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Dear Secretary-General,

Re: A review of the policy framework for local and community television programming, Broadcasting Notice of Consultation CRTC 2015-421 (Ottawa, 14 September 2015) – final reply by FRPC

- 1 The final reply of the Forum for Research and Policy in Communications (FRPC) in the above-noted proceeding is set out below, following a summary.

Summary

- 2 The Forum's reply addresses three areas: the establishment of a fund to finance local news and/or local programming, the definition of local news and local programming, and matters related to the process of this proceeding.
- 3 The Forum opposes the use of BDU broadcast revenues to subsidize local TV stations' local programming expenditures, on the grounds that the CRTC lacks the jurisdiction to order such a use. Even if the CRTC had the required jurisdiction, a local news fund should not be established because it would maintain or strengthen two elements of the broadcasting system at the expense of the third; as proposed the funds may not maintain and may even reduce original local news and employment opportunities in the broadcasting system; and a government-created local news fund raises concerns about journalistic independence.
- 4 The Forum opposes the proposed definition of local programming, on the grounds that it will transfer editorial control and employment opportunities from local TV stations to unlicensed centralcasting hubs, and convert local TV stations into rebroadcasters of the programs assembled by the hubs. The CRTC should instead define local programming using a variation of its approach for defining Canadian content – by requiring key creative and other local programming personnel to reside in the communities that local TV stations are licensed to serve.
- 5 The Forum also opposes the proposal to expand the definition of local news to include enlightening documentaries and talk shows, as well as entertaining fund-raisers, on the grounds that Parliament instead requires the Commission to ensure distinct programs that inform, enlighten and entertain. The CRTC should instead maintain its current definition of local news, while incorporating requirements to ensure local editorial control and that radio programs cannot be counted as TV programs.
- 6 Bearing in mind the objectives that Parliament has set for Canada's broadcasting system, and the authority it has granted to the CRTC, the Forum makes the following recommendations in its reply:
 1. The CRTC should license all broadcasters capable of contributing materially towards the achievement of Parliament's objects, while exempting those that are not
 2. The CRTC should revise its annual return form in time for licensees to submit more precise financial and other information for the 2015-2016 broadcast year
 3. The CRTC should decline to renew programming undertakings licences unless it has a more precise statement of the financial and other resources available to each undertaking

4. The CRTC should decline to grant or renew the licences of applicants that are unable to or decline to meet their programming commitments, and
5. The CRTC should set broadcasters' programming, financial and employment commitments as conditions of licence of each programming undertaking's licence, in relation to the resources available to that undertaking.

I Do 'changing times' permit revision of the Broadcasting Act's objectives?

- 7 Parties in this proceeding were frequently reminded that times have changed. We agree.
- 8 The Forum is aware that, for example, responsibility for broadcast content and distribution was once divided between the BBG (radio and television) and the Ministry of Transport (cable systems), that non-Canadians controlled many Canadian television stations and distribution systems until 1967, and that satellite TV services did not exist.¹ Canada did not even have a broadcasting policy.
- 9 By 1968 times had changed. Parliament enacted a new law that set out a policy for Canadian broadcasting. It said that policy objectives were best achieved by the regulation and supervision of Canada's broadcasting system by a single independent public authority. It defined the 'system' as comprising public and private elements. It mandated Canadian control over its broadcasting system, and stipulated the system's role in safeguarding, enriching and strengthening Canada's cultural, political, social and economic fabric. It incorporated cable television into the broadcasting system.
- 10 Parliament also gave a new regulatory body – the CRTC – specific powers over the entire broadcasting system: to make regulations,² to issue or renew licences,³ and to impose conditions on those licences related to licensees' circumstances.⁴
- 11 Parliament's new law altered the course of broadcasting in Canada. It returned control of major television and cable broadcasters to Canadians. It ensured that television broadcasters spent more money on Canadian, than on foreign programming. It limited non-local television services' competition with local television stations. It established a regulatory bargain between broadcasters and communities, requiring local service in exchange for local revenue. It ensured that cable subscriber rates were reviewed, and if necessary limited, in subscribers' interest.
- 12 By 1991 times had changed. Parliament replaced its 23-year old broadcasting law with a statute that while similar in many respects to its predecessor, is also quite different. In the 1991 *Broadcasting Act*, for example, Parliament maintained the CRTC's power to make regulations,⁵ to issue or renew licences,⁶ and to impose conditions "related to the circumstances of the licensee" on those licences.⁷ But it gave the CRTC a new power, to exempt broadcasting undertakings from "any or all" of the requirements of Part II of the *Act* where the CRTC "is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy"⁸

¹ In BBG, *Public Announcement: Special Public Hearing, March 7, 1967*, (Ottawa, 30 November 1966), the Board of Broadcast Governors (BBG) invited submissions about Ken Soble's proposal for a space satellite distributing television signals to a network of ground transmission stations, prior to a public hearing on 7 March 1967 – but Mr. Soble died before the hearing. Although the BBG decided to proceed with the hearing (BBG, Revised Public announcement: Special Public Hearing March 7, 1967 (Ottawa, 10 January 1967), the BBG was replaced by the CRTC by April 1968.

² S. 16(1)(b).

³ Ss. 17(a) and (c).

⁴ *Ibid.*

⁵ S. 10(1).

⁶ Ss. 9(1)(b) and (d).

⁷ *Ibid.*

⁸ S. 9(4).

