Internet Society Canada Chapter

Submission to the Broadcasting and Telecommunications Legislative Review Panel

January 11, 2019

1. Introductory Comments

Who we are

1. The Internet Society Canada Chapter (ISCC) is a not-for-profit corporation that engages on internet legal and policy issues to advocate for an open, accessible and affordable internet for Canadians. An open internet means one in which ideas and expression can be communicated and received except where limits have been imposed by law. An accessible internet is one where all persons and all interests can freely access websites that span all legal forms of expression. An affordable internet is one by which all Canadians can access internet services at a reasonable price.

What is the internet?

2. Discussions of the internet almost invariably conflate the internet with the applications that run on it. The internet is a series of computer protocols that form a neutral vehicle of digital communications that runs over the infrastructure of incumbent telecommunications carriers – in that sense akin to telephony or telegraphy.

3. In the traditional world of telephony, the intelligence was principally located in the centre of the network – the switching systems that routed calls from a residential number in Montreal to, say, a business number in Vancouver. The internet disperses the intelligence throughout the network and to both ends of the communication. A circuit is not created, and parts of a single message may travel by different routes to its destination, where it is reassembled into its original form.

4. The absence of switching means that the distribution of information is limited only by the capacity of the communications paths (fibre, copper, cable, wireless) – and not constrained by the capacity of switches. Increasingly, telecommunications networks have been adapted to internet protocols – even for functions such as live voice communication.

5. Applications are the content that is delivered over the internet: the search engines, social media, travel reservation and booking services, knowledge banks and streaming services – to name a few. These applications are seen as disruptive of existing industries and ways of doing things. Their reach is global. Their pricing is competitive. They are popular and addictive. They are what is of greatest controversy when “the internet” is seen as a benefit or a threat.

6. We will not always make fine distinctions in this submission – we will generally use the popular usages, while always keeping in mind that carriage issues are central to the internet as a communications system.

7. In the broadcasting context, the greatest competitors to the incumbent broadcasting system are found in the applications that run over the internet rather than the internet itself.

About this Submission

8. ISCC welcomes this legislative review as a singular opportunity to recast the issues surrounding telecommunications and broadcasting in light of the revolutionary impact of the internet on an evolving Canadian society.

9. The internet has become a primary engine of economic growth, spawning new industries and upsetting the business models of established ones. It has become critical to the ability of businesses to deal with their customers and suppliers. Increasingly, the internet is the means by which government services are delivered to citizens. It has become the method by which friends and families stay in touch. It is becoming critical to communicating knowledge in all domains of knowledge and endeavour. It also competes with and displaces existing media in the delivery of news and entertainment.

10. Against this background, the legislative framework surrounding the vehicles for carriage of and access to internet services is of primary importance to ISCC. Internet traffic passes through the wireline and wireless networks of telecommunications carriers to reach Canadians. The legislative and regulatory framework surrounding telecommunications carriage is therefore of critical import to ISCC and users of internet services. There are few issues respecting telecommunications and radiocommunication regulation that do not or may not have an impact on the internet in Canada.

11. As the internet is increasingly the delivery vehicle of choice for all kinds of informational, news and entertainment content, the revision of the *Broadcasting Act* may detrimentally impact internet content services if those services are subjected to the *Broadcasting Act* or somehow taxed to contribute to broadcasting subsidies.

12. In this submission, ISCC will limit its responses to issues that may affect the openness, accessibility and affordability of internet services to Canadians and the availability to Canadians of services on the internet. As a consequence, ISCC will not address some questions that, however important, have no particular relevance to the internet.

Guiding Principles

13. The Panel should always be guided in its deliberations by two fundamental considerations. First, a new legislative framework should be constructed from an internet-centric viewpoint. Second — necessary to achieve the first — is to recognize the very different reasons for the regulation of telecommunications and broadcasting.

14. Put simply, telecommunications regulation is essentially aimed at the potential economic power of telecommunications carriers over business and residential consumers. It recognizes that the ownership of capital-intensive networks cannot be easily duplicated so as to permit a level of facilities-based competition sufficient to protect the interests of users. Telecommunications regulation is meant to prevent the abuse of market power. It does not target either the content of messages sent by telecommunications or the services provided by third parties over telecommunications networks. Indeed, the telecommunications regulator has no power to proactively regulate the content of messages or providers of third-party services delivered by telecommunications — except with respect to abusive activities such as unsolicited telemarketing, spam and other harmful telecommunications.

