BY GC KEY

Montréal, February 13, 2018

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

Object: Application under Part 1 for reconsideration of the *Exemption order for new media broadcasting undertakings* (CRTC 2012-409)

Dear Secretary General,

The Conseil provincial du secteur des communications (CPSC) of the Canadian Union of Public Employees (Syndicat canadien de la fonction publique, SCFP-CUPE) represents more than 7,400 workers in Québec's communications sector. Although most of its members work in telecommunications (for Cogeco, Telus and Videotron), significant number works for television stations and discretionary programming service in both French-speaking and English-speaking markets (Global, Groupe TVA and RNC Media).

In the attached application, which can also be found on http://scfp.qc.ca/memoires-du-scfp/, CPSC is asking the Canadian Radio-television and Telecommunications Commission (the CRTC or the Commission) to reconsider the *Exemption order for new media broadcasting undertakings* (Broadcasting Order CRTC 2012-409) under Part 1 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules).

Should you have any questions, please contact the undersigned or the authorized representative.

Sincerely yours,

[Signed original]

Réjean Beaudet
Recording Secretary, CPSC
scfp687@bellnet.ca

APPLICATION UNDER PART 1
OF THE
CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION
RULES OF PRACTICE AND PROCEDURE
FOR RECONSIDERATION
OF
EXEMPTION ORDER
FOR NEW MEDIA BROADCASTING UNDERTAKINGS
(CRTC 2012-409)

Submitted by the
Conseil provincial du secteur des communications
of the
Canadian Union of Public Employees
(Syndicat canadien de la fonction publique)

February 13, 2018

TABLE OF CONTENTS

I. INTRODUCTION

1. The Conseil provincial du secteur des communications (CPSC) of the Canadian Union of Public Employees (Syndicat canadien de la fonction publique, SCFP-CUPE) represents more than 7,400 workers in Québec's communications sector. Although most of its members work in telecommunications (for Cogeco, Telus and Videotron), significant number works for television stations and discretionary service stations in both French-speaking and English-speaking markets (Global, Groupe TVA and RNC Media).

2. CPSC is applying to the Canadian Radio-television and Telecommunications Commission (the CRTC or the Commission) for reconsideration of the *Exemption order for new media broadcasting undertakings* (Broadcasting Order CRTC 2012-409) under Part 1 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules).

3. CPSC is filing this application because it is convinced that the digital media broadcasting undertakings that benefit from the exemption—undertakings that offer broadcasting services "delivered and accessed over the Internet or delivered using point-to-point technology and received by way of mobile[1]"—now have an impact on the implementation of the *Canadian broadcasting policy*[2] (the Policy) set out in the *Broadcasting Act* (S.C. 1991, c. 11).

4. More specifically, CPSC notes that digital media broadcasting undertakings (online broadcasting undertakings or services, online broadcasters, over-the-top broadcasting undertakings or services, Internet broadcasting undertakings) that operate in Canada while exempted from the regulations have an impact "on the ability of licensed undertakings to fulfil their regulatory requirements[3]." CPSC also submits that these online broadcasters could make a greater contribution to the Canadian broadcasting system "whether with respect to Canadian programming carried by […] or the expenditures on Canadian programming […][4]" if they were subject to the regulations.

5. It is CPSC's position, therefore, that the time has come to fully reconsider the *Exemption order for new media broadcasting undertakings.*

[1] CRTC, *Exemption order for new media broadcasting undertakings,* Broadcasting Order CRTC 2012-409, Ottawa, July 26, 2012, para. 2.
[2] *Broadcasting Act*, art. 3(1).
[3] CRTC, *Policy on exemption orders*, Public Notice CRTC 1996-59, Ottawa, April 26, 1996, para. d) ii).
[4] Ibid., para. d) i).

II. RELEVANT FACTS

A. The Exemption order and previous reconsiderations

6. The initial *Exemption order for new media broadcasting undertakings* (CRTC 1999-197)[5] was published following a consultation that led the Commission to make the following observations in 1999:

   - "[…] The Internet, which today has a penetration rate of approximately 20%, […] cannot yet deliver mass Canadian audiences[6]";
   - "[…] the effect of new media on television audience size will be limited at least until such time as high-quality video programming can be distributed on the Internet[7]";
   - "The Commission agrees […] that there is currently no evidence that the Internet has had a negative impact on the advertising revenues of regulated broadcasters as a result of the growth in on-line advertising[8]";
   - "[…] there was no evidence submitted that points to such a sudden and large shifting in advertising resources to new media[9]";
   - "[…] definitive on-line business models have yet to emerge […][10]";
   - "Much of the Canadian new media content available complements either the existing programming of those Canadian broadcasting undertakings involved in new media […][11]".

7. These observations led the Commission to conclude that:

   > "[…] compliance with Part II of the Act, and any applicable regulations made thereunder, by persons carrying on new media broadcasting undertakings will not contribute in a material manner to the implementation of the policy objectives set out in section 3(1) of the Act. Accordingly, the Commission will issue a proposed exemption order without terms or conditions in respect of all undertakings that are providing broadcasting services over the Internet, in whole or in part, in Canada[12]."

[5] The reconsideration was limited to the retransmission of radio and television signals live over the Internet. Refer to Public Notice CRTC 2003-2 mentioned below.
[6] CRTC, *New media*, Public Notice CRTC 1999-84, Ottawa, May 17, 1999, para. 93.
[7] Ibid., p. 2.
[8] Ibid., para. 109.
[9] Ibid., para. 108.
[10] Ibid., para. 98.
[11] Ibid., para. 23.
[12] Ibid., para. 50–51.

8. In 2003, the Commission maintained the exemption order (CRTC 1999-197)[13] at the end of a partial review requested by the Governor General in Council. It also made the following observation regarding the diversity of the proposed amendments to the order:

> "In the Commission's view, this diversity of opinion reflects the relative immaturity of Internet retransmission, the absence of clear answers to many technical questions at this time, and the lack of reasonably developed business models. Without a reasonably clear indication as to how the industry will develop, the Commission considers that the development of conditions of exemption or a licensing framework at this point would entail considerable speculation[14]."

9. In 2006, the Commission determined that mobile television broadcasting services that were distributed and made available over the Internet were covered by the scope of the exemption order and that nothing warranted revising the terms given that the 1999 findings remained relevant despite how the Internet had evolved:

> "[…] in the Commission's view, there is nothing on the record of this proceeding to indicate that the use of the Internet to deliver and access programming has increased to the point that the ability of traditional broadcasters to fulfil their obligations under the Act has been impeded[15]."

