters free over-the-air.

[12] Prior to the last iteration of copyright reform, Nordicity Group Ltd. (**Nordicity**) authored a study, commissioned by Canadian BDUs, that estimated that the introduction of broadcast signal rights (also known as "retransmission consent" rights) in copyright could result in claims by Canadian and US over-the-air broadcasters in the range of $1.1B to $1.6B per year. This study posited possible outflows of money from Canadian BDUs to US broadcasters alone could range from $380M to $570M annually. *See* Nordicity, *Impact of Retransmission Consent in Canada: The Impact of a Retransmission Right on the Canadian Broadcasting System* (Ottawa: Nordicity Group Ltd., 2006) at vi.

the strength of the Canadian broadcasting system for the benefit of tens of millions of Canadian viewers, any new levies on BDU revenue that might be proposed should be dismissed.

25. Moreover, introducing retransmission consent rights would also lead to a large outflow of system monies to the US. If an attempt were made to restrict the application of these rights to Canadian broadcasters, the Canadian government would be faced with strong opposition from US broadcasters making demands for equal treatment. In the absence of equal treatment, US broadcasters would likely seek trade sanctions, notwithstanding the existence of the cultural exemption clause in the NAFTA. We have already seen evidence of this inclination in the recent Let's Talk TV proceeding.[13]

26. Accordingly, we respectfully submit that any calls for additional measures in support of Canadian content that would negatively impact the revenues of BDUs would undermine the broader public interest and should be rejected. To the extent that Canadian broadcasters need additional support for their production and exhibition of local programming, Shaw believes that the CRTC's Local and Community Television Policy[14] provides an effective and flexible approach to ensuring that adequate resources to support the continued provision of such programming are available.

New Levies on ISPs or WSPs

27. To the extent that there is any suggestion that a content levy should be applied to ISPs or WSPs as a means of supporting Canadian content (based on a general idea that ISPs and wireless companies are effectively "the new BDUs" given online consumption of audio-visual content), Shaw believes it would be inappropriate, and damaging to Canadians and the public interest, to introduce such a levy.

28. We are fully committed to investing in and growing our broadcasting distribution businesses and are making robust investments to do so, as described above in the context of FreeRange TV and our investments in the X1 platform. At Comcast, the company that initially developed and rolled out the platform in the US, X1 has contributed significantly to reduced customer churn and increased cable revenue.[15]

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[13] During the CRTC's Let's Talk TV proceedings, US border broadcasters filed a submission with the CRTC alleging discriminatory treatment under the current regulatory framework and calling on the United States Department of State to initiate discussions with the Department of Canadian Heritage to address the treatment of US distant signals pursuant to Canadian broadcasting and copyright law. *See* Lesley Hunter, "US border stations still want cash from Canadian BDUs. Are there really trade discussions ongoing?" (November 25, 2013) online: CARTT < https://cartt.ca/article/us-border-stations-still-want-cash-canadian-bdus-are-there-really-trade-discussions-ongoing>.

[14] BRP 2016-224, *supra* note 2.

[15] *See* Daniel Frankel, "Comcast adds 53K Xfinity TV customers, 438K HSI subs in Q1" (April 27, 2016) online: Fierce Cable <http://www.fiercecable.com/cable/comcast-adds-53k-xfinity-tv-customers-438k-hsi-subs-q1>. In Q3 2016, Comcast reported an added 32,000 net video customers, "the best third quarter result in 10 years." These highlights were addressed by Mike Cavanagh, Senior EVP and CFO of Comcast Corporation, in Comcast's third-

29. Moreover, the logic that ISP revenue should be drawn upon to supplant declining BDU contributions to Canadian content is inconsistent with Canada's *Broadcasting Act* and *Telecommunications Act.*[16] This was confirmed by the Supreme Court of Canada in its 2012 decision on the question of whether retail ISPs carry on "broadcasting undertakings" when providing access through the internet to "broadcasting" requested by end-users. In its decision upholding that of the Federal Court of Appeal, the Supreme Court ruled that:

> The [*Broadcasting Act* (the **Act**)] makes it clear that "broadcasting undertakings" are assumed to have some measure of control over programming. The policy objectives listed under s.3(1) of the Act focus on content such as the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse.
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> An ISP does not engage with these policy objectives when it is merely providing the mode of transmission. ISPs provide Internet access to end-users. When providing access to the Internet, which is the only function of ISPs […] they take no part in the selection, origination, or packaging of content...[17]

30. Notably, unlike s. 3(1) of the *Broadcasting Act*, none of the policy objectives of the *Telecommunications Act*[18] provide for the promotion or support by TSPs (including ISP and wireless services) of Canadian programming or other cultural goods and services. Furthermore, TSPs are prohibited, by s. 36 of the *Telecommunications Act*, from controlling the content or influencing the meaning or purpose of telecommunications carried by it unless authorized by the CRTC.

31. Given that current law does not accommodate the imposition of a cultural levy on ISPs or WSPs, Shaw strongly cautions against the proposed introduction of any legislative amendment to attempt to enable such a measure. Any levy imposed on ISPs to support Canadian content would be damaging to Canada's digital economy, innovation agenda and – we respectfully submit – Canadians' perceptions of the legitimacy of Canadian content.

32. While consumers may be accustomed to a 5% levy on their cable and satellite bills (introduced in 1998 and not specified on invoices), they are very sensitive to increases in

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quarter 2016 earnings conference call, where the increase in video subscribers was attributed to Comcast's X1 platform. Mr. Cavanagh explained:

> "In fact, we have improved churn in video and high-speed data for 32 consecutive months as customers increasingly recognize the value of our X1 platform and superior high-speed data product and we make meaningful strides in improving customer service."

Source: Comcast, "Comcast Reports 3rd Quarter 2016 Results" (26 October 2016), online: Comcast Investor Relations Home, <http://cmcsa.com/releasedetail.cfm?ReleaseID=995492 >; Comcast, "Edited Transcript of CMCSA Q3 2016 Comcast Corp Earnings Call" (26 October 2016), online: Comcast Investor Relations Home, < http://files.shareholder.com/downloads/CMCSA/3276473219x0x913883/5AD6DECC-0737-43A9-9CC2-CB000A65FE13/Comcast_3Q16_Earnings_Transcript.pdf> at slides 4-5.

[16] SC 1993, c 38 (***Telecommunications Act***).

[17] *Reference re Broadcasting Act*, 2012 SCC 4, at paras. 4-5.

[18] *Telecommunications Act,* at s. 7.

internet and wireless prices, as well as cable and satellite prices. Moreover, the Government has already indicated that it has no intention to introduce a "Netflix tax" on Canadian consumers.[19] A levy on ISPs and/or WSPs would effectively amount to the same thing and would be seen as such. Moreover, given the opposition of many Canadian consumers to a levy on Netflix – a service that actually exists to provide content – the imposition of any such tax on Canadian TSPs – services entirely neutral to content – can be expected to be met with vociferous public opposition.

33. If introduced, middle class households, millions of which subscribe to both broadcasting distribution and internet services, would find themselves paying twice for Canadian content out of their household budgets. Moreover, broadband and wireless users could find themselves targeted, even though their online consumption of cultural content is limited or non-existent. The C.D. Howe Institute recently summarized some of the negative and inappropriate public policy ramifications of imposing a cultural content levy in connection with the use of broadband service:

> …such a tax might exclude some people from Internet connectivity. Moreover, the targeted tax base would be overbroad relative to the benefits of the cultural programming since those benefits would not accrue to business users of broadband services, nor to individual subscribers in their multifaceted need to access the Internet beyond cultural or news programming, such as internet shopping or banking.[20]

34. More broadly, any proposal for an ISP or wireless levy stands in stark contrast to the Government's objective to extend the accessibility of telecommunications to rural and remote communities, and to its recognition of the importance, to business and Government alike, of the availability of high value, affordable internet service to all Canadians. As explained above with respect to Shaw's vanguard Internet 150 product and the commitment of Freedom Mobile to Canadian wireless consumers, value and affordability are important components of Shaw's competitive strategy. These features should not be compromised or offset by the introduction of new taxes or levies, particularly those that are directed at policy objectives that fall outside of the scope of the *Telecommunications Act*.

