



August 10, 2006

Canadian
Association of
Broadcasters

L'Association
canadienne des
radiodiffuseurs

Mr. Michael Binder
Assistant Deputy Minister, Spectrum, Information Technologies and
Telecommunications

300 Slater Street
Ottawa, ON K1A 0C8

Dear Mr. Binder:

**Re: CAB comments on Telecommunications Policy Review Panel
Final Report**

Introduction

1. The Canadian Association of Broadcasters (CAB) – the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private television and radio stations, networks and specialty, pay and pay-per-view television services – is pleased to submit these comments concerning the final report of the Telecommunications Policy Review Panel.
2. The CAB submits that the implementation of many of the Report's suggestions and recommendations would have a direct impact on the operations of broadcasters, and on the policy and regulatory framework that governs those operations. Accordingly, the CAB appreciates the opportunity to make its views known with respect to several of the Report's proposals that are most pertinent from a broadcasting perspective.
3. As the Report notes, the Panel did not have a mandate to make recommendations about broadcasting policy, and in any event, did not have the opportunity to study in detail the "complex interplay of cultural, industrial and trade issues" that broadcasting policy involves.
4. The Report further notes that broadcasting stakeholders would be "justifiably concerned if the Panel made specific recommendations on matters that affected their interests, without a full review of the implications of such recommendations."

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5. Nevertheless, the CAB notes that the Report ventures outside of its specific mandate to make several suggestions about broadcasting policy that, if acted upon, would have a major impact on broadcasters' operations. These are in addition to many of the Report's recommendations about telecommunications policy that would also have a direct impact on the achievement of the objectives of Canada's broadcasting policy.
6. Accordingly, the CAB strongly recommends that Industry Canada undertake formal consultations with Canada's private broadcasters before acting upon any recommendations that would have a direct or indirect impact on the operations of broadcasters and/or the achievement of Canada's broadcasting policy objectives. We would also recommend that Canadian Heritage be involved in the policy discussions.
7. Under that heading, the CAB would include any proposal to commercialize spectrum management, and any proposal to liberalize foreign ownership rules for 'carriers' while retaining them for 'content.' As detailed below the CAB has significant concerns about the impact of these recommendations on Canada's broadcasting system.

Canada's broadcasting policy objectives are still valid, and have not been overtaken by advances in technology

8. As the Report acknowledges, there have been two longstanding objectives behind Canada's broadcasting policy: (i) how to ensure a space within the communications environment for Canadian content, and (ii) how to ensure that Canadian broadcasters have sufficient access to the communications facilities—including terrestrial and satellite spectrum, plus wireline— necessary to reach Canadian viewers and listeners.
9. The Report concludes that the technological and business environment for broadcasting has undergone significant change since those objectives were adopted, suggesting that they have been superseded or alleviated by developments in technology.
10. The CAB disagrees with this view. While these policy objectives predate the advent of cable, DTH or other wireless distribution platforms, the CAB maintains that they remain valid in today's technological environment.
11. While these two main objectives of Canadian broadcasting policy are becoming increasingly difficult to achieve as sources of unregulated content and spectrum-intensive distribution platforms continue to proliferate, they remain appropriate and firmly rooted in the public interest.
12. For example, the current regulatory framework for broadcasting facilitates Canadians' access to foreign content to an unprecedented degree, both directly via eligible satellite services, and indirectly, through programming supply deals with Canadian broadcasters. At the same time, as unregulated platforms for the distribution of foreign content also proliferate at an exponential rate, ensuring a space for Canadian content within the Canadian communications environment has become more important, not less.