10. The following year, the Commission published a new exemption order that applied to mobile television broadcasting undertakings that used point-to-point wireless technology (CRTC 2007-13)[16], having deemed that these undertakings:

> "[…] are unlikely to have a significant impact on traditional broadcasters due to the limitations of the wireless technology employed, the battery life and screen size of the handset, the reduced image and audio quality, and the type and range of programming choices offered by the mobile broadcasters[17]."

11. In 2009, the Commission revoked the order referred to in the previous paragraph (CRTC 2007-13) and incorporated that order into the initial exemption order (CRTC 1999-197). It also added a provision that prohibited any undue preference as well as a new clause that forced new media

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[13] The review was limited to the retransmission of radio and television signals live over the Internet. Refer to Public Notice CRTC 2003-2 cited below.
[14] CRTC, *Internet retransmission – Report to the Governor General in Council pursuant to Order in Council P.C. 2002-1043,* Public Notice 2003-2, Ottawa, January 17, 2003, para. 77.
[15] CRTC, *Regulatory framework for mobile television broadcasting services*, Broadcasting Public Notice CRTC 2006-47, Ottawa, April 12, 2006, para. 40.
[16] CRTC, *Exemption order for mobile television broadcasting undertakings*, Broadcasting Public Notice CRTC 2007-13, Ottawa, February 7, 2007.
[17] Ibid., para. 42.

broadcasting undertakings to provide the CRTC with any information requested regarding their operations. This in turn led to the publication of an amended order (CRTC 2009-660[18]).

12. Approximately one year later, the Commission set up an industry working group to determine the information required from all new media broadcasting undertakings (NMBUs), whether or not they were affiliates of licensed undertakings:

> "The Commission considers that, to obtain a complete picture of the broadcasting in new media environment, information from both affiliated and unaffiliated, foreign and domestic, NMBUs would be required. However, as a starting point, the Commission considers that it would be appropriate to collect information only from NMBUs that are affiliates of licensed broadcasting undertakings. […] Accordingly, the Commission determines that NMBUs that are affiliates of licensed broadcasting undertakings will be required at this time to report to the Commission their revenues and expenditures[19]." [emphasis added]

13. Since 2010, the NMBUs that are affiliates of licensed broadcasting undertakings must as a result provide the Commission with an annual report pursuant to Broadcasting Regulatory Policy CRTC 2010-582[20]. However, nothing is known of the findings of the working group set up at the time with respect to the final reporting requirements that were to apply to all online broadcasters, including unaffiliated and foreign broadcasters.

14. In any event, the 2009 amended order (CRTC 2009-660) granted the Commission the power to demand information from new media broadcasting undertakings "[…] regarding their activities in broadcasting in new media, and such other information that is required by the Commission in order to monitor the development of broadcasting in new media[21]," but it is not known if it exercised its power prior to September 2014 (c.f. section I.B).

15. In the spring of 2011, the Commission proceeded with a *Fact-finding exercise on the over-the-top programming services in the Canadian broadcasting system* (CRTC 2011-344) given the proliferation of programming made available by the multiple platforms of both domestic and foreign undertakings. The Commission then found that:

> "an acceleration of technological, market and consumer behaviour trends that may influence the Canadian broadcasting system's ability to achieve the policy objectives of the *Broadcasting Act*[22]."

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[18] CRTC, *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197, December 17, 1999),* Appendix to Broadcasting Order CRTC 2009-660, Ottawa, October 22, 2009.
[19] CRTC, *Reporting requirements for new media broadcasting undertakings*, CRTC 2010-582, Ottawa, August 13, 2010, para. 25 and 26.
[20] Ibid., para. 29.
[21] Op. cit. note 18, para. 3.
[22] CRTC, *Fact-finding exercise on the over-the-top programming services in the Canadian broadcasting system*, Broadcasting and Telecom Notice of Consultation CRTC 2011-344, Ottawa, May 25, 2011, p. 1.

16. From this exercise, the Commission arrived at the conclusion that it would not revise the new media exemption order and would not relax its regulations[23]. However, it recognized that it needed to be vigilant and to monitor over-the-top service providers attentively. It also intended to:

> "[…] conduct financial data collection and another fact-finding exercise in May 2012 to determine if the scenarios put forth by parties with respect to potential regulatory impacts and opportunities have materialized[24]."

17. The exemption order was then revised one last time in 2012 but solely for the purpose of implementing the *Regulatory framework relating to vertical integration*[25] and replacing the term "new media" by the more current term "digital media." It is not known if the data collection exercise announced by the Commission for May 2012 took place.

B. Let's Talk TV

18. At the end of the *Let's Talk TV* public consultation, which led to a review of the entire Canadian television regulatory environment in 2015, the Commission did not see fit to review the *Exemption order for digital media broadcasting undertakings* (the exemption order)[26] even though several stakeholders including CPSC had requested such a review.

19. Bell, OMTCS and WGC among others had explained that a distinct review process was necessary in order to draw up a complete picture of over-the-top broadcasters and their influence on the Canadian broadcasting system[27].

20. It must be said that the Commission had not examined over-the-top broadcasting services in depth as these services had been the object of a single question posed by the Commission to stakeholders[28]. Testimony of representatives of the online broadcasting undertakings invited by the CRTC to take part in its public hearing (Google and Netflix) were, for their part, struck from the public record as the undertakings had refused to provide the requested information to the Commission[29].

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[23] CRTC, *Results of the fact-finding exercise on the over-the-top programming services*, Ottawa, October 2012, p. 11.
[24] Ibid., p. 12.
[25] CRTC, *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings),* Broadcasting Order CRTC 2012-409, Ottawa, July 26, 2012.
[26] Zboraslka, Emilia and Charles H. Davis, "Transnational over-the-top video distribution as a business and policy disruptor: The Case of Netflix in Canada" in *The Journal of Media Innovations 4.1*, 2017, p. 16.
[27] Idem.
[28] Zboraslka, Emilia and Charles H. Davis, "Transnational over-the-top video distribution as a business and policy disruptor: The Case of Netflix in Canada" in *The Journal of Media Innovations 4.1*, 2017, p. 13.
[29] Ibid., p. 15, 16 and 18.

C. The last full reconsideration of the order dates back to 2006

21. Since 1996, the Commission has said that it "has the ability to review its exemption orders at any time, regardless of whether or not any party applies to the Commission in this respect[30]." However, it established in the *Policy regarding the use of exemption orders* (Public Notice CRTC 1996-59) that these orders were to be reviewed periodically: "Such reviews will normally take place five years from the date of issuance of the order and will be subject to the Commission's normal public process[31]."

22. It has now been more than five years since the exemption order was last reviewed (CRTC 2012-409). It has been twelve years, however, since the Commission reviewed all of the substantive questions regarding online broadcasting undertakings. Indeed, the 2006 review represents the last actual decision-making process during which the Commission subjected the order to an extensive review.

23. Moreover, as explained below, the circumstances that led to the publication of the initial exemption order and its renewal have changed dramatically in the last years.

