CAB | ACR

Sent via Intervention Form

11 March 2025

Marc Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Gatineau, Quebec
K1A 0N2

Re: Reply comments of the Canadian Association of Broadcasters with respect to Broadcasting Notice of Consultation CRTC 2025-2
The Path Forward – Working towards a sustainable Canadian broadcasting system

1. As the national voice of small, medium and large Canadian privately-owned and controlled radio, TV and discretionary broadcasters both independent and vertically integrated, including those operating under 9.1(1)(h) distribution orders, the Canadian Association of Broadcasters (CAB) is pleased to provide reply comments on the above noted notice of consultation.

2. As a result of our review of the initial comments, we wish to focus our reply on six key points, as follows:

   - First, the lack of constructive proposals from foreign online undertakings for supporting the delivery and discoverability of diverse Canadian and Indigenous content and Canadian programming services – coupled with a similar lack of support in their submissions with respect to Broadcasting Notice of Consultation 2024-288[1] – confirms for us the critical need for specific rules from the Commission to ensure the availability, prominence and discoverability of Canadian programming and services.

   - Second, the Commission must provide clarity around the proper interpretation of *"an online undertaking that provides the programming services of other broadcasting undertakings in a manner that is similar to a distribution undertaking"* for the purposes of section 9.1(1)(i) of the *Broadcasting Act* (the Act).

[1] *The Path Forward – Defining "Canadian program" and supporting the creation and distribution of Canadian programming in the audio-visual sector,* Broadcasting Notice of Consultation CRTC 2024-288, 15 November 2024.

- Third, the Commission must make regulations respecting unjust discrimination, undue or unreasonable preference, and undue or unreasonable disadvantage (UDP), in accordance with section 10(1)(h.1) of the Act. Guidance on the process for considering complaints and on the proper interpretation of that regulation (including, perhaps, guidance on behaviours that would and would not constitute UDP) could be published later.
- Fourth, the Commission needs to update and speed up its dispute resolution mechanisms, including adopting a more directive style of mediation.
- Fifth, the Commission does not have the jurisdiction to regulate relationships between broadcasters and program suppliers and must not mandate codes of practice or terms of trade.
- Six, ensuring the prominence of services of exceptional importance will not be a sufficient solution to ensure the ongoing viability of these services. The CAB supports the proposals of those parties that called for a new services of exceptional importance fund (SEIF).

3. We elaborate on each of these points below.

The lack of constructive proposals from foreign online undertakings dictates a need for stronger rules

4. It is discouraging to us, and presumably to the Commission, that foreign online undertakings are unwilling to make any meaningful proposals with respect to their support of a sustainable model for the delivery and discoverability of diverse Canadian and Indigenous content. Their “nothing-to-see-here” “just-trust-us” approach leaves the Commission with a limited record on which to base its decisions.

5. We would have appreciated an opportunity to consider any alternatives they may have proposed instead of the model we (and others) put forward, with the objective of finding workable solutions. However, in the absence of any alternatives or any commitments whatsoever, we believe the Commission must adopt specific rules around the distribution of Canadian programming services by online undertakings that provide the programming services of other broadcasting undertakings (hereinafter vBDUs).

6. Of note, many parties recommended rules for the distribution and promotion of Canadian programming services by vBDUs, including the CBC/Radio Canada, Friends of Canadian Media, and the News producing local independent television stations (LITS), along with several individual broadcasters.

7. We support their recommendations and reiterate that the Commission must set out rules to support “pride of place” for Canadian and Indigenous content and programming services by:

    - requiring foreign streamers to make meaningful and equitable contributions to Canadian program production, including programming that is “risky to produce and hard to monetize” such as news;

- requiring vBDUs to make the greatest practical number of Canadian services available to their Canadian subscribers, on a non-discriminatory basis;
- requiring vBDUs to make Canadian services visible and easily discoverable to Canadians; and
- adopting a "prominence" framework that ensures that certain specified Canadian services are prominently available and visible to Canadians, namely:
    - services of exceptional importance, as identified by the Commission through its current practices and procedures – including national news services;
    - the CBC/SRC;
    - provincial educational broadcasters; and
    - local television stations that provide local news.