- 13 Parliament made significant changes in the 1991 Act. It said that the *Broadcasting Act* “shall be construed and applied in a manner that is consistent with the freedom of ... journalistic ... and programming independence enjoyed by broadcasting undertakings.”⁹ It expanded the definition of the broadcasting system to include public, private and community elements, requiring each element to “contribute in an appropriate manner to the creation and presentation of Canadian programming.”¹⁰ It expressly recognized four sources of programming, including from local sources.¹¹ It said that Canadians should have opportunities to be employed in Canada’s broadcasting system.¹²
- 14 Parliament’s also said that private programming undertakings should contribute significantly to Canadian programming’ creation and presentation, “to an extent consistent with the financial and other resources available to them”.¹³ It explicitly recognized distribution undertakings, saying they should give priority to local and Canadian signals, deliver programming efficiently and at affordable rates, provide reasonable terms for carrying programming services, originate programming, and provide access to the broadcasting system to underserved linguistic and cultural minorities.¹⁴
- 15 The 1991 Act also described how the CRTC should regulate and supervise the broadcasting system, permitting it among other things to consider linguistic and regional characteristics, technological changes and the costs of regulation¹⁵ – while stating explicitly that the CRTC’s primary consideration must be Parliament’s broadcasting policy for Canada in section 3.¹⁶
- 16 Times have changed since 1991: Canadians can now access audio-visual content online, for example.
- 17 Do ‘changing times’ permit the CRTC to reinterpret the purpose of Parliament’s 25-year old broadcasting policy, to subsidize conventional TV broadcasters or to treat news and talk shows both as news?
- 18 No – because the Supreme Court of Canada has already considered and rejected the idea that changing times permit Parliament’s statutes to be reinterpreted in line with changing ideas as to their purpose.
- 19 In 1985 the Court held that a statute’s purpose “is a function of those who drafted and enacted the legislation at the time, not of any shifting variable”:¹⁷ it explained that a ‘shifting purpose’ approach to Canadian laws would create uncertainty, increase re-litigation and deny Parliament’s supremacy. The Court later said even more specifically that “[t]he purpose of legislation cannot logically be said to alter with the passage of time and changing circumstances”.¹⁸ While clarifying that “the degree to which a purpose remains or becomes pressing and substantial” may change over time,¹⁹ the Court has explained that its rejection of the shifting-purpose doctrine encompassed the approach of “inventing a supposed legislative purpose”: many supposed purposes are conceivably consistent with a statute, it said – but purposes that may be consistent with those of a statute are still not the statute’s purpose.²⁰ The Court

⁹ S. 2(3).

¹⁰ S. 3(1)(e).

¹¹ S. 3(1)(i)(ii).

¹² S. 3(1)(d)(iii).

¹³ S. 3(1)(t)(i).

¹⁴ S. 3(1)(t).

¹⁵ S. 5(2).

¹⁶ S. 5(3).

¹⁷ *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at ¶¶90-91 (per Dickson J. for the majority).

¹⁸ *Clark v. Canadian National Railway Co.*, [1988] 2 SCR 680, at para. 43.

¹⁹ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 (per Dickson C.J. and Lamer and Wilson JJ. for the majority).

²⁰ *M. v. H.*, [1999] 2 SCR 3, at ¶197 (per Cory and Iacobucci JJ. for the majority) considering Ontario’s *Family Law Act*.

said, rather, that “a law’s purpose is set on its enactment, and cannot be subsequently altered other than by amendment.”²¹

- 20 While times have changed, therefore, the CRTC remains responsible for “regulating and supervising ‘all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)’ (s. 5(1))”.²² In our view, “all aspects” means that the CRTC must consider those to whom it has granted broadcasting licences, as well as those whom it has decided to exempt from the licensing requirement. It means that the CRTC must consider all the issues in section 3(1), not just the economics of broadcasting. Moreover, as Parliament has not expanded the powers granted to the CRTC under sections 9 and 10, the CRTC may still only exercise the licensing and regulatory powers expressly set out in the *Act* (*Ibid*, at ¶¶23-26).
- 21 Last, but certainly not least, the Forum respectfully submits that in the absence of any amendments to the *Broadcasting Act*, section 5(3) continues to require the CRTC to make Parliament’s broadcasting policy its primary objective.

II The 2015-421 proceeding

- 22 Broadcasting Notice of Consultation CRTC 2015-421 (2015-421) flows from Broadcasting Regulatory Policy CRTC 2015-24. In that policy the CRTC noted that conventional television broadcasters’ Canadian and local programming requirements “encourage job creation and professional development”, ensure that “locally relevant programming is available to Canadians across the country in various communities”, and in the case of “[s]maller, independently-owned local broadcasters ... provide a diversity of news perspectives at the local level (¶15).
- 23 When the CRTC issued 2015-421 it repeated that the cost of local program production is significant, and added that “[m]any commercial conventional broadcasters devote substantial portions of their local programming to news” (¶29). It did not mention the data from its *Statistical and Financial Summaries for Private Television* showing that total employment in private television has decreased every year for ten years, or by 27% overall: from 8,197 full-time or equivalent (FTE) employees in 2006, to 5,961 FTE employees in 2014. While this 25% decrease in employment opportunities in Canada’s private conventional television may not be due to practices such as centralcasting, airing radio on TV, or ongoing reductions to local programming, these at least exacerbate the problem of diminishing employment opportunities.
- 24 Similarly, BNoC 2015-421 did not offer specific proposals to address issues about local programming, but said the CRTC wanted “comments on how the existing funding can be allocated in a manner that is accountable and responds to demonstrated needs” (¶30) along with “supporting evidence” (¶32). It said that the “chosen approach should be forward looking and take into account the technological, cost and market changes occurring in the broadcasting system as well as the new forms of distribution and consumption” (¶31). It acknowledged that for community TV, its decisions to permit concentrated ownership and for BDUs to centralize their operations has made “it difficult to monitor ... whether BDUs are meeting their expenditure and exhibition requirements in each community” (¶36). The notice concluded with the CRTC’s statement that it “is open to considering issues and concerns other than those” it had identified in the notice (¶41).
- 25 The CRTC hearing panel set out its determination (but not its reasons) at the beginning of the 2015-421 public hearing, that “the economic model for the production of news and local programs is under stress” (I, ¶15, CRTC). It then asked interveners

1. “... should the CRTC intervene to guarantee the production and long-term viability of these broadcasts?” (I, ¶15)

²¹ *Ibid*.

²² *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 SCR 489, 2012 SCC 68, at ¶15.