D. The Internet and mobile have dethroned BDUs

24. Over the past decade, Internet and mobile data transmission services have greatly improved and today enable the streaming of videos, television programs and movies in HD. The quality and performance of mobile devices have also increased.

25. Recognizing the increased importance of the Internet in the lives of Canadian citizens, the CRTC began intervening in 2011 to increase the broadband speed made available by telecommunications companies. The CRTC initially set target speeds of 5 megabytes per second (Mbps) downstream and 1 Mbps upstream in 2011[32]. In 2016, it established a universal service objective of making broadband Internet access services, on both fixed and mobile wireless networks, available throughout Canada at speeds of at least 50 Mbps downstream and at least 10 Mbps upstream[33]. The Commission also determined that all Canadians should have access to an unlimited data allowance and that mobile wireless services should be made available to all households as well as on as many transportation roads as possible[34].

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[30] CRTC, *Exemption order for mobile television broadcasting undertakings*, Broadcasting Public Notice CRTC 2007-13, Ottawa, February 7, 2007, para. 49.
[31] CRTC, *Policy regarding the use of exemption orders*, Public Notice CRTC 1996-59, Ottawa, April 26, 1996, para. e).
[32] CRTC, *Obligation to serve and other matters*, Telecom Regulatory Policy CRTC 2011-291, Ottawa, May 3, 2011.
[33] CRTC, *Modern telecommunications services – The path forward for Canada's economy,* Telecom Regulatory Policy CRTC 2016-496, Ottawa, December 21, 2016, p. 2 and para. 37 and 80.
[34] Ibid., p. 2.

26. The Commission set up a funding mechanism to eliminate regional variations with respect to broadband availability. The subsidies aimed at improving existing networks were in addition to those made available by the different levels of government as well as private sector investments[35].

27. Internet and mobile service use is on the rise. Since 2014, there are more residential Internet service subscribers in Canada than broadcasting distribution undertaking service subscribers (including DTH, MDS and IPTV). As for mobile technology users, their number has been constantly increasing since 2012.

TABLE 1 – RESIDENTIAL INTERNET, BDU AND WIRELESS SERVICE SUBSCRIBERS

Canada (in millions)	2012	2013	2014	2015	2016
Internet	10.9	11.25	**11.63**	12.02	12.3
BDUs (including DTH, MDS and IPTV)	11.5	11.5	**11.4**	11.2	11.1
Wireless services	27.7	28.4	28.8	29.8	30.8

Source: CRTC, *2017 Communications Monitoring Report*.

28. Increasing numbers of Canadians are using their Internet subscription to access online television programming: [TRANSLATION] "Services such as Netflix and YouTube led to a 23% increase in households' data consumption last year[36]." Furthermore, regional services such as Hulu, Roku and AppleTV now make it possible to view Internet programming on a television set[37].

29. The percentage of the Canadian population that watches television exclusively online increased from 4% to 10% between 2012 and 2016. However, the attractive power of the Internet is higher among Anglophones (13%) than Francophones (4%). Youths aged 18–34 are the most likely to watch television exclusively on the Internet (23%[38]).

30. The consumption of data on mobile wireless devices is also growing. In 2016, the average monthly data consumption on wireless devices reached more than 1,500 Mb per month, up by close to 13% year-over-year[39]. Up to 20% of Quebeckers use their cellular phone to watch videos, series and films according to a CEFRIO study[40].

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[35] CRTC, *Modern telecommunications services – The path forward for Canada's economy,* Telecom Regulatory Policy CRTC 2016-496, Ottawa, December 21, 2016.
[36] "La consommation résidentielle de contenus numériques en forte hausse" in *Le Devoir,* Montréal, November 10, 2017.
[37] C.f. https://evoboxtv.com/.
[38] CRTC, *2017 Communications Monitoring Report*, Ottawa, November 9, 2017, p. 209.
[39] Ibid*.*, p. 310.
[40] CEFRIO, *Mobilité au Québec en 2016 : état des lieux, NETendances, Édition 2016, Volume 7 – Numéro 8,* p. 12

E. Close to half of all Canadian households are subscribed to Netflix

31. Netflix entered the Canadian market in 2010. At the time, its subscription to its online broadcasting service was offered at a price defying any competition ($7.99 per month)[41] and was not subject to sales taxes, which remains the case to this day.

32. In 2013, the year of the launch of Club illico, *i.e.*, Videotron's subscription video-on-demand (SVOD), the number of Netflix subscribers in Canada was already estimated at 1.6 million[42]. The US company reportedly now has between 5.3 and 6.3 million customers in the country[43], representing an increase of 300% to 400% in just five years. The Convergence Research Group estimates that Netflix will continue to grow at this sustained rate in the coming years and that 6.9 million Canadian households will subscribe to Netflix by 2018 (7.4 million by 2019)[44]. By comparison, broadcasting distribution undertakings (BDU, DTH and IPTV) had just over 11.1 million subscribers in Canada, down by more than 400,000 compared to five years earlier[45].

33. In Québec, according to data recently compiled by the CEFRIO, 53% of the population with an Internet connection, *i.e.,* 90% of all adults[46], now subscribes to an online broadcasting undertaking. This represents 13% growth year-over-year. Netflix dominates this market with a higher rate of growth and 7% more subscriptions than all of the comparable Canadian services combined (Club illico, CraveTV and Extra Tou.tv[47]).

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[41] CBC, *Netflix Launches Canadian Movie Service*, September 22, 2010: http://www.cbc.ca/news/technology/netflix-launches-canadian-movie-service-1.872505.

[42] IHS Markit, *Netflix losses increase for International, but per-subscriber financials improve*, January 23, 2013: https://technology.ihs.com/420129/netflix-losses-increase-for-international-but-per-subscriber-financials-improve.

[43] The number of Netflix subscribers in Canada is estimated at between 5.3 million and 6.3 million: Canadian Media Concentration Research Project, *The Growth of the Network Media Economy in Canada, 1984-2016 – Report*, November 2017 and The Convergence Research Group and SRC, *Le nombre de « débranchés » continue d'augmenter au Canada,* April 19, 2017, http://ici.radio-canada.ca/nouvelle/1028962/canadiens-sans-television-abonnements-etude-the-convergence-research-group.