35. Indeed, in order to ensure that all Canadians (including creators and domestic audiences and users of creative works) are empowered to participate in our future digital economy, the extension of broadband services to rural and remote areas is a critical priority. This imperative has also been cited by many creators at the Minister of Canadian Heritage's roundtables held across Canada in this consultation, particularly during the in-person consultations convened in Iqaluit, Edmonton and Halifax.

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[19] Sean Craig, "No Netflix tax', but the future of Cancon is up for debate, says heritage minister Melanie Joly" (June 13, 2016), online: Financial Post < http://business.financialpost.com/news/no-netflix-tax-but-the-future-of-cancon-is-up-for-debate-says-heritage-minister-melanie-joly?__lsa=f2e1-c7e0>.

[20] Benjamin Dachis and Daniel Schwanen, "Changing the Channel on Canadian Communications Regulation" (May 2016) Commentary No. 451 at 7, online: C.D. Howe Institute <https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary_451.pdf>.

36. Accordingly, Shaw reiterates our position with respect to Budget 2016's $500 million commitment to broadband investment: these resources should be invested in the transport/community layer to help connect remote communities to next-generation infrastructure across Canada.[21] Any new broadband levies imposed on Canadian TSPs in support of Canadian content would divert investment from critical network development, including investments in high capacity transport links to underserved and unserved areas, many being First Nations lands.

37. In summary, requiring TSPs to contribute monies to the support of cultural content would detract from their efforts to satisfy the fundamental demands for connectivity, wireless and broadband network growth, and innovation. In the current environment, what matters most is: empowering Canadians to realize the full potential of their communications system; investing in reliable and powerful networks that can evolve and grow through innovation; promoting consumer choice and competition that can discipline pricing and improve services; and striving to close any current or foreseeable connectivity gaps. Shaw believes that more appropriate and effective measures must be found to support and promote content, and that such measures should not find their locus in fundamentally different sectors with competing but equally important public policy objectives.

The Importance of Giving Canadians Content They Want

38. Shaw strongly believes that new measures to incentivize, support and promote Canadian content must give the vast majority of Canadians the programming they want to watch and must not impose the costs of additional content levies on them. In the borderless digital world, Canadian consumers have limitless opportunities for content consumption and will exercise their right to choose freely. Accordingly, working to ensure the attractiveness of Canadian programming to broad domestic audiences is fundamental to: the development of a strong and successful Canadian programming and production industry; a responsible approach to public spending; and ongoing public confidence in policies that support Canadian content development, production and exhibition. In this context, it is important to highlight the fact that – despite the rise in popularity of OTT services – television broadcasting remains the primary means for content to reach broad Canadian audiences and remains the biggest driver of Canada's audio-visual cultural community.

39. We understand that Canada's social contract may require special support measures to ensure that constituencies with unique needs and circumstances, such as First Nations and Official Language Minority Communities, can contribute fully to and see themselves reflected in Canadian cultural expression. With that in mind, it is Shaw's view that public policy measures that prioritize the development and promotion of popular Canadian programming by a viable and sustainable production community (in satisfaction of the broad cultural

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[21] Shaw Cablesystems G.P.., *Submission of Shaw Cablesystems G.P. to Pre-Budget 2017 consultations: The Innovation Budget* (August 5, 2015).

objectives of the *Broadcasting Act*) will free up public resources to ensure strong support for the cultural content of unique constituencies.