8. Given that other countries are similarly implementing domestic content and prominence rules, we urge the Commission to question the platforms at the hearing on the specific ways in which they are ensuring the availability, prominence and discoverability of local content and programming services in those markets. In the absence of any concrete proposals or commitments from the platforms, these examples may prove useful as the Commission designs a new framework to support the sustainability of the Canadian broadcasting system.

We need clarity on who *provides programming services of other broadcasters*

9. While we recognize that section 9.1(1)(i) of the Act does not apply to foreign online undertakings that do not carry the programming services of other broadcasting undertakings, it is nonsensical for those undertakings that *do* carry the programming services of others to assert that this section of the Act does not apply to them.

10. It is true that the Act speaks of the provision of programming services "in a manner that is similar to distribution undertakings," however, this does not mean an online undertaking must precisely meet the Act's definition of a distribution undertaking to fall within the scope of section 9.1(1)(i). It merely means that the undertaking provides the programming services of other parties like distribution undertakings do.

11. In its comments, Prime Video acknowledges that it acts as a reseller of third-party service providers; Apple TV Channels noted that it provides channels such as APTN, Cottage Life, Love Nature, Outtv, Smithsonian, Starz, and Super Channel among others. These two platforms sign wholesale agreements with programmers, set the retail price of the individual services, and make the programming services available to subscribers through their platforms.

12. They are clearly online undertakings that *provide the programming services of other broadcasting undertakings in a manner that is similar to a distribution undertaking*. However, in light of their comments in this proceeding, we believe that the Commission must immediately make it clear that these are precisely the types of platforms to which section 9.1(1)(i) of the Act applies.

13. Roku notes in its comments that *"connected devices and their platforms (including the Roku OS) are already incentivized to provide the widest possible access to third-party online services, and any programming service that wants to make its programming available to consumers may do so by making available an app through the connected TV platform…"* In our minds, this sounds very much like the actions of a distribution undertaking and should also be encompassed in the Commission's sustainable delivery regime.

UPD regulations are a critical component of a fair and competitive marketplace

14. Contrary to the positions of certain foreign streamers and platforms, the Commission's undue preference/undue discrimination regulations are *not* only relevant in the context of the traditional broadcast environment. There are many potential situations where online undertakings might engage in discriminatory or anti-competitive behaviour. Indeed, in an ecosystem as competitive as ours, there are indubitably incentives to engage in such behaviour. For example, the Commission clearly has a role in ensuring that vBDUs provide "reasonable terms for the carriage, packaging and retailing of programming services," as it implements the broadcasting policy set out in section 3(1) of the Act, and in particular, section 3(1)(q).

15. It is also significant that the ability of the Commission to establish regulations in this respect was a specific amendment resulting from the implementation of Bill C-11. Clearly, Parliament intended for the Commission to have the authority to prevent UPD and to address unduly preferential, discriminatory or disadvantageous behaviour.

16. Further, contrary to recommendations in the submissions of Roku and others, UDP obligations should continue to apply to all online undertakings (as they do now under Broadcasting Order CRTC 2023-332). For example, the obligation to ensure that content is broadly available over the Internet and not offered in way that requires subscription to any particular mobile or Internet provider is as relevant to small undertakings as it is to large ones.

17. Indeed, as noted by several parties to this proceeding, non-discriminatory access to online platforms is critical for the sustainability of Canadian programming services. For this reason, UDP regulations are a key component of the new framework. Therefore, the CAB recommends that the Commission publish regulations regarding unjust discrimination, undue or unreasonable preference, and undue or unreasonable disadvantage (UDP), in accordance with section 10(1)(h.1) of the Act as soon as possible.

18. Although some parties have raised concerns about potential "gaming" of the UDP provisions, CAB believes that such concerns can be addressed through a more rigorous approach to UDP complaints. As recommended in our initial submission, the complaining party should be required to demonstrate, with evidence, that there is UDP – they should also demonstrate why Commission involvement is necessary, both in terms of the impact of the alleged UPD on them *and* on the impact on the attainment of the objectives of the Act. They should also propose a remedy. If the Commission finds that a complaint is frivolous, it could refuse to consider it.