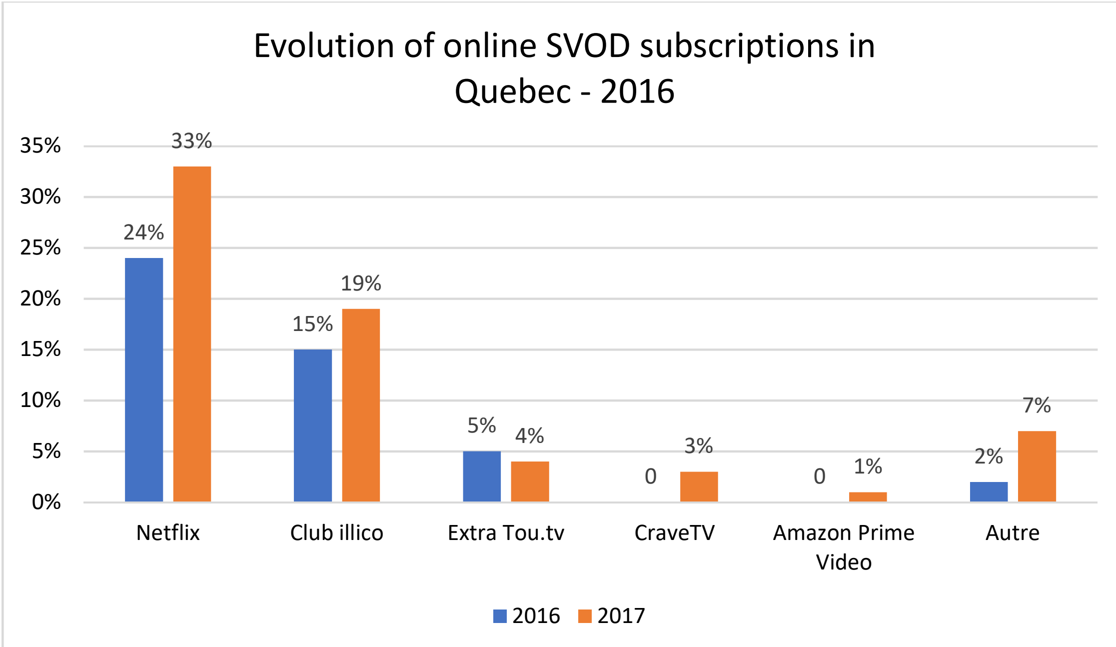
[44] SRC, *Le nombre de « débranchés » continue d'augmenter au Canada,* April 19, 2017, http://ici.radio-canada.ca/nouvelle/1028962/canadiens-sans-television-abonnements-etude-the-convergence-research-group.

[45] CRTC, *Communications Monitoring Report*, p. 201.

[46] CEFRIO, *Portrait numérique des foyers québécois*, *NETendances, Édition 2017, Volume 8 - Numéro 1,* p. 10.

[47] Infopresse, *Netflix, la plateforme préférée des Québécois*, October 3, 2017: http://www.infopresse.com/article/2017/10/3/le-tiers-des-quebecois-branches-est-abonne-a-netflix.

TABLE 2 – EVOLUTION OF QUEBEC HOUSEHOLD SUBSCRIPTIONS TO AN ONLINE BROADCASTER



Source: CEFRIO, *Portrait numérique des foyers québécois, NETendances, Édition 2017, Volume 8 - Numéro 1,* p. 16.

34. Moreover, Canada is second in the world in terms of the number of users who connect to Netflix on a daily basis[48].

35. Netflix's competitive attractiveness is so strong that it has replaced Québecor as the fifth most important television broadcaster in the country in terms of revenue[49]: [TRANSLATION] "Netflix has never disclosed its number of subscribers in Canada or its revenue, but they are *estimated* at 766 million for 2016, *i.e.*, five times higher than in 2012[50]..."

36. Furthermore, Netflix has begun to reach distribution partnerships with Internet access providers and broadcasting distribution undertakings throughout the world. In 2017 alone, Netflix associated with SFR/Altice in France, Proximus in Belgium, T-Mobile (an American subsidiary of Germany's Deutsche Telekom), Cox Communications and Verizon in the United States. These undertakings all include Netflix in their service packages[51]. Netflix is also available

[48] "140 millions d'heures d'écoute chaque jour sur Netflix" in *Le Devoir,* December 12, 2017: www.ledevoir.com/culture/ecrans/515210/140-millions-d-heures-ecoutees-sur-netflix-chaque-jour-en-2017.

[49] Canadian Media Concentration Research Project, *Broadcasting Notice of Consultation CRTC 2017-359 – Call for comments on the Governor in Council's request for a report on future programming distribution models*, December 1, 2017, para. 42.

[50] "La consommation résidentielle de contenus numériques en forte hausse" in *Le Devoir,* November 10, 2018: www.ledevoir.com/economie/512672/la-consommation-de-contenus-numeriques-en-tous-genres-dope-les-telechargements-chez-les-menages-canadiens

[51] Netflix, *Letter to Shareholders*, Q3 Results, October 16, 2017 and Netflix, *Letter to Shareholders*, Q4 Results, January 22, 2018.

directly through Comcast's X1 decoder in partnership with Videotron and Shaw in Canada[52], as well as on Cogeco's TiVo platform[53].

F. Netflix spends more on programming than all Canadian television broadcasters reunited

37. In 2012, Netflix went from acting as a simple broadcaster to producing original content, and as a producer quickly learned the ropes, increasing its annual production from 4 to 126 projects in the space of five years. Most of these are American or foreign productions that are automatically offered in Canada, as Netflix holds all of the rights to its productions.

TAB 3 – NETFLIX: NUMBER OF ORIGINAL PRODUCTIONS PER YEAR (2012–2016)

(number)	2012	2013	2014	2015	2016
Original productions	4	13	25	59	126

Source: Netflix Financial Statements, 2014 (Q4), 2016 (Q4) and 2017 (Q1).

38. In 2016, Netflix alone spent more than US$5 billion to acquire and produce films and television programming for its online platform[54]. Taking into account the exchange rate, that amount is equal to nearly three times the total budget invested in Canadian programming by all traditional, specialty and on-demand service providers in Canada that same year ($2.4 billion). In 2017, Netflix increased its programming budget to US$6 billion, and the company plans to spend US$7–8 billion on content in 2018.

G. Netflix is now incorporated and produces content in Canada

39. Last year, Netflix gave the government a commitment to invest $500 million in audiovisual production in Canada over the next five years[55]. This represents a significant investment of $100 million per year, *i.e.,* the equivalent of approximately:

[52] Shaw and Videotron during the hearings held pursuant to the *Renewal of the broadcasting licences for terrestrial broadcasting distribution undertakings that will expire in May 2018*, CRTC 2017-160, hearing transcripts, October 19, 2017.
[53] https://www.cogeco.ca/web/on/fr/residentiel/soutien/199/1018/faq-tivosupmd-sup/tivo-central/netflix/comment-puis-je-utiliser-netflix-avec-mon-service-cogeco-tivo.
[54] Netflix Financial Statements, 2014 (Q4), 2016 (Q4) and 2017 (Q4).
[55] https://www.canada.ca/en/canadian-heritage/news/2017/09/launch_of_netflixcanadaarecognitionofcanadascreativetalentandits.html

- One third of the 2017–2018 annual budget of the Canada Media Fund (close to $350 million)[56];

- Almost as much as Groupe TVA spent on Canadian programming within its network of traditional television stations in 2016 ($107 million[57]); and

- Half of CTV's investments in Canadian content in 2016[58].