40. Unlocking the potential for Canadian programming with broad domestic and international appeal is of critical importance to ensuring that Canadians feel deeply connected to and value Canadian programming as their global content choices multiply. Survey data confirms Canadians' belief that the production and distribution of domestic television content is important.[22] Decades of effort and billions of dollars have been directed to Canadian television production and exhibition. Despite this, Canadian entertainment shows continue to represent a very small share of the most popular entertainment programs on Canadian television and – despite some notable successes, such as *Vikings* and *Blackstone* – have not maximized their ability to achieve export sales and advance Canada's culture in foreign markets.

41. As noted by Richard Stursberg in his recently released study entitled *Cultural Policy for the Digital Age,*

> Despite regulatory requirements to devote half of their prime time inventory to Canadian programs, the number of Canadian entertainment shows in the top 40 shows watched by Canadians in prime time has averaged three per year. [23]

42. Furthermore, over the past five years, while peak-hour viewing to Canadian English-language children's and documentary programming has increased relative to viewing to foreign programming in those genres, English-language drama viewing in peak hours continues to be dominated by foreign programs. Foreign dramas represented 85% of all peak hour English-language viewing to drama in 2010-2011 and 85% of the same viewing in 2015-2016. Similarly, viewing to foreign English-language variety and performing arts programming in prime time has increased from 81% in 2010-2011 to 82% in 2015-2016.[24] The lack of increases in viewing to Canadian programming to those key categories occurred despite the fact that the CMF contributed over $610M to productions in those genres and over that period.

43. Shaw strongly supports an expanded emphasis on audience potential and success as key factors underlying public support for Canadian programming. Audience success has indeed been a strong focus of the CMF. Since its inception in 2010, the CMF has distributed funding

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[22] See, for example, Nanos Research National Survey, *What Canadians Think About Local Broadcasting, the CBC and the Federal Election* (August 2015) at 3, 7, 31, online: Friends of Canadian Broadcasting <https://www.friends.ca/files/PDF/2015-706-fcb-national-report-with-tabs-english.pdf>.

[23] Richard Sturberg, *Cultural Policy for the Digital Age* (November 2016) <techlaw.uottawa.ca/sites/techlaw.uottawa.ca/files/culturalpolicyforthedigitalage.pdf> [**R. Stursberg**], at 10, Figure 3 at 11 citing Numeris, November 1 to November 30, 2004 to 2015, English Canadian and U.S. services, Ind. 2+ AMA, Total Canada.

[24] Canada Media Fund, *2015-2016 Annual Report: Overall English-language Viewing Trends,* online: Canada Media Fund <*http://ar-ra15-16.cmf-fmc.ca/audience/audience_results/*>.

to Canadian broadcasters through its "broadcast envelop" system, given that broadcasters have an economic incentive to support programming with the greatest potential appeal due to their reliance on audience-based advertising revenues. Moreover, the primary criterion pursuant to which the CMF allocates monies to different broadcaster envelopes is, appropriately, the actual audience success of funded programming that the broadcaster has licensed. Any modifications to or the introduction of new funding criteria going forward should prioritize the audience potential of a production and the track record of the broadcaster and/or producer in both securing wide audiences and achieving positive returns on investment (**ROI**). Confidence among Canadians in the legitimacy and effectiveness of public policy support measures for Canadian content will best be achieved by incentivizing the production of television content of broad appeal. In addition, the greater the popularity of supported programming, the greater the opportunity to generate ROI and to develop a viable and sustainable production sector.

The Importance of Exports

44. Another critical component of building a self-sustaining television production sector, amplifying national pride and selling Canada's brand is focusing on export growth for Canadian programming. Data on the scope of the export value of Canadian content suggests that there is significant potential for growth in this area.