2. "... if the answer is yes, what type or types of intervention should continue or should emerge?" (I, ¶16)
3. "Is it still necessary and relevant for the CRTC to intervene to ensure that Canadians have access to the community element of the traditional broadcasting system?" (I, ¶17)
4. "... if the answer is yes, what type or types of intervention should continue or should emerge?" (I, ¶18)

- 26 The CRTC hearing panel also set out three new definitions for interveners to consider, including one for local news.
- 27 While some interveners proposed few or no changes to the CRTC's current regulatory framework for local and community television, several asked the CRTC to establish a new fund that would allocate a percentage of BDUs' broadcast revenues to finance TV licensees' local programming.
- 28 For the reasons that follow the Forum opposes proposals to create a new local programming fund and to redefine local news. We propose alternatives in our conclusions.

III Proposals for a new fund to subsidize local TV broadcasters

A *Does the CRTC have the authority to require BDUs to finance local TV production?*

- 29 As noted above, the 1991 *Act* acknowledges broadcast distribution undertakings (BDUs) and describes what they may do. Section 3(1)(t) of Part I of the *Act* says that distribution undertakings – BDUs – should give priority to Canadian programming services, and in particular to local Canadian stations;²³ should deliver programming efficiently and at affordable rates;²⁴ and should provide reasonable carriage, packaging and retail terms for programming services it supplies under contract.²⁵ This section also permits BDUs – if considered appropriate by the CRTC – to originate their own programming, including local programming.²⁶
- 30 Section 3(1)(t) does not suggest that BDUs should finance programming undertakings' production of local programs, as it is entirely silent on this point.
- 31 Part II of the *Act* then sets out the CRTC's powers. Section 9(1)(b)(i) permits the CRTC to set conditions on a licence "related to the circumstances of the licensee ... as the Commission deems appropriate for the implementation of the broadcasting policy". It does not expressly state that the CRTC may require one class of broadcaster – such as BDUs – to direct any of its revenues to another class of broadcaster – such as television programming undertakings.
- 32 While section 10(k) says the CRTC may "in furtherance of its objects, make regulations ... respecting such other matters as it deems necessary for the furtherance of its objects", the Supreme Court has limited the application of this clause. It held in 2012 that subsections 10(1)(k) (and 9(1)(b)(i)) did not – in that case – allow the CRTC to grant broadcasters exclusive rights to control their signals
- Parliament must be presumed to have empowered the CRTC to work towards implementing these cultural objectives; however, the regulatory means granted to the CRTC to achieve these objectives fall short of creating exclusive control rights.²⁷
- 33 Witnesses at the 2015-421 hearing noted that as described, the proposed fund would require non-profit community co-operatives to subsidize Canada's largest for-profit TV broadcasters (VI, ¶9347, MTS; VII, ¶12400, Metro Vancouver; VIII, ¶13121, Access).
- 34 The Forum therefore opposes proposals for the CRTC to establish a new fund to finance local television stations' production of local programs using BDU revenues, on the grounds that as Parliament never

²³ S. 3(1)(t)(i).

²⁴ S. 3(1)(t)(ii).

²⁵ S. 3(1)(t)(iii).

²⁶ S. 3(1)(t)(iv).

²⁷ 2012 *Reference*, *supra* note 22, at ¶32.

intended distribution undertakings to subsidize programming undertakings' local programming expenditures, the CRTC lacks the jurisdiction and authority to require BDUs to allocate any of their broadcast revenues to broadcasters' local programming expenditures.

B *Should the CRTC weaken one element to strengthen another element or elements?*

35 Rather than suggesting that one element in the broadcasting system ought to subsidize another, section 5(3) of the *Act* requires the CRTC to “give primary consideration to the objectives of the broadcasting policy ... in any matter before” it. Section 3(1)(b) in turn defines the broadcasting system as comprising separate public, private and community elements. The *Act* does not expressly state that the CRTC may use one element's funding to subsidize the other two: instead it requires that each element contribute to Canadian program creation and presentation “in an appropriate manner”.

36 Where the CRTC has for many years granted licences to community radio stations, the CRTC has permitted cable BDUs to operate community TV channels without requiring that these channels be separately licensed. Only a few licences have been issued to community TV stations.

37 The CRTC's evidence before the hearing was that its monitoring could not establish whether BDUs are meeting their exhibition and expenditure requirements in each community. The evidence at the hearing was that the resources now devoted to community television may not be adequate for current levels of program production and presentation (VI, ¶10046, Regent Park), that adequate resources are required to permit cable community TV channels and community TV stations to meet their mandate properly (VI, CMWG, ¶9896), and that more resources would be needed if this element were given more responsibilities.

38 BCE, CBC and Rogers nevertheless all requested that their local news and/or local programming be financed by a portion of BDUs' broadcast revenues, redirected from community TV channels or stations (I, ¶¶1160-1162, BCE; II, ¶¶5155-5156, Rogers; V, ¶¶6916-6917, CBC).

39 The Forum opposes proposals to direct BDUs to give funding they now use “to originate programming, including local programming ...” under section 3(1)(t)(iv), to private and/or public television programming undertakings for those undertakings' program productions, because this would reduce the community element's current capacity to contribute appropriately to the broadcasting system, potentially weakening diversity of voices in Canada's broadcasting system.

C *Will a CRTC-created local news fund increase the level of original local TV news available to communities?*

40 While the 2015-421 hearing panel asserted that “the economic model for the production of news and local programs is under stress” (I, ¶15), the evidence placed on the 2015-421 record by the CRTC did not provide needed detail about the availability of local programming. For instance, it did not publish the hours of original local TV programming and news broadcast by conventional TV stations. A study submitted by Shaw to the CRTC on 6 February concluded that on January 28, 2015 its stations broadcast “slightly less than the volume of local content ... produced on the same day the previous year”, but did not explain how it defined “local” or measured “volume” (duration or number of stories, for example). The Forum's submission, on the other hand, evaluated the duration of programs using broadcasters' own program logs (which measures hours of programming content), and set out evidence showing that some broadcasters rebroadcast local news, and that some broadcasters are counting radio broadcasts as original local television programming (see also VII, ¶11194, Shaw). SCFP also referred to evidence measuring a significant decrease from 2001 to 2015 in the availability of electronic local news in the province of Quebec from 2001 to 2015 (II, ¶3127).