A purely market-driven approach to spectrum management will frustrate broadcasters' ability to meet their statutory obligations

13. Section 5 of the Report contains numerous recommendations pertaining to technical regulation, including the function of spectrum regulation. Specifically, Recommendation 5.9 contains 8 separate recommendations that can be generally described as indicating a preference for market-based approaches to spectrum management.
14. The CAB is concerned that the implementation of the Report's recommendations captured in Recommendation 5.9 would create unintended consequences for broadcasters, particularly with respect to their ability to provide Canadian audiences with Canadian content.
15. As noted above, the Report recognizes that ensuring the availability of spectrum for the distribution of Canadian content has always been one of the objectives of Canada's broadcasting policy. Broadcasters are licensed on the basis of available spectrum, and once licensed, take on Canadian content and other obligations, including the payment of multiple licence fees, in exchange for access to that spectrum.
16. Accordingly, any move to a completely market-driven approach to spectrum management could have significant consequences for the achievement of many of Canada's broadcasting policy and regulatory objectives.
17. Managing spectrum by way of auctions could result in a system at cross-purposes with itself. On one hand, the CRTC would licence broadcasters according to a public-interest test, while on the other, access to necessary spectrum would be limited to those with the deepest pockets. Broadcasters who assume Canadian content obligations in pursuit of broadcasting policy objectives on one hand, could be frustrated by lack of spectrum to operate their services on the other.
18. Moreover, the CAB considers this recommendation in the context of the Report's various references to the need to liberate spectrum for new non-broadcasting purposes, and its general position that spectrum-sharing should be encouraged, potentially enabling the same frequencies to be auctioned to multiple users.
19. While the CAB recognizes that such an approach may allow new services to be licensed, it submits that two undesirable effects could also occur. First, the interference-free reception enjoyed by those who tune to established stations could be eroded, especially at the outer fringes of their service areas. Second, new services licensed as a result of the rule changes could themselves be subject to very large zones of interference from existing broadcast stations.
20. The CAB therefore questions whether full commercialization represents an advance in the art and science of spectrum management. The Report may consider that reducing service areas for existing stations is an appropriate response to demands from new

players to become part of the communications system. However, it is necessary to ask if such actions really serve the public interest, where established audiences are being compromised in one area in order to provide a greater variety of services somewhere else.

21. In this sense, it must also be remembered that the Canadian public is by far the greatest “user” of the radiofrequency spectrum. A broadcaster that is licensed to cover a given area is certainly a spectrum user, since the broadcaster transmits an electromagnetic signal on a specified frequency or channel. But there can also be millions of additional, simultaneous users of this same frequency.
22. These additional users are members of the general public who, by operating their own receivers, make up the other end of the radiocommunication circuit. By virtue of sheer numbers and hours of use, the public is by far the largest “user” of broadcast spectrum, and any impact that the full commercialization of spectrum management would have on the general public must be taken into account.
23. It may be argued that television receivers are increasingly connected to wired means of communications and are not therefore as dependent on spectrum. However, even the reduced number of households that are totally dependent on over-the-air spectrum still represent millions of Canadians. Moreover, radio is totally dependent on over-the-air spectrum. DTH and MDS subscribers are spectrum users, and all of the new and anticipated distribution platforms for mobile broadcasting are spectrum-based.
24. Therefore, any move on the part of the Government of Canada with respect to the commercialization of spectrum policy should only be made after formal consultation with the department responsible for Canada’s broadcasting policy, and with Canada’s private broadcasters, who are licensed on the basis of interference-free access to that spectrum to reach Canadian audiences with Canadian content.
25. In addition, the CAB strongly submits that the Government of Canada has a responsibility to undertake specific economic research into the current and future value of radiofrequency spectrum, to broadcasters and all other users, before acting upon any recommendation that would lead to the full commercialization of spectrum allocation in Canada.

Government assistance for the deployment of broadband networks must take into account the impact of unregulated content on licensed broadcasters

26. Section 8 of the Report contains numerous recommendations pertaining to ways in which the federal government could incent the development of broadband networks. For example, Recommendation 8-1(b) calls for the immediate commencement of a program to ensure the availability of affordable and reliable broadband services in all regions of Canada.
27. While the CAB supports the objective of affordable and reliable communications infrastructure in Canada, it notes that broadband networks have become “unregulated

competition” to the highly-regulated broadcasting system, delivering content not just from Canada, but from around the world, anytime, anywhere.