45. Statistics provided by the Canadian Media Production Association (**CMPA**) and cited by R. Stursberg in *Cultural Policy for the Digital Age* demonstrate that "the export value of [Canadian] television production as a percentage of total production costs doubled over the period 2006-2012, but has remained roughly constant since then" at between 20-21%.[25]

46. At the same time, a recent study by the United Nations Educational, Scientific, and Cultural Organization (**UNESCO**) indicates that the annual export value of Canadian "cultural goods" has decreased significantly, yielding US$2.5B in 2004 and falling to US$1.5B in 2013.[26] Comparatively, the UK experienced significant growth over this same period, from US$12.9B to US$16.4B.[27] Moreover, the decline in Canada's cultural goods exports represents a decrease in value on both an absolute and per capita basis, whereas the inverse applies to the UK.[28]

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[25] R. Stursberg, *supra* note 23 at 11; CMPA, *Profile 2015 – Economic Report on the Screen-based Media Production Industry in Canada* (CMPA, Department of Canadian Heritage, Association Quebecoise de la production mediatique, Telefilm Canada, Nordicity, 2015) at 10, 49 and 84, <http://www.cmpa.ca/sites/default/files/documents/industry-information/profile/PROFILE-2015-ENG.pdf>.

[26] Lydia Deloumeaux, José Pessoa & Lisa Barbosa, *The Globalization of Cultural Trade: A Shift in Consumption – International flows of cultural goods and services 2004-2013"* (Montreal, QC: UNESCO Institute for Statistics, 2016), <http://unesdoc.unesco.org/images/0024/002440/244061e.pdf> [***UNESCO: Globalization of Cultural Trade***], at 100-101, Table G1: Total exports of cultural goods by country, 2004-2013.

[27] *UNESCO: Globalization of Cultural Trade*, *supra* note 26, at 109-110, Table G1.

[28] R. Stursberg, *supra* note 23 at 11 citing *UNESCO: Globalization of Cultural Trade*, *supra* note 26.

47. Notably, the UNESCO definition of "cultural goods" encompasses not only television production, but a broad range of products – including films, and multimedia products, software, books, magazines, crafts and fashion. The study nevertheless points, in broad terms, to an important activity that, if effectively incented through revisions to current cultural support approaches, will contribute to making Canada's cultural industries (including the television production and programming businesses) highly successful.

48. The Minister's Consultation Paper expresses the same sentiment, noting that "export and international audiences will be critical to the future sustainability of Canada's cultural sector and its economy. Partnerships and foreign financing and key."[29] Although co-production partnerships have leveraged talent and financing from countries that are party to the treaties, with some notable international success stories, new measures can augment these successes.

49. In addition to focusing on programming with significant popular appeal, which is consistent with an effective export strategy, Shaw recommends a re-evaluation of the current number of Canadian content certification points required to obtain CMF funding. Currently, ten out of ten points must be secured for a production to access CMF monies – meaning that every key creative role must be filled by a Canadian. Previously, a total of eight out of ten points were required to access funding from Certified Independent Production Funds (**CIPFs**), but the CRTC recently modified this requirement in its *Policy Framework for Certified Independent Production Funds*,[30] setting the required points at six out of ten. This change made a key term of access to CIPF support equivalent to the Canadian Production Tax Credit through the Canadian Audio-Visual Certification Office (**CAVCO**), which also requires six out of ten Canadian content certification points.

50. While the CRTC's CIPF decision engendered some opposition from representatives of the creative industries, Shaw agrees with the CRTC's view that the capitalization of Canadian content can be augmented by a revised points requirement. On this point, the CRTC determined that;

> A reduced requirement of at least six points could also facilitate the hiring by production companies of non-Canadian actors or creators, who may increase a project's attractiveness and visibility in international markets. A reduction in points […] would also allow co-ventures to be eligible for CIPF funding.[31]

51. Likewise, Shaw submits that such a change in the context of CMF funding would not only improve the fundamental economics of the domestic production industry, it would create

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[29] Canada, Department of Canadian Heritage, *Consultation Paper: Canadian Content in a Digital World – Focusing the Conversation* (Ottawa: Department of Canadian Heritage, 2016) at 9. <http://www.canadiancontentconsultations.ca/Consultation-Paper>.