41 BCE, Rogers and CBC acknowledged that the new Fund they each proposed would not lead to an increase in their original local news or local programming (I, ¶1232, BCE: “We're not committing to do more of what we're doing today”; IV, ¶5599, Rogers: agreed it would not re-introduce newscasts dropped from its ethnic TV stations; CBC *Remarks*, Appendix A would reduce the threshold level of local news required in

communities of up to one million from the current 7 hours per week in English-language communities, to 2.5 hours of original local news per week).

- 42 The Forum therefore opposes the proposal for the CRTC to create a new fund for local news and/or for local programming, on the grounds that (a) it would neither maintain nor increase current levels of local programming, local news, original local programming or original local news, and (b) it may reduce the level of original local programming from community channels and stations by reducing their funding.

D Will a CRTC-created mechanism to fund local news affect journalistic independence?

- 43 Section 2(3) of the Act requires it to be applied “in a manner that is consistent with the ... journalistic ... and programming independence enjoyed by broadcasting undertakings”.
- 44 The CRTC’s establishment of a fund to finance private and/or public television stations’ production of news programs either directly or indirectly, means that broadcasters and their employees would know that a federal agency has the ultimate responsibility for decisions about stations’ expenditures on local programming, including perhaps the content of the local news they choose to broadcast.²⁸ After all, even if it restricts itself to approving the mandate and arms’ length operation of a local news fund, the CRTC would be the only authority other than Parliament and the courts able to hear, address and resolve complaints about the fund’s operations.²⁹
- 45 A federal agency’s creation of a local news or local programming fund raises serious concerns (see *e.g.* I, ¶¶837-838, CRTC; VII, ¶12204, CMES), particularly at a time when media ownership is so concentrated, leading to a very low number of competitors for broadcast news. Such funds may affect journalistic independence by leading to real or apparent conflicts of interest that could change or alter decisions about the news to be reported and analyzed. While reporters may well resist such changes due to their own professional standards,³⁰ the real problem is that the public may never know whether a broadcaster or broadcast group had or had not censored itself. The CRTC itself does not know – as it said less than a year ago, “Canadians can only wonder how many times corporate interests may have been placed ahead of the fair and balanced news reporting they expect from their broadcasting system”.³¹
- 46 The Forum therefore opposes proposals that the CRTC establish a fund to finance the production of local news in Canada directly, or indirectly by funding local programming, as being contrary to Parliament’s desire to protect journalistic independence.

²⁸ It should be noted that mechanisms such as the Canadian Media Fund were created by Telefilm Canada (not the CRTC; see Telefilm Canada, “History”, <https://www.telefilm.ca/en/telefilm/telefilm/history>.) in the early 1980s (under a broadcasting law that did not expressly state the necessity for journalistic independence), to support Canadian audio-visual fiction (rather than news).

²⁹ Under s. 5(1), the CRTC and no other agency is empowered to “regulate and supervise all aspects of the Canadian broadcasting system” By way of example, the Forum notes that when the CRTC established a Local Programming Improvement Fund in the late 2000s, it also established a CRTC “oversight panel to ensure that the LPIF is operated in a manner consistent with the Commission’s objectives.” It added that

All matters related to the LPIF are first referred to Commission staff. The Oversight Panel may, with assistance of staff, address matters where a resolution could not otherwise be achieved.

(*Local Programming Improvement Fund*, Broadcasting Information Bulletin CRTC 2010-333, (Ottawa, 31 May 2010), at ¶3.

³⁰ Art. 5 of the RTNDA’s *Code of Ethics* points to “real or apparent” pressures on journalists that affect news content: “Independence is a fundamental value and we will resist any attempts at censorship that would erode it. Electronic journalists will resist pressures to change or alter the news. Intrusion into content, real or apparent should be resisted.” Art. 6 requires electronic journalists to “govern themselves on and off the job in such a way as to avoid conflict of interest, real or apparent.”

³¹ CRTC, “Statement by Jean-Pierre Blais, Chairman and CEO of the CRTC, on journalistic independence”, Media Release (25 March 2015, Ottawa), <http://news.gc.ca/web/article-en.do?nid=955409>.

E Will a CRTC-created mechanism to fund local news increase employment opportunities?

- 47 Section 3(d)(iii) says that the broadcasting system should serve Canadians' interests in, needs for and aspirations for employment opportunities, while section 3(d)(i) affirms that the broadcasting system must safeguard, enrich and strengthen Canada's political, social and economic fabric.
- 48 The evidence in this proceeding is that the proposed funds will not increase employment opportunities for Canadians. No broadcaster committed to increase employment at its TV station or stations, and none argued that any reduction in TV station employment opportunities will be offset by increased employment opportunities at community TV channels or stations.
- 49 The Forum therefore opposes proposals to establish a new local news television program fund as its effect will be to ignore, impoverish or weaken Canada's political, social and economic fabric, contrary to section 3(1)(d)(i): by decreasing or by not increasing the level of original news that Canadians require to be informed about their local communities, by reducing Canadians' access to programming about their local communities, and/or by either reducing or failing to increase opportunities for employment by Canadians.