28. In this sense, the original policy preoccupation with the ability of Canadian broadcasters to compete with unregulated content from foreign sources is as relevant today as ever: the proliferation of IP based audio-visual platforms and business models are making it increasingly difficult for broadcasters to assemble and monetize audiences for Canadian programming.
29. Accordingly, while the CAB has no objection to investment in ubiquitous broadband infrastructure, it notes its deployment will facilitate the proliferation of unregulated competition to broadcasters at a time when they are required to make massive investments in their own physical plants to undertake the necessary transition to digital broadcasting.
30. The CAB encourages the Government of Canada to act upon this recommendation, and in so doing, to ensure that investment in broadband infrastructure takes into account the impact that broadband networks have on licensed Canadian broadcasters: investment in Canadian infrastructure should continue to be matched by investment in Canadian content to be delivered on that infrastructure, whether that be in conventional or ‘new media’ formats.

An ICT adoption tax credit should extend to broadcasters to ensure they can make the necessary transition to digital and high-definition broadcasting, and to ensure the presence of Canadian content on Canadian broadband networks.

31. Recommendation 7-5 calls for the introduction of an ICT adoption tax credit. The CAB supports the creation of such a tax credit, and agrees that it “should define ICT assets broadly.”
32. As noted, Canada’s private broadcasters are in the midst of a transition to digital broadcasting. The CRTC’s stated expectations are for the “replacement” of analog broadcasting with digital broadcasting in the shortest possible timeframe.
33. To that end, the CRTC has introduced various digital and high-definition licensing frameworks to incent the transition of analog programming services to digital broadcasting.
34. At the same time, the CRTC has indicated that many key regulatory measures that have historically enabled broadcasters to meet their regulatory obligations will not be carried forward into the digital broadcasting marketplace.
35. Moreover, the transition to all-digital production and delivery is an investment that, for most private broadcasters, will not deliver a return for the foreseeable future. Advertisers, for instance, will not pay a premium to reach audiences of HD programs. New digital transmission infrastructure for both radio and television will take many years to accumulate sufficient audience, such that duplicate analog facilities are no

longer needed. In other words, as technology, market forces and regulatory requirements are exponentially increasing broadcasters' capital and operational costs – costs that are largely unrecoverable in the marketplace.

36. Also, it is important to note that Canada's private broadcasters are by far the primary investors in, and producers of, Canadian content. As the Government of Canada is committed to ensuring that Canadian communications networks deliver Canadian content to Canadian audiences, this ICT tax credit should also extend to the rights holders of Canadian content, to enable re-purposing of broadcast content for broadband distribution.
37. Accordingly, while encouraging the Government of Canada to implement this recommendation, the CAB submits that any ICT adoption tax credit be extended to private broadcasters to assist them in making the required investments in digital broadcasting technology to meet their regulatory obligations, and/or to repurpose Canadian broadcasting content for broadband distribution.

Separation of content and carriage assets is a complex exercise at the best of times, and will be more complex if regulatory frameworks are harmonized as proposed in the Report

38. The Report's main body contains numerous recommendations to the effect that Canada's communications legislative and regulatory frameworks should be harmonized. The Report's Afterword further proposes "a phased and flexible" approach to the liberalization of legislation and regulations that impact both broadcasters and BDUs. For example, the Afterword submits that "content and carriage" could be separated for the purposes of applying foreign ownership rules and regulations differently to carrier and content divisions within the same company.
39. The CAB notes that there is long history in Canadian broadcasting regulation of measures that seek to accommodate the "cross-ownership" of broadcasting, distribution and/or telecommunications undertakings. The result has been a highly complex regulatory relationship between any given company's content, carriage and telecommunications assets.
40. The lines between content and carriage assets would be further blurred if the Report's general recommendations for a harmonized approach to communications regulation were acted upon. This could cause unintended consequences for broadcasters, particularly in concert with other recommendations and suggestions in the Report, such as the liberalization of foreign ownership regulations for telecommunications assets within an integrated company.
41. For example, the CAB notes that the most recent *Direction to the CRTC (Ineligibility of Non-Canadians)*, issued in 1997, already permits foreign entities to hold significant ownership interests in Canadian broadcasting companies and to exercise a considerable