19. Guidance on the processes for considering complaints – including a possible 'test' for whether the complaint is 'frivolous' or not – could follow later. In addition, we believe that it may be appropriate for the Commission to set out guidance on the proper interpretation of the UDP regulations, including identifying behaviours that would and would not constitute UDP. Such guidance could also be published at a later date.

Dispute resolution is still important and would benefit from improvements

20. The record of this proceeding suggests that dispute resolution remains an important component of the regulatory framework and that the Commission has a role to play in overseeing disputes and actively assisting in their resolution. We fully recognize that the Commission has no authority to *mandate* dispute resolution for online undertakings, however, it remains a valuable tool in helping parties to come to mutually beneficial agreements and is entirely consistent with sections 9.1(10) and (9) of the Act, which together specify that the Commission may facilitate good faith negotiation at the request of either party to a negotiation. It is ridiculous to argue that the Commission should not have robust dispute resolution mechanisms in place simply because an undertaking may not wish to avail themselves of them.

21. That said, the record also demonstrates that changes to the Commission's approach to dispute resolution are required to ensure that it is more effective and timelier. We made some specific proposals in this respect in our initial comments, including:

    - A more directive style of mediation
    - Time limited mediations – with a faster path to arbitration (where necessary)
    - In-person mediation sessions
    - The additional option of MedArb (or ArbMed), where both parties agree
    - Guidelines respecting good faith negotiations, and
    - Consideration of more than one service in final offer arbitrations (FOA).

The Commission lacks jurisdiction to mandate CMPA's code of practice

22. We are sympathetic to some of the issues raised by production sector representatives, specifically their concerns about ensuring fair arrangements with foreign online companies, the need to ensure the retention of IP in Canadian hands, and the importance of partnerships between foreign online undertakings and Canadian producers and broadcasters.

23. That said, we do not agree that the Commission has any jurisdiction over the negotiation of program supply agreements. Further, we are concerned that the CMPA's proposed codes of practice (or terms of trade) would have a negative impact on broadcasters' willingness and incentive to invest more significantly in compelling Canadian content. Limits on the ability of broadcasters to recoup their investments and otherwise benefit from ownership of broader rights packages, longer licence terms, or increased revenue-sharing opportunities will have a chilling effect on their level of investment. The CMPA's proposal should therefore be rejected.

Ensuring meaningful support for services of exceptional importance

24. We note that several of the services currently designated by the Commission as services of exceptional importance, have raised concerns about falling revenue largely due to decreases in subscriber levels, and the need for additional support so that they can continue to meet their commitments and serve the objectives of the Act.

25. We believe that these services play an important role in helping to ensure that key objectives of the Act are indeed met within the Canadian broadcasting system, including service by and for Indigenous people, service to Francophones outside Quebec, access to proceedings of the House and Senate with associated public affairs programming, ethnic and third-language programming and service to people with disabilities.[2] In the face of declining subscriber revenue, the Commission must find other ways to support these important services, in accordance with section 5 of the *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*.

26. Therefore, in addition to ensuring their distribution and prominence on vBDUs, and in the absence of the ability to impose specific terms with respect their carriage (including a wholesale rate), we recommend that the Commission require online undertakings to contribute to a new fund dedicated to their support, namely the SEIF as proposed by Independent Broadcast Group. This contribution requirement should be in addition to the base requirement imposed as a result of Broadcasting Regulatory Policy CRTC 2024-121-1. The CAB stands ready to administer such a fund, should the Commission choose to assign us that responsibility.

[2] For full transparency, we note that AMI, APTN, CPAC, Groupe TVA, OMNI Regional, and TV5 Quebec Canada are members of the CAB.

Conclusion

27. As a result of this process, the Commission has an important opportunity – but also the obligation – to create conditions which will help to support the continued health and vitality of the Canadian owned and operated broadcasting sector. It cannot accede to the uncooperative positions of the foreign undertakings and must instead push them to make concrete commitments to ensuring the availability and discoverability of Canadian programming and Canadian programming services.

28. The record clearly demonstrates that the Commission will have to use its order making power under section 9.1(1)(i) of the Act to ensure that Canadian owned and operated services continue to have pride of place in the Canadian broadcasting system.

29. All of which is respectfully submitted.

Yours sincerely,

[Original signed by]

Kevin Desjardins
President | Canadian Association of Broadcasters

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