40. The federal government has refused to unveil the details of its agreement with Netflix[59], but the Minister of Canadian Heritage has claimed that the agreement provides a net benefit to Canadians, as provided for in the *Investment Canada Act*[60].

41. Under this agreement, Netflix agreed to set up shop in Canada to produce films and television shows in both English and French[61] without respect to the certification of this programming as Canadian. The films and television programs are of a global scope ("We have invested in Canada because Canadians make great global stories[62].") and shot in Canada. Netflix will hold the global distribution rights over its online service. To our knowledge, the agreement was not reviewed by the CRTC to ensure that it contributes to the objectives of the *Broadcasting Act*.

42. The Minister of Canadian Heritage, Mélanie Joly, indicated during the unveiling of her cultural policy in September 2017 that other such agreements would be forthcoming: "This is what is possible, this is what we expect, and this is the type of commitment we will work to achieve with other platforms, as well[63]." [emphasis added]

43. The agreement between Netflix and the federal government has confirmed that Netflix is present in Canada given that a subsidiary—Netflix Canada Inc.—is registered here and established in Toronto[64].

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[56] CMF, *Budget breakdown per program for 2017–2018.*
[57] CRTC, *Aggregate Annual Returns for Groupe TVA*, 2016.
[58] CRTC, *Aggregate Annual Returns for BCE*, 2016.
[59] Jean-Hugues Roy, blog: http://jhroy.ca/2018/01/courriels-netflix-gouv-federal/.
[60] *Investment Canada Act*, s. 21 and 23.
[61] "Netflix committed to invest at least half a billion CAD in movies and television shows produced in Canada, both in English and in French, over the next five years." in Netflix, *What Netflix's half a billion CAD investment in Canada is really about*, October 10, 2017, https://media.netflix.com/en/company-blog/what-netflixs-half-a-billion-cad-investment-in-canada-is-really-about [emphasis added].
[62] Netflix, *What Netflix's half a billion CAD investment in Canada is really about*, October 10, 2017, https://media.netflix.com/en/company-blog/what-netflixs-half-a-billion-cad-investment-in-canada-is-really-about [emphasis added].
[63] Government of Canada, *Launch of Creative Canada – The Honourable Mélanie Joly, Minister of Canadian Heritage – Speech*, Ottawa, September 28, 2017: https://www.canada.ca/en/canadian-heritage/news/2017/09/creative_canada_-avisionforcanadascreativeindustries.html.
[64] Business Number (BN): 785288689RC0001.

44. Moreover, Netflix now operates its online distribution service from Canada, at least in part[65], as it has installed servers designed to facilitate the streaming of its programming in Canada with Canadian Internet access providers:

> "Netflix developed Open Connect, a Content Delivery Network (CDN), to deliver our content globally. We give qualifying Canadian ISPs free servers called 'Open Connect Appliances' (OCAs) loaded with Netflix content. After these appliances are installed in an ISP's data center, almost all Netflix content is served from the local OCAs rather than "upstream" from the internet[66]."

H. Netflix is not the only one to have an eye on the Canadian market

45. There are reported to be more than 500 online distribution undertakings in the world having generated total revenue of $25 billion in 2015. Most of these undertakings are operated regionally, but five global players—Netflix, Amazon, Hulu, HBO and YouTube—generated close to half of this revenue (over $11 billion), according to the estimates of the Boston Consulting Group[67].

46. Other major American players are getting ready to launch their own online broadcasting distribution undertakings and are targeting the global market, including Canada. This is the case, among others, of Disney, which will launch two channels including ESPN by 2019 and CBS All Access which will be entering the Canadian market this year, as well as Facebook, which will begin to distribute original audiovisual productions on social media through its new Watch service[68].

47. In addition, Facebook[69] and Apple[70] are planning to produce original content and each expects to spend US$1 billion this year.

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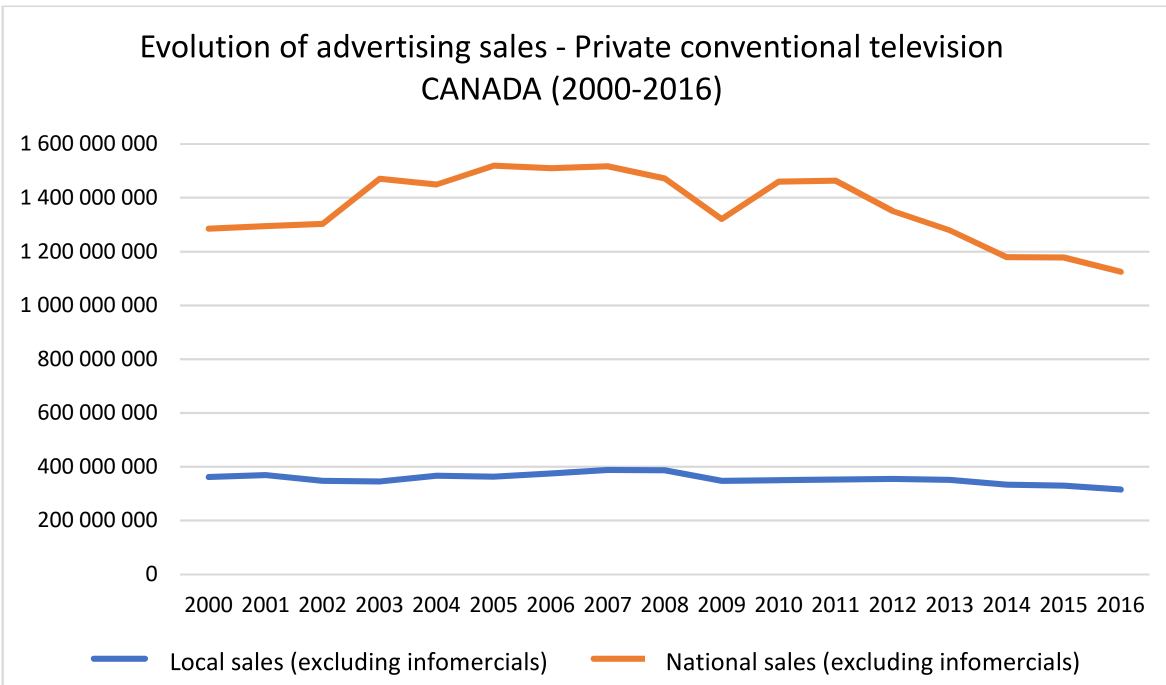
[65] *Broadcasting Act*, s. 4(2).
[66] Netflix, *Comments in response to: CRTC Broadcasting Notice of Consultation CRTC 2017-359 – Call for comments on the Governor in Council's request for a report on future programming distribution models*, December 1, 2017, p. 6.
[67] Boston Consulting Group, *The Future of Television. The Impact of OTT on Video Production Around the World*, September 2016, p. 15.
[68] Corus, *Supplementary Brief, Reconsideration and hearing for all English-language discretionary services under the control of Corus Entertainment Inc.,* October 31, 2017, p. 16 and 17.
[69] The Crunch, *Facebook Plans to Spend up to $1B on Original Shows in 2018*: https://techcrunch.com/2017/09/08/facebook-plans-to-spend-up-to-1b-on-original-shows-in-2018/
[70] Variety, *Apple Projected to Spend $4,2 Billion on Original Content by 2022*: http://variety.com/2017/digital/news/apple-projected-to-spend-4-2-billion-on-original-content-by-2022-1202622459/.