IV Proposals to broaden the definition of local news

- 50 In implementing Parliament's programming requirements the CRTC requires broadcasters to submit electronic logs that list and describe the programs they broadcast, from one minute to the next. The log codes that describe the programs are set out in Schedule I of the *Television Broadcasting Regulations, 1987*:

Origin – the country from which the station obtained the program

Broadcast origination point – whether a program originated locally, from a network or elsewhere

Composition – whether a program was broadcast live, was a recording of a live broadcast, or was a repeat broadcast of a live or recorded program

Production source – whether a program was produced by a local station, by a production company affiliated with the station, by another station, by a network, by an independent producer, by a government or the National Film Board, or from any other source not accredited as Canadian

Audience target – whether for children, youth or other audience group

Language – an abbreviated language for programs by an ethnic station or that use a language other than the official language for which a station has been principally licensed

Captioning – whether captioned and/or described, and

Categories – fifteen types of different programming.³²

- 51 The fifteen categories of programming set out in the *1987 Television Broadcasting Regulations* include three categories for news, for analysis and interpretation, and for reporting and actualities. As the CRTC's descriptions show, each category provides programming that performs a different function:

Category 1 News Newscasts, newsbreaks, and headlines. Programs reporting on local, regional, national, and international events. Such programs may include weather reports, sportscasts, community news, and other related features or segments contained within "News Programs."

Category 2a) Analysis and Interpretation Programs on various topics that include analysis or discussion, for example, talk or panel shows, consumer affairs or reviews, newsmagazines and documentaries that do not fall under category 2b). This category excludes programs presenting information primarily for entertainment value.

...

Category 2 b) Long-form documentary Original works of non-fiction, primarily designed to inform but may also educate and entertain, providing an in-depth critical analysis of a specific subject or point of view over the course of at least 22 minutes. These programs shall not be

³² The categories are set out in Schedule I, *Television Broadcasting Regulations, 1987*, and described in CRTC, *Television Program Categories*, <http://www.crtc.gc.ca/canrec/eng/tvcat.htm> (accessed 11 February 2016).

used as commercial vehicles. Further, programs that fall under the category 11(b) Reality television do not qualify as 2(b) programming.

Category 3 Reporting & Actualities Programs focusing on the coverage of conferences, political conventions, opening/closing of events (including awards dinners) and political debates, as well as programs of a non-entertainment nature intended to raise funds.³³

52 The CRTC published data about the hours of total local programming and total local news broadcast by private television stations and some community TV channels as part of the 2015-421 proceeding, but did not publish total original hours of news and non-news local programming or show how the hours that were broadcast fit into the CRTC's current programming categories.

53 When the 2015-421 hearing began the CRTC hearing panel asked interveners to comment on three definitions:

Local programming ... must:

- be at least five minutes in duration (excluding commercials);
- refer directly to the community, which could be defined as:
 - the station's contours;
 - BDU service area;
 - municipality; or
 - census metropolitan area or census agglomeration.
- be produced by the personnel of the local station, independent local producers or members of the community for the local station.

Local presence ... is defined as:

- Providing seven-day-a-week original local news coverage distinct to the community;
- Employing full-time journalists on the ground in the community; and
- Operating a news bureau or news gathering office in the community.

Local news is defined as category 1 (News), category 2a (Analysis and Interpretation) and category 3 (Reporting) programs as defined in BRP 2010 808 and is considered local if it also meets the definition of local programming.

54 The CRTC hearing panel asked broadcasters to submit empirical evidence on the proposed definition's impact on broadcasters' reported hours of and expenditures on local news and local programming on 16 February 2016, but did not ask for an analysis of the proposal's impact on employment opportunities.

55 At the hearing some cable community TV channels explained that they broadcast talk shows, city council meetings, fundraisers (VII, ¶18910, FTCAQ), conferences and other live events as news (VIII, ¶¶13104-13108, Access). Rogers and CBC agreed that 'news' should be expanded to Category 2 (analysis/interpretation/documentaries) and Category 3 (actualities) (II, ¶15611, Rogers; ¶7197, CBC).

A Does the proposed redefinition of news meet Parliament's objectives?

56 Parliament requires Canada's broadcast programming not just to offer "information and analysis" ["de l'information et de l'analyse"],³⁴ but also to provide "a balance of information, enlightenment and entertainment" ["programmation équilibrée qui renseigne, éclaire et divertit"].³⁵ A basic principle of statutory interpretation is that Parliament must be assumed to express itself intentionally: "[w]hen an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning".³⁶ Listing informative, analytical and enlightening types of content separately indicates that Parliament envisioned that different types of content would be provided.

³³ *Ibid.*

³⁴ S. 3(1)(d)(ii).

³⁵ S. 3(1)(i)(i).

³⁶ *Jabel Image Concepts Inc. v. Canada*, 2000 (FCA) 15319 at ¶12.

- 57 Under the CRTC's proposal, however, a program would be local news when it consists of newscasts, newsbreaks and headlines, reporting on regional, national and international events, weather reports, sportscasts, community news (Category 1 news); talk shows, panel shows, consumer affairs, consumer reviews, newsmagazines and documentaries (Category 2a analysis and interpretation); original non-fictional critical analysis of specific subjects or points of view which may inform, educate and entertain (Category 2b long-form documentary), and/or coverage of conferences, political conventions, awards dinners, political debates and non-entertainment programs intended to raise funds (Category 3 reporting and actualities).
- 58 Defining 'news' to include reports on current local events, documentaries about communities' past events, talk shows about local personalities, and award shows and fund-raisers for local organizations effectively removes the distinction between information, enlightenment and entertainment, contrary to Parliament's decision to distinguish between these types of programming. Combining Categories 1, 2 and 3 into a larger 'news/information' category will permit TV stations to provide their communities with the least expensive content from this expanded category, rather than daily reports about events affecting those communities. Broadcasters will be able to say that they have increased the level of 'news' they broadcast, purely because the new 'news' category will include far more than Category 1 news.
- 59 The Forum therefore opposes the CRTC's proposed definition, because it does not support Parliament's objective of ensuring that TV broadcasters provide programming permitting Canadians to be aware of day-to-day events in their communities.