[30] CRTC, Broadcasting Regulatory Policy 2016-343, *Policy framework for Certified Independent Production Funds* (Ottawa: 25 August 2016) (**BRP 2016-343**).

[31] BRP 2016-343, *supra* note 30 at para. 57.

opportunities for the exhibition of Canadian programming – and of Canadian values and ideas – throughout the world.

52. An additional measure that should be seriously considered to engender greater activity in support of exports is the removal of limits on the Canadian content that Canadian broadcasters can own, in order to create a strong incentive to maximize the value of their programming with its own audiences and in export markets. The UK, which the UNESCO report[32] has illustrated is an export powerhouse, permits broadcasters to have affiliated production studios. The same is true of American broadcasters.

53. As well-financed companies, broadcasters are suited to invest in high-quality programming and take financial risks. Moreover, they are compelled, by regulation, to spend 30% of their gross revenues on Canadian programs[33] and to exhibit significant amounts of Canadian programming pursuant to their conditions of licence.[34] To the extent that broadcasters can own copyright in programming and are not constrained to license Canadian content for a limited window in Canada, they would presumably be highly motivated to promote their content aggressively in multiple media and markets and to recoup and, indeed, profit from the costs associated with the fulfilment of their Canadian content exhibition and expenditure requirements. Allowing this to occur in Canada could be a critical step in Canada's development of a robust and sustainable production community with the capacity to successfully promote Canadian culture internationally and ultimately forego the need for extensive government support.

The Importance of Competitive Fairness

54. Shaw generally supports a content-agnostic approach to access to cultural support measures. As discussed above, the most critical criterion underpinning most government support should be the potential for widespread appeal of a cultural product to Canadian and foreign viewers or users.

55. In the context of television programming, this means that promotion and support measures should not be limited to particular genres of programming while excluding others that may be more inherently "commercial" (for example, reality television programming). There is no reason why digital products with significant commercial potential (such as video games) should be afforded access to public policy supports, such as tax credits, while populist television programs are not. Like video games or other cultural products with export potential, there is no reason why a Canadian reality show should be considered as an insufficient

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[32] *UNESCO: Globalization of Cultural Trade*, *supra* note 26.

[33] CRTC, Broadcasting Regulatory Policy 2010-167, *A group-based approach to the licensing of private television services* (Ottawa, 22 March 2010), at para. 50. In 2015 alone, Canadian broadcasters, collectively, contributed CPE of almost $3B, amounting to 45 cents invested in support of Canadian programming for each dollar earned during the 2014-2015 broadcast year. Source: CRTC Monitoring Report, *supra* note 1, at 130.

[34] CRTC, Broadcasting Regulatory Policy 2015-86, *Let's Talk TV – The way forward - Creating compelling and diverse Canadian programming* (Ottawa, 12 March 2015) at paras. 193-198.

vehicle for export and the realization of cultural objectives. The BBC's *Great British Bake Off* is an international success. As of 2015, it has been sold in 196 territories and its format has been sold in 20 territories. This program, although reality-based, has been an excellent vehicle for the promotion of UK values and culture, and has undoubtedly made significant economic contributions to the UK production industry. It exemplifies the value of introducing more flexibility to the genres of programming that may receive the benefit of cultural support measures.

56. Shaw also concurs, in general, with an approach to Canadian content support and promotion that is platform agnostic, subject to one key caveat. Contributions by BDUs and their customers to the production and exhibition of Canadian programming – whether they are contributed to and redistributed by the CMF or any other funding mechanism, should be used for the support of programming whose first window of exhibition is within the licensed Canadian broadcasting system.