I. Advertising revenue is migrating to the Internet

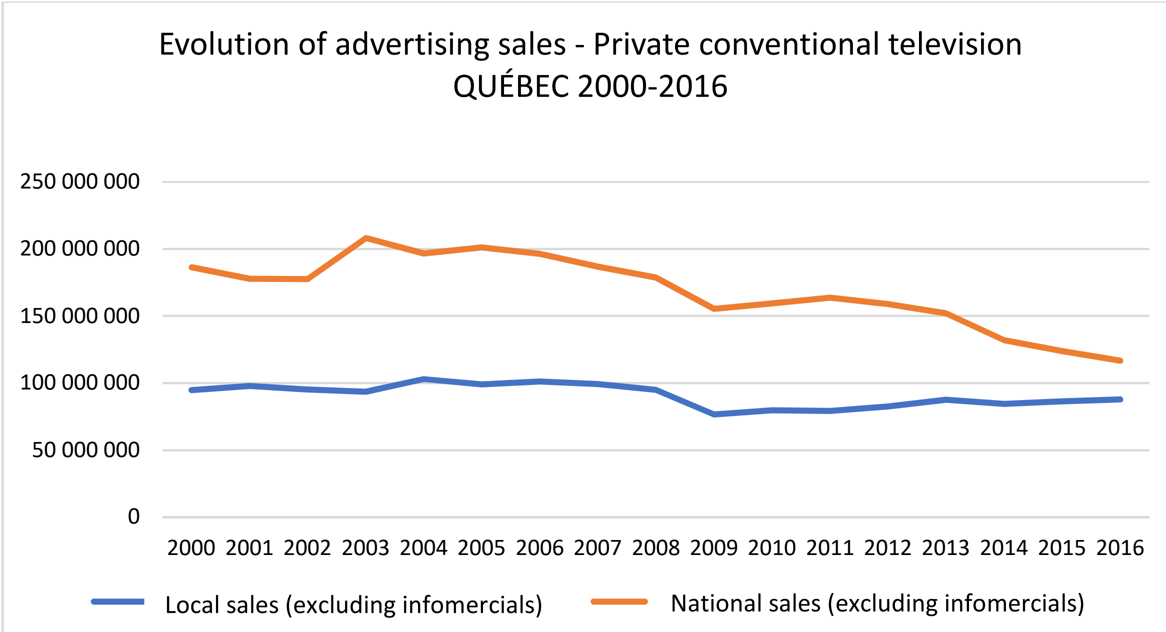
48. It is now also recognized that digital media have a major financial impact on the advertising revenue of Canadian media:

> [TRANSLATION] "A data analysis conducted by Deep Blue Agency on advertising revenue reveals that between 2014 and 2017, Canadian traditional media recorded a decrease of their advertising revenue of approximately $1.1 billion, whereas digital media saw their revenue increase by about $2.4 billion[71]."

49. Traditional television in particular is affected by the transfer of national advertising revenue since 2011, both nationally and in Québec.



[71] Québecor Média, *Observations of Québecor Média inc. in response to the calls for comments on future programming distribution models*, Broadcasting Notice of Consultation CRTC 2017-359, Montréal, December 1, 2017.



Source: CRTC, *and Financial Summaries* 2000–2004, 2003–2007, 2008–2012 and 2012–2016.

50. This shift of advertising revenue is not only observed from conventional to digital media. It is also characterized by a shift of Canadian advertising dollars toward large American corporations that provide access to broadcasting content or distribute such content themselves:

> "Google and Facebook dominate the internet advertising market, with nearly three quarters of the market between them in 2016 – up from a little under two thirds a year earlier. Their grip over economic resources *and* the technical interfaces that journalists, news organizations, and other media depend on to effectively reach their audiences has been accelerated by the rise of the "mobile internet[72]." [emphasis added]

> "Digital revenue is flowing primarily to new digital companies rather than to the digital operations of traditional media companies, and this trend is expected to continue. Some estimates suggest that already as much as 85% of all digital revenue is captured by two companies, Facebook and Google. By 2020, as much as 50% of the Canadian advertising market will be digital ($6.5 billion), with the vast bulk of that revenue going to the United States. HST is not captured on advertising revenues bound for the US[73]." [emphasis added]

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[72] Canadian Media Concentration Research Project, *Call for comments on the Governor in Council's request for a report on future programming distribution models,* Broadcasting Notice of Consultation CRTC 2017-359, December 1, 2017, para. 18.
[73] Richard Stursberg*, Cultural Policy for the Digital Age*, November 2016.

51. Furthermore, during the reconsideration of their licence renewals in December 2017, the major television ownership groups all forecast declining revenues over the next five years[74].

III. RATIONALES

52. CPSC estimates that it is urgent to seriously reconsider the *Exemption order for digital media broadcasting undertakings* (CRTC 2012-409) on the following grounds supported by the facts noted above.

A. The arguments previously invoked to warrant the publication and renewal of the exemption order are obsolete

53. Firstly, the list of circumstances that led the CRTC to adopt and later renew the exemption order is completely outdated. As established above:

- The Internet penetration rate is now higher than BDUs' penetration rate. More than half of all subscribers today have access to downstream broadband speeds varying between 16 Mbps and more than 100 Mbps[75].

- On first view, online broadcasters do not seem to have an impact on television viewing, which remains high at 28.2 hours per week on average[76]. However, viewed more closely, younger generations (12–34-year-olds) watch less conventional television (down by 4–6% in the past five years). The 18–34 age group is more likely to only watch television programming available over the Internet[77].

- The Internet has a negative impact on the advertising revenue of regulated broadcasters.

- OTT service providers have implemented profitable business models that enable them to compete against regulated broadcasters in terms of original content production. Furthermore, they are poised to replace television and its distribution models (cable, DTH, IPTV).