B *Will redefining news meet Parliament's objectives for comprehensive programming?*

- 60 Even if Parliament had intended fund-raisers and documentaries to be counted as news, Parliament requires the broadcasting system's programming to "be ... comprehensive", and to "provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern" (section 3(1)(i)(i) and (iv)). Canadians' access to news is critical to Canadian democracy.³⁷
- 61 The level of original local television news in Canada's broadcasting system has decreased since the 1990s. Recent examples include Channel Zero's decision to reduce local programming, and Rogers' cancellation of all original local news on its conventional OMNI TV stations in 2015, after other local programs were cancelled before then. The CRTC's definition will permit television stations to reduce news further, by substituting raw footage of a community's conventions and fund-raisers for news reports about matters of public concern. As for using community TV channels to replace or expand the news available from TV stations, the Forum shares other parties' concerns that this proposal will commercialize community services (VII, ¶12200, CMES).
- 62 The Forum therefore opposes the CRTC's proposed definition, because even if communities receive extensive programming that presents talk shows where events are discussed, they may no longer receive reports about the events themselves, reducing their residents' opportunities to know that they are being exposed to the expression of matters that are of public concern, and weakening Canadians' ability to exercise their democratic rights.

C *Does the Act permit centralcasting?*

- 63 Parliament also requires the CRTC to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing" its broadcasting policy³⁸ and declares "that the broadcasting system constitutes a single system"³⁹ It defines programming undertakings as undertakings for the transmission of programs, and distribution undertakings as undertakings that receive and re-transmit programs.

³⁷ See e.g. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at ¶26.

³⁸ S. 5(1).

³⁹ S. 3(2).

- 64 If adopted, the definitions proposed by the 2015-421 hearing panel will *de facto* authorize centralcasting, the practice in which programming undertakings licensed to serve local communities become distribution undertakings for the programming they receive from unlicensed central hubs. Describing its centralcasting approach as a ‘remote production technique’, Shaw’s newscasts for Halifax, New Brunswick, Montreal, Toronto, Winnipeg, Regina, Saskatoon and Kelowna in Toronto (VII, ¶¶10900 & 10903, Shaw.)
- 65 The proposed definitions authorize centralcasting because they do not require an entire program to consist of local content, to be assembled entirely in a station’s community, or to be assembled under the station’s editorial control. They allow unlicensed central hubs to select and assemble 5-minute-long program segments received from licensed local stations into larger programs whose content was chosen by the hubs, and to send completed programs back to the stations for re-transmission to the communities they were licensed to serve. Those claiming that “the decisions about what stories to cover and how to cover them are still made at the local level” presented no actual evidence to support their statements (VII, ¶10905, Shaw).
- 66 The Forum therefore opposes the definitions proposed for local programming and local news because they effectively transform local stations into rebroadcasting undertakings (that do not produce and originate programming of their own), but transfer editorial control over individual local TV stations’ local programming to unlicensed centralcasting hubs whose control is unknown, and create two broadcasting systems: one that generates and transmits all programs broadcast by the system without a broadcast licence, and the other that is licensed but has little or no control over the content it re-transmits.
- D Will redefining news increase employment opportunities for Canadians?**
- 67 Section 3(1)(d)(iii) requires the broadcasting system’s programming to provide employment opportunities to Canadians.
- 68 The CRTC’s proposed definition would permit personnel employed by the station, independent producers or members of the community to produce a station’s programming, but would not require any of these persons to reside in the community served by the station. It does not expressly prohibit television stations from counting radio programming as television programming. By authorizing centralcasting, it also permits TV broadcasters to reduce their stations’ production and anchoring staff – without any enforceable requirement to increase or even maintain “frontline reporting” (VII, ¶¶10903-10904, Shaw; VII, ¶12392, Metro Vancouver).
- 69 The Forum instead recommends that local programming and local news be defined by adopting variations of the concepts, definitions and guidelines now used by the CRTC and the Canadian Audio-Visual Certification Office (CAVCO) to certify Canadian programs. Specifically, we propose that for a program to qualify as ‘local’ its producer and key creative positions must be occupied by individuals who reside permanently within the broadcast contours of the licensee station, and that 75% of the services, post-production and lab costs must be performed on facilities located within the broadcast contours authorized for the licensee station.

FRPC reply recommendation 1 The CRTC should define local programs based on the CRTC and CAVCO definition of Canadian program

V Conclusions and recommendations

- 70 Times have changed. While, as some have said, the ‘world may have moved on’, the Forum welcomed the CRTC’s statement in BNoC 2015-421 that it “is open to considering issues and concerns other than those” it identified. The Forum’s issues are based on the law as set out by Parliament in the 1991 *Broadcasting Act*. What this means is that while we recognize that owners of printed daily or weekly newspapers may cut their coverage or to shut down altogether, licensees granted the privilege of operating conventional TV stations bear different responsibilities, are also in turn granted significant protections.