degree of influence over the operations of those companies that falls just short of effective control.

42. In other words, the level of permissible foreign ownership in Canadian broadcasting companies is as high as it can go while still retaining effective Canadian control. Any measures that increase, however slightly or indirectly, the accumulation of non-Canadian influence over Canadian broadcasting assets could see that effective control leave Canadian hands. This would in turn run contrary to Section 3(1) of the *Broadcasting Act* which requires the broadcasting system to be “effectively owned and controlled by Canadians.”
43. Moreover, this narrow margin would be exacerbated by the kind of regulatory harmonization also proposed by the Report –what is currently a complex exercise in structural separation would be even more challenging under the proposed harmonized regulatory regime.
44. Accordingly, the CAB strongly submits that Industry Canada should undertake formal consultations with the department responsible for Canada’s broadcasting policy before acting upon recommendations and suggestions for either regulatory harmonization or liberalization – simply put, the effect of the former would exacerbate the impact of the latter.

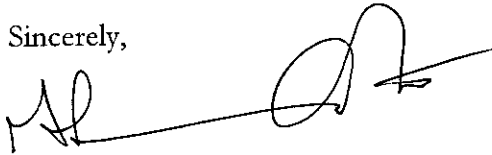
Regular comprehensive reviews of telecommunications policy must take into account the impact of their findings on the broadcasting system

45. Recommendation 9-4 calls on the Minister of Industry to be mandated by legislation to undertake a comprehensive review of telecommunications policy and regulation every five years.
46. In the context of other recommendations calling for the harmonization of broadcasting and telecommunication legislation, the CAB is concerned that the implementation of Recommendation 9-4 could have significant implications on broadcasters and their regulatory obligations.
47. Given that broadcasters face many of the same technology-driven challenges and opportunities as BDUs and/or providers of telecommunications services, the CAB submits that any periodic review of telecommunications policy and regulations, whether conducted under a harmonized legislative framework or not, must formally take into account the impact of communications technologies on the ability of broadcasters to meet their legislative and regulatory obligations.
48. In this sense, the CAB submits that it will be necessary to conduct parallel reviews of broadcasting regulations and policies to ensure that the separate regulatory frameworks for telecommunications and broadcasting, and their separate objectives, are both consistent and achievable.

Formal consultations are essential

49. The CAB appreciates the opportunity to provide its comments on this Report, and reiterates that many of this Report's recommendations and suggestions could have a direct and significant impact on the achievement of the objectives of Canada's broadcasting policy. In today's crowded and borderless communications environment, these objectives remain more valid than ever before.
50. Accordingly, as the original mandate of the Panel was specific to telecommunications policy, and given that broadcasters and other stakeholders were not given the specific opportunity to present evidence or submissions relevant to this report's suggestions pertaining to broadcasting policy, the CAB strongly recommends that Industry Canada undertake all relevant economic and policy research, and engage in formal consultations with Canada's private broadcasters, before acting on any recommendations with potential consequences for Canada's broadcasting industry.

Sincerely,

A handwritten signature in black ink, appearing to read 'Glenn O'Farrell', with a long horizontal line extending to the right.

Glenn O'Farrell
President and CEO

cc: Judith A. LaRocque, Deputy Minister, Canadian Heritage
Jean-Pierre Blais, Assistant Deputy Minister, Cultural Affairs, Canadian Heritage