[74] Data filed with the Commission during the reconsideration of licence renewals for the television services of private ownership groups (CRTC 2017-428 and CRTC 2017-429), December 8, 2017.
[75] CRTC, *Communications Monitoring Report*, p. 281.
[76] Ibid., p. 162.
[77] Ibid., p. 209.

B. The exemption order and the migration of advertising revenue to the Internet impact the capacity of licence holders to meet their regulatory obligations

54. CPSC has also established, as indicated above, that television advertising revenue has declined to the benefit of Internet giants in the US (mainly Facebook and Google) and that BDUs (including DTH and IPTV) are losing customers.

55. The migration of advertising revenue negatively impacts the sums at the disposal of television licence holders to produce Canadian programming. This analysis is also shared by licensed broadcasters: [TRANSLATION] "That is why Canadian media now lose access to several hundreds of millions of dollars per year and are no longer able to finance the production of Canadian content[78]."

56. BDUs' contributions to Canadian programming are also decreasing. They declined from $495 million in 2012 to $428 million in 2016, *i.e.,* by close to 14%[79]. The Minister of Canadian Heritage has committed to increasing the funding of the Canada Media Fund (CMF)[80], one of the beneficiaries of these contributions, to support Canadian production, but we have yet to know the amount it will receive and for how long the additional support will be provided. Sustained support is somewhat unlikely, especially if the trend continues and if BDUs' revenues continue to decline.

57. By accepting a two-tiered system, the exemption order has increased the challenges for licensed undertakings to meet their regulatory obligations, as pointed out by Québecor during a recent appearance before the CRTC:

> [TRANSLATION] "Major international corporations, which are not subject to any regulatory or fiscal constraints in Canada, are competing directly against local companies such as TVA and Videotron which bear a heavy regulatory burden and must fulfill their fiscal obligations. It would be detrimental to continue to encourage a blatantly unfair situation that hinders local players' ability to innovate. Local players must be given the means to create inspiring cultural content that speaks to Canadians and Quebeckers and to which they can identify. […] In the absence of the availability of high-quality local programming that is competitive with respect to big-budget American films and series, the attractive power of American content, especially among young Canadians, shall continue to increase to the detriment of

[78] Québecor Média, *Observations of Québecor Média inc. in response to the calls for comments on future programming distribution models*, Montréal, December 1, 2017, para. 37

[79] CRTC, *Communications Monitoring Report*, p. 213.

[80] Government of Canada, *Launch of Creative Canada – The Honourable Mélanie Joly, Minister of Canadian Heritage – Speech*, Ottawa, September 28, 2017: https://www.canada.ca/en/canadian-heritage/news/2017/09/creative_canada_-avisionforcanadascreativeindustries.html

cultural content that is more representative of our society's specificities[81]." [emphasis added]

58. BCE also favours change:

> "To date, the Commission has employed a light touch with respect to broadcasting services operating over the Internet, while heavily regulating traditional broadcasting services – from what they air to what they can charge for distribution of their services. Such an approach may have been appropriate a decade ago when Internet access speeds were slow by modern standards and Internet broadcasting was in its infancy, but today this two-tiered regulatory approach is outdated. These two models of content distribution are not separate silos, but competitors within the same ecosystem that influence each other's outcomes. Traditional broadcasters compete with OTT services for programming rights and subscriber dollars. As we have demonstrated, Netflix, by far Canada's largest OTT subscription service, depends on the existing broadcasting industry's funding system for the high-quality Canadian programs that it distributes[82]." [emphasis added]

59. It is CPSC's position that deregulation is not the solution to the imbalance between online distribution services and licence holders. Rather, the *Exemption order for digital media broadcasting undertakings* (CRTC 2012-409) must be reconsidered. Any such reconsideration must be aimed at identifying problems clearly and at contemplating a range of regulatory solutions that respect our cultural sovereignty and the implementation of the social objectives of the *Canadian broadcasting policy* (the Policy). These objectives have not become obsolete by virtue of the simple fact that new broadcasting undertakings have emerged.

C. The exemption order or its deficient implementation prevent the CRTC from fulfilling its mission

60. The CRTC's madate is to regulate and supervise "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy […][83]." In the exemption order, the CRTC therefore included a provision that allowed it to demand information from online distribution undertakings in order to better understand how they evolved:

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[81] Québecor Média, *Observations of Québecor Média inc. in response to the calls for comments on future programming distribution models*, Montréal, December 1, 2017, para. 74 and 75.
[82] BCE inc. *Call for comments on the governor-in-council's request for a report on future programming distribution models*, CRTC 2017-359, December 1, 2017, para. 154.
[83] *Broadcasting Act,* s. 5(1).

"The undertaking submits such information regarding the undertaking's activities in broadcasting in digital media, and such other information that is required by the Commission in order to monitor the development of broadcasting in digital media, at such time and in such form, as requested by the Commission from time to time[84]."

61. Unfortunately, this provision does not appear to be applied regularly or firmly to obtain information from all online broadcasting undertakings. As recently as two weeks ago, the CRTC requested that the Internet giants and regulated undertakings offering web-based services provide it with information on their operations in Canada as part of a consultation stemming from an order by the Governor in Council (CRTC 2017-359). However, this request excluded information on Canadian programming and the results received will remain strictly confidential[85].

62. The only request of which we have knowledge prior to this one had been presented to Netflix and Google during the *Let's Talk TV* consultations (CRTC 2014-190) and had ended in failure:

> "Following Netflix's refusal to provide the requested information, the Commission struck its participation from the public record completely, removing its written submission and even the transcripts of its oral participation at the hearing from LTT documentation, thereby adding to the accumulation of policy silences[86]."

63. The CRTC therefore knows nothing of the contribution made by all of the OTT service providers to reaching the objectives of the *Act*. The opacity in which the Commission finds itself does not enable it to make relevant regulatory decisions regarding online broadcasters—whether foreign or domestic—to ensure the implementation of the *Canadian broadcasting policy*.

64. The Canadian Broadcasting Corporation (CBC) in particular recently argued before the Commission that access to the data of BDUs' set-top boxes was crucial to ensuring the success of Canadian broadcasting operations:

> "Access to big data and data analysis technologies is critical to the development and distribution of successful Canadian content. Consequently, the regulatory regime should ensure that such data is readily available on a non-discriminatory basis. In particular, data about Canadians and their programming preferences should not become the exclusive property of a select group of players. This data

[84] CRTC, *Exemption order for digital media broadcasting undertakings*, Appendix to Broadcasting Order CRTC 2012-409, s. 4.
[85] CRTC, *Request for information from audio and video online programming services available in Canada,* Ottawa, February 2, 2018: https://crtc.gc.ca/eng/8045/lc2018.htm.
[86] Zboraslka, Emilia and Charles H. Davis, "Transnational over-the-top video distribution as a business and policy disruptor: The Case of Netflix in Canada" in *The Journal of Media Innovations, 4.1,* 2017, p. 16.

should be available to all players so as to benefit the system as a whole[87].” [emphasis added]

65. CPSC adds that the data of OTT service providers should also be shared with the Commission to enable the latter to make the necessary decisions with respect to required regulations, thereby encouraging the production of Canadian content and the undertakings that produce it. The current lack of information favours online broadcasters such as Netflix, which are the only ones to have access to the financial and audience data of their respective services. These data are publicly available as regards the traditional broadcasting system[88].