- 71 One of our principle concerns stem from our position that the need for an informed citizenry is just as, if not more important, as it was in the 1980s. Our extensive detailed and evidence-based written submission and our remarks at the hearing stressed the importance of the local presence of, and local reflection in the communities by, licensed undertakings. The facts it presented establish the steady diminution of local programming and reductions in employment at all levels of local production; the Influence Communication (IC) study for CUPE/SCFP⁴⁰ confirmed that the level of electronic media information available from one region to others in Quebec decreased over time and that the level of political news about regional contests and local candidates dropped by 73% over the past decade; it also found that levels of regional news affect voters' participation in elections.
- 72 The CRTC has the authority and responsibility to address that decline, and to ensure that Canadians continue to see the issues, events and values of their local community reflected back to them by their local broadcasters. While noting that 'change' has been used to rationalize broadcast regulatory change for several decades, the Forum very much appreciates that the dynamics and the economics of the broadcast industry are changing rapidly and dramatically: yet the CRTC has a vital role to play as the industry reinvents itself, in meeting the terms of its legal mandate, in serving the public interest and in confirming that this essential element of local reflection survives this period's "moving on". One aspect of this role is that the CRTC due to its unchanging mandate is expected to provide a certain level of continuity (see e.g. VII, ¶11289, Shaw), rather than shifting with every gust of wind from the economy or elsewhere.
- 73 Specific suggestions for gathering relevant data, considering the resources available to each programming undertaking and using conditions of licence, are set out below.
- A Gather relevant data**
- 74 The Forum considers that a major problem is that the CRTC does not have a clear picture of the current television system, or indeed, of the broadcasting system as a whole. We led evidence in which the CRTC acknowledged that it does not know how many television reporters or television news bureaus exist in Canada. The CRTC therefore cannot estimate the impact of any new local television policy on the availability of television news-gathering resources. While BCE noted that "eight of the top 10 online news sites accessed by Canadians belong to traditional TV and print providers [and] account for approximately ninety percent of the usage" (I, ¶1152, BCE), and Shaw said that streaming and video obtains "almost as high and sometimes higher rates for ... advertising online than ... on television" (VII, ¶11173, Shaw), the CRTC's current approach to data collection means it does not know how broadcasters' unlicensed broadcasting activities are affecting their licensed services, or indeed, what resources are available from online broadcasting.
- 75 The Forum led unrefuted expert evidence that the CRTC's current annual returns process does not precisely measure the impact of centralcasting and that fundamental changes to broadcasters' business such as centralcasting should be reflected in the CRTC's annual returns. This means that when the CRTC considers 'all the resources' available in the broadcasting system to support programming', it is unable to consider the resources that may be available from centralcasting hubs or other unlicensed broadcasters operating in whole or in part in Canada.⁴¹ As a result neither the CRTC nor Parliament knows the true extent of resources in Canadian broadcast television.
- 76 Section 10(i) of the *Act* permits the CRTC to request such information – but only from licensees. The CRTC should therefore license all broadcasting undertakings that it considers capable of materially contributing to the achievement of Parliament's broadcasting policy, so as to obtain more complete and accurate

⁴⁰ Influence Communications, *Analyse sur l'état de l'information locale au Québec: Rapport final*, (Montreal: 1 February 2016), http://scfp.qc.ca/wp-content/uploads/2004/08/2016-02-01_%C3%89tudeInfluenceComm_InfosR%C3%A9gionales.pdf.

⁴¹ S. 4(2) of the *Act* provides that it applies in respect of broadcasting undertakings operating in whole or in part in Canada.

information about the broadcasting system; but it should for the moment permit currently exempted broadcasters to remain exempt from other Part 1 and II requirements. Broadcasters may decide whether to comply with the CRTC's information-collection regulations, to challenge the CRTC's authority via the courts or the Governor in Council, to risk the penalties of non-compliance, or to terminate their operations in Canada (as happened in the late 1960s and early 1970s, when the CRTC enforced directions on Canadian ownership).⁴²

FRPC reply recommendation 1 **The CRTC should license all broadcasters capable of contributing materially towards the achievement of Parliament's objects, while exempting those that are not**

77 Before requiring licensees to submit completed annual returns for the 2015-2016 broadcast year, the CRTC should revise its annual return forms to measure the financial and other affairs of licensees more precisely. The Forum recommends that the CRTC establish definitions for the types of costs, including such cost allocations as centralcasting and head-office, which would qualify to be considered local programming costs, and that licensees would be required to use to ensure uniform and consistent reporting by all licensees. The annual return forms should be further revised so as to determine, for example, not just the financial impact of centralcasting, but also the impact of access to a company's television programming rights by another, commonly owned Internet and/or mobile telephone company.

FRPC reply recommendation 2 **The CRTC should revise its annual return form in time for licensees to submit more precise financial and other information for the 2015-2016 broadcast year**

78 Despite Parliament's requirement that the broadcasting system must "enrich and strengthen the cultural, political, social and economic fabric of Canada", and even though the 2015-421 panel asked appearing interveners about their qualitative research (VIII, ¶13061, CRTC), very few of the CRTC data in this proceeding addressed non-economic questions. The Forum respectfully urges the CRTC to commission studies such as that conducted by Influence Communication for CUPE/SCFP, which analyzed the quantity of local information available from newspapers, magazines, radio, television and websites in 2001 and 2015, as well as the impact of regional news on voters' participation in elections. If the data it gathered for Quebec were collected regularly across Canada, Parliament, the CRTC and Canadians would be able to evaluate the vital, non-economic effect of implementing section 3.

B ***Consider the resources available to each programming undertaking***

79 Generally speaking, broadcasters that have asked the CRTC's permission to acquire more broadcasting licences have argued that the larger scale of their broadcasting business would benefit local communities and the broadcasting system.

80 Some now argue that local newscasts of each of television station do not pay for themselves, and that a new fund should be created to subsidize their programming. The Forum has argued that the CRTC lacks the authority to establish such a fund. Even if the CRTC had the authority (and it does not) the Forum would not support such a fund⁴³ because the *Act* does not suggest that each individual programming category must be self-financing. Rather, section 3(1)(s)(i) says that "private ... programming undertakings should, to an extent consistent with the financial and other resources available to them ... contribute significantly to the creation and presentation of Canadian programming" (underlining added). In other words, the *Act* does not permit the CRTC to consider an individual programming undertaking solely in terms of the undertaking's financial capacity: it must evaluate that undertaking's creation and

⁴² See e.g. *R. v. Continental Cablevision Inc. et al.*, (1974), 5 O.R. (2) 523, 19 C.C.C (2d) 540 (Ont. Prov. Ct, Crim. Div., Dist. of Algoma, 1 May 1974).

⁴³ In the case of the independent television stations not affiliated with Canada's largest broadcasters, however, and as we explained in our remarks before the CRTC hearing panel, the Forum supports an increase in the Small Market Local Programming Fund (this Fund was established by negotiations between the CAB and DTH services, rather than by the CRTC).

presentation of Canadian programming – which includes local programming – by reference to all of the resources available to that undertaking.

- 81 As described in the Forum’s written submission and remarks at the hearing, individual programming undertakings’ true capacity to create and present Canadian programming, including local programming is unknown due to gaps in the current annual return form. It does not require individual programming undertakings to set out all resources available to them. Therefore, and as provided for in section 3(1)(s)(i) of the *Act*, the CRTC should determine the capacity of each programming undertaking that it plans to renew, to meet its programming commitments in the next licence term.