57. As described throughout this submission, the business of content distribution is highly competitive and Shaw is investing and competing aggressively to add value, attract new users, and minimize cord-cutting and cord-shaving. It would be fundamentally unfair to Canadian cable and satellite customers, BDUs and broadcasters, as well as contrary to the objectives of the *Broadcasting Act*, to divert monies contributed from licensed participants and their customers to producers and distribution platforms who carry on business outside of the licensed broadcasting system and make no contributions to the creation and presentation of Canadian programming.

58. In its new CIPF Policy, the CRTC eliminated the requirement that producers obtain a broadcast licence or development agreement to receive CIPF funding with the objective of fostering innovation and providing funding for a wide variety of productions.[35] The result is that projects not necessarily created for distribution in the licensed system will be eligible to receive CIPF funding, much of which is contributed by BDUs. That said, we note that several CIPFs, in contrast to the CMF, receive funding from private sector organizations other than BDUs. However, were a policy change made with respect to access to the portion of CMF funding that represents mandated BDU contributions, it would effectively force BDUs to subsidize their competitors, with the perverse implications described above.

59. One matter of competitive fairness that would be beneficial as a means of supporting domestic content outlets is the application of s. 19.1 of the *Income Tax Act*[36] to advertisers that use non-Canadian media buyers or non-Canadian new media platforms. As the Government is aware, advertisers are already proscribed, pursuant to s. 19.1 of the *Income Tax Act*, from deducting advertising costs as a business expense when advertising is purchased on conventional media outside of Canada. Given the decline in advertising

[35] BRP 2016-343, *supra* note 30 at paras. 20-24.

[36] RSC 1985, c 1 (5th Supp.).

revenues affecting all Canadian media, such a measure could incent advertisers to keep their expenditures within the Canadian advertising and media ecosystem.

Conclusion

60. Shaw appreciates the initiative taken by the Minister to undertake a detailed and open review of existing and potential approaches to supporting Canadian content in a digital world. The existing “system” of rules and supports as they pertain to television programming alone – not to mention the complete spectrum of Canadian cultural products – is daunting and byzantine. It has evolved over time in a piecemeal fashion, and – while it has produced a strong and skilled talent pool and industrial base, and some compelling content – it has lacked focus and a clear goal concerning what it aims to achieve for Canadians.

61. Shaw strongly believes that any attempt to subsidize Canadian content by increasing obligations on BDUs or taking steps to impose levies on ISPs or WSPs would be inconsistent with the legislative framework and with critical public policy objectives of the Government pertaining to network access and affordability, and would engender a strong negative reaction from Canadians. Some (but certainly not all) in the creative community are eager to cast network providers as deep-pocketed companies that unjustly benefit from the sale of access services that are used, to a significant extent, for the communication of cultural content. This overlooks the critical role that networks have played – beyond BDUs 5% contribution – both in the broadcasting and telecommunications sector. BDUs have, quite simply, created and sustained a robust customer base for Canadian content and created universal access to an enviable and unique broadcasting system in the face of challenging geography. For their part, TSPs are at the forefront of facilitating Canadians’ (including creators’) engagement in the digital economy. Network demand continues to grow and the critical role of ISPs is to ensure access to affordable and robust digital infrastructure.

62. We fully agree with the insightful statement in the Consultation Paper that:

> Canada will need strong, adaptable and competitive businesses that are able to manage risk effectively, diversify revenue and attract investment from many sources, including private investment. The path to tomorrow’s success depends partly on the ability of today’s creators and entrepreneurs to try new things – to succeed and sometimes to fail.

63. Our suggestions are intended to create a viable Canadian production sector, sustained by programming with tremendous popular appeal both domestically and internationally, and robust Canadian networks. This will indeed require risk-taking and letting go of a conception of cultural measures as a zero-sum game where one party’s benefit is another’s loss. In spite of the challenges of a globalized, digital world, there has never been a better time seize the opportunity to use global partnerships to create a strong Canadian industry and to be confident of what Canada has to offer its citizens and the world.

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