66. Netflix refuses to unveil this information because [TRANSLATION] “Netflix’s main competitive advantage is its in-depth and exclusive knowledge of its subscribers’ motivations[89].” This situation is inconceivable in light of the fact that OTT broadcasting undertakings use infrastructure that is largely subsidized by governments.

67. Also, the exemption order removes OTT service providers from any public review process. They can ignore the CRTC and negotiate directly with the government to obtain agreements that appear positive in economic terms, yet contribute nothing to protecting, improving and strengthening the country’s cultural, political and social structure, as nevertheless prescribed by the *Canadian broadcasting policy*[90]. The government is no more aware of these objectives and tends to give priority to consumeristic or electoral objectives[91]:

> “The political dimension of regulatory decisions in the face of disruptive innovation is increasingly significant in situations where the status quo is justified in terms of abstract public benefits (Cable, 2016). Because reformer startups offer consumers immediate benefits, regulations that negatively affect these benefits can carry significant political cost (ibid)[92].” [emphasis added]

68. The absence of any obligations in terms of French-language production in the agreement reached between Netflix and Minister Mélanie Joly in particular was singled out by several

[87] SRC, *Broadcasting Notice of Consultation 2017-359 – Call for comments on the Governor in Council’s request for a report on future programming distribution models*, December 1, 2017, p. 3.
[88] According to a study conducted by Ryerson University, a regulated system is disrupted when an innovator gets ahead of the regulator and the regulator’s lack of information figures among the first three factors that enable the innovator to make the first move (op. cit., note 86).
[89] Association des producteurs d’expériences numériques, *Qui a dit que la disruption serait facile : les défis économiques et stratégiques de Netflix,* February 2018, p. 15.
[90] *Broadcasting Act,* s. 3(1)d)(i).
[91] Zboraslka, Emilia and Charles H. Davis, “Transnational over-the-top video distribution as a business and policy disruptor: The Case of Netflix in Canada” in *The Journal of Media Innovations, 4.1*, 2017.
[92] Ibid.*,* p. 7 and 8.

stakeholders[93], and the Commissioner of Official Languages of Canada launched an investigation after receiving two complaints on the absence of such obligations[94].

69. The Commission could have played a social role in this transaction, as it could have played a role by applying its regulation prohibiting fake news by online services such as Facebook, which distribute media-generated news items in addition to various broadcast content. The Internet giant, which reaches over two billion people, recently acknowledged that social networks had the ability to weaken democracies and promised to do everything possible to limit such risks[95]. CPSC estimates that regulating the main online broadcasters would certainly contribute to strengthening Canada's political, cultural and social policy.

IV. CONCLUSION

70. In its *Policy regarding the use of exemption orders,* the CRTC indicates that "When circumstances warrant, the Commission will amend or revoke an exemption order[96]." CPSC submits that the current circumstances warrant a review to amend or revoke the *Exemption order for digital media broadcasting undertakings* (CRTC 2012-409), especially as the last such review took place more than five years ago.

71. The CRTC and the Canadian government have focussed for years on encouraging innovation on the Internet and enabling this economic sector to gain momentum. It is now clear, however, that regulatory exemption does not allow Canadian online broadcasting undertakings to compete on a level playing field with the global corporate giants. The current two-tiered regulatory system is obsolete and jeopardizes the creation and distribution of Canadian programming.

72. The exemption order or its deficient application also prevents the Commission from adequately monitoring and regulating the broadcasting system in order to reach the objectives of the *Canadian Broadcasting Policy* set by Parliament. The resulting vacuum allows the government to prioritize consumerist or electoral objectives to the detriment of the societal requirement of the *Broadcasting Act,* which nevertheless remains relevant in this digital age.

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[93] In particular: "Mélanie Joly se soumet à la loi de Netflix" in *Le Devoir*, September 29, 2017 (http://www.ledevoir.com/culture/509240/le-contenu-francophone-en-suspens) and "Ottawa refuse de taxer Netflix qui est libre de ses choix de production" in *Journal de Montréal*, September 28, 2017 (http://www.journaldemontreal.com/2017/09/28/ottawa-refuse-de-taxer-netflix-qui-est-libre-de-ses-choix-de-production).

[94] "Netflix : le commissariat aux langues officielles enquêtera sur l'entente" in *La Presse,* October 20, 2017: http://www.lapresse.ca/actualites/national/201710/20/01-5140752-netflix-le-commissariat-aux-langues-officielles-enquetera-sur-lentente.php.

[95] "Facebook admet qu'il peut être dangereux pour la démocratie" in *AFP*, January 22, 2018: http://www.tvanouvelles.ca/2018/01/22/facebook-admet-quil-peut-etre-dangereux-pour-la-democratie.

[96] CRTC, *Policy regarding the use of exemption orders,* Public Notice CRTC 1996-59, Ottawa, April 26, 1996, p. 2.

73. The CRTC must therefore reconsider the order, by virtue of Part I of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules), to evaluate its advantages and disadvantages before determining whether it must be amended or revoked. The reconsideration must also enable the determination of ways to strike a new balance between licence holders and exempted web-based broadcasting undertakings from the perspective of reaching the objectives set out in the Policy.

74. Given that the requested reconsideration is in the public interest and that the solutions to be put forward are potentially complex, CPSC asks that the Commission, by virtue of section 26 (1) of the Rules, to publish a formal notice of consultation including the following amendments to the standard deadlines set out in Part I:

- That the initial intervention period be extended from 30 to 45 days;
- That the applicant's reply period be extended from 10 to 20 days;
- That a public hearing be scheduled to discuss the reconsideration's more complex issues;
- That a final reply be provided to all stakeholders and scheduled within 20 days following the public hearing;
- That the content of the notice of consultation be that provided in section 21 of the Rules in addition to the date of the public hearing (to enable stakeholders to prepare in advance) as well as the deadline for making final representations.

75. These amendments are necessary to allow a wide variety of stakeholders to participate in the reconsideration and to provide the Commission with the evidence it needs to make informed decisions with respect to this matter.

76. This application under Part I is posted on SCFP's website and can be consulted at http://scfp.qc.ca/memoires-du-scfp/.

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