FRPC reply recommendation 3 **The CRTC should decline to renew the licences of each programming undertaking until it receives a statement of the financial and other resources available to that undertaking for the current broadcast year and next licence period**

- 82 In the event that broadcasters decline to meet their programming commitments or provide the undertakings for which they hold licences with available resources, the CRTC should exercise its discretion under section 9(1)(d) to decline to renew their licences, and invite others to apply for that privilege.⁴⁴

FRPC reply recommendation 4 **The CRTC should decline to grant or renew the licences of applicants or licensees that are incapable of meeting or decline to meet their programming commitments**

C ***Use existing powers to implement section 3***

- 83 The result of the CRTC’s belief since the mid-1990s that the marketplace will lead broadcasters to produce and originate local television news and programming is that they have terminated most local programming, replaced it with radio programming or rebroadcast it. Contrary to the CRTC’s 1999 assumption, “sufficient market incentives” have not ensured “that audiences continue to receive a variety of local programming, particularly local news programming, without regulatory intervention.”⁴⁵
- 84 Several broadcasters now argue that BDU subscribers should subsidize local TV stations’ local news, threatening otherwise to close many stations. The threat may seem credible thanks to claims that the only persons in Canada interested in holding a conventional television licence are those who now have such licences (VII, ¶11185, Shaw). (Of course, the threat has never been tested, thanks in part to decisions such as that of the CRTC in 1978 to decline to hear competitive licence renewal or transfer applications.⁴⁶)
- 85 A conflict therefore exists between the CRTC’s desire to regulate in a flexible way pursuant to subsection 5(2)(d) – by offering incentives such as a new local programming fund, and the CRTC’s mandate in subsection 5(3) – to ensure that the section 3’s objects are met.
- 86 Parliament has given the CRTC a solution: it directs the CRTC to take all the resources available to an undertaking into account, and permits the CRTC to set conditions on broadcasters’ licences. The CRTC’s *Conventional Television Statistical and Financial Summaries* show that private TV stations’ local

⁴⁴ *Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283 at ¶154: “The decision whether or not to renew a broadcasting licence involves a question of appropriateness. It is a discretionary decision on a matter that lies at the very heart of the CRTC’s expertise. ...”

⁴⁵ BNoC 2015-421, at ¶121, citing Public Notice CRTC 1999-97.

⁴⁶ *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, CRTC Public Announcement (Ottawa, 25 July 1978), at pp. 35-36 and 44-45. The claim has also never been tested because when broadcasters such as Canwest announced the sale of their television programming assets, they had already converted their stations to perform as rebroadcasters for their unlicensed centralcasting hubs: if those who bought such programming undertakings would have had to incur significant costs to restore the undertakings’ master control and transmission facilities (so as to be independent from another entity’s centralcasting model), would the purchases have made business sense?

programming expenditures exceeded their local ad revenues by \$111.6 million from 2012 to 2014 – while in the same period these broadcasters chose to spend \$300 million more on foreign programming, than on Canadian programming. Rather than reallocating money from the community to the private and/or public elements, the CRTC could require broadcasters by condition of licence to allocate funds now spent on foreign programming to local Canadian programming.

- 87 The Forum respectfully submits that the CRTC must establish the programming, financial and employment requirements for individual programming undertakings, in terms of the circumstances of their respective licensees, to ensure implementation of section 3's objects. As the CRTC said in Decision CRTC 2016-8 that it will not enforce commitments or other "terms" of broadcasters' licences, the CRTC should not create a new fund, but establish conditions of licence for local programming expenditures and original local programming exhibition based on the resources available to each undertaking.

FRPC reply recommendation 5 The CRTC should set broadcasters' programming, financial and employment commitments as conditions of licence of each programming undertaking's licence, in relation to the resources available to each programming undertaking

D Final comments on 2015-421

- 88 The Forum welcomed the CRTC's decision to review its policy for local television, though we have serious concerns about its decision to incorporate a review of its community television into the same proceeding. The Act's distinction between the community, public and private elements, as well as the distinctive mandate and operation of community television services present a separate and discreet set of issues from that of local commercial television stations: the reviews of local television and community television might better have been conducted as separate proceedings.
- 89 The Forum respectfully urges the CRTC to take concrete steps to strengthen the unique mandate of community television in Canada. As many participants argued during the hearing, the lack of local, democratic governance of community television channels means that they cannot reach their full potential as vital community services. While the Forum has significant concerns about the viability of the community media access centre model promoted by several parties, we believe strongly that the system should facilitate the exploration of this and other models for community broadcasting. The Forum also maintains that the best means of insuring the future viability of community television, in addition to the governance changes proposed by many participants, is by creating a community television programming production mechanism independent of BDU control.
- 90 The unusually high number of procedural requests on the record of the 2015-421 proceeding also indicates some of the concerns about disadvantages created by procedures. One of the Forum's main concerns in this proceeding involved the evidence available to all parties. The CRTC collects data about broadcasters' exhibition of and expenditures on original local program production, but instead published data about all local programming. Distinguishing between original and repeat programming matters, however: private TV stations have reduced their production of original local news by replaying newscasts (during the same day, during the next day, or on weekends in 'highlights' programs), or by broadcasting radio programs. The absence of station-by-station financial and programming evidence on the record made it impossible for non-broadcasters to evaluate claims that TV stations will soon fail (VIII, ¶13206, CRTC). The lack of evidence, and late disclosure of evidence in general, made it difficult for the Forum to make and support its arguments, and to evaluate the arguments made by others.
- 91 The Forum appreciates the work of the hearing panel and CRTC staff in this proceeding: the decisions flowing it matter because as the CRTC's own survey research found, local television stations play a vital role in the democratic life of Canada's communities by reporting and analyzing the issues and events that matter locally. We look forward to the CRTC's determinations.

*** End of reply ***