15. Broadcasting regulation, by contrast, is focused primarily on the content of broadcast services. Historically, the use of licensing to regulate broadcasters has been justified by spectrum scarcity. There were limits to the number of licences that could be issued in any given geographic area. In addition, broadcast communications were one-way and controlled by the licensee. These characteristics combined to create a strong public interest in ensuring that licensees did not abuse their position as broadcasters to attempt to control public opinion or inappropriately influence political processes. Since the 1960s, regulation has also been used to encourage Canadian content in broadcast programing, and a distinct Canadian broadcasting system, with the objectives of promoting Canadian culture and identity, and supporting the livelihood of artists and technicians. All of this was possible because broadcasting, even after the advent of cable-TV and satellite-TV, was a closed-access and geographically-contained domestic “system” dependent upon a fixed number of one-way distribution “channels”.

16. The internet is neither a traditional telecommunications service nor is it broadcasting. Rather, it is a vast, open-access array of applications and online services that ride over, and are delivered through, telecommunications networks. The internet has enabled a level of innovation, competition and interactive communications that today underpin what is called the ‘digital economy’. The internet has been widely characterized as the most dynamic generator of economic activity, growth and wealth since the industrial revolution. As a nation dependent on trade, Canada and Canadians have benefited greatly from the access to global markets, content, products and services that the internet has enabled.

17. There is no doubt that the internet has disrupted and transformed both traditional telecommunications and broadcasting. But those who suggest that the internet is a “convergence” of these two legacy industries miss the point. They conflate the

internet, with one small technological side-effect of its vast, economic, social and, yes, cultural impact.

18. Going forward, public policy needs to recognize that an open-access internet that fosters dynamic competition and innovation is central to Canada's future economic growth and wealth. Telecommunications policy and legislation should be constructed around that fundamental recognition.

19. Broadcasting policy and legislation must come to terms with the reality that an open-access internet, with its panoply of content services, is inimical to, and subverts, the legacy regulatory system. Any attempt to impose on the internet the regulatory scheme devised for mid-20th Century broadcast technologies will fail — both technologically, and because Canadians will not accept it. *To be clear: that does not mean the end of measures to promote and support Canadian content.* What it means is that, rather than seeking to "harness" online media as has been done with broadcast media, Canadian content policy needs to focus on measures that *unleash and incentivize* the great potential demonstrated by Canadian creators, artists and producers to seize the opportunities that the internet presents.

20. ISCC believes that, as a matter of legality, it is incorrect that the *Broadcasting Act* gives the CRTC jurisdiction over audio-visual content on the internet, let alone over the undertakings that provide that content. ISCC further believes that sound policy dictates that the CRTC should not be permitted to attempt such regulation, and any new *Broadcasting Act* should make that explicit.

2. Telecommunications Act

General Comments

21. Telecommunications is a key industry in the Canadian economy. With $60B in revenues, the telecommunications industry is large by any comparator. However, the size and importance of the telecommunications industry itself pales by comparison with the impact of telecommunications on communications-reliant industries that exchange information, sell products, and service clients over communications networks. The effects of decisions in the telecommunications industry potentially affect every government, business, and resident in Canada.

22. The impact of telecommunications on other industries and consumer interests necessitates that the potential for the abuse of market power be mitigated by regulation in the public interest. That regulation must recognize the enormous complexities of the relations between the telecommunications carriage industry

and the economy as a whole, as well as the complexities of the relations between players within the telecommunications carriage market itself. The regulator must be able to identify and address artificial technological barriers to competition between telecommunications service providers, as well as artificial barriers that limit the ability of telecommunications customers to shape their telecommunications services to suit their individual needs. A clear example of this was the inability of clients to bring their own devices when they chose to switch carriers, or had need of devices embedding particular technologies that were not permitted access to carrier networks.

Objectives

23. The objectives of the present *Telecommunications Act* reflect the preoccupations of the 1980's, when drafting of the Act commenced. Some have become outmoded over time, and others are really better addressed by other legislation or other governmental programs.

24. In an effort to assist in focussing the objectives, ISCC would like to suggest the following to replace the current s. 7 of the *Telecommunications Act*:

Objective

The objective of this Act is to ensure that Canadians have access to a robust telecommunications industry that delivers world class telecommunications services using world class infrastructure to meet the communications needs of all classes of users.

Guiding Principles

In exercising its powers under Part III of this Act, the Canadian Telecommunications Authority must:

a) place emphasis on the interests of business and individual consumers of telecommunications services;

b) have regard to the safety and security of telecommunications infrastructure and of the users of telecommunications services;

c) ensure that internet service providers treat all data on the internet equally, and not discriminate or charge differently by user, content, website, platform, application, type of attached equipment, or method of communication;

d) rely to the extent possible on market forces to provide telecommunications services;

e) ensure that quality telecommunications services are available at affordable prices in all regions of Canada; and,

f) foster the development of wholesale and secondary markets for telecommunications services.

Need for an Expert Regulator

25. Telecommunications is at the heart of economic growth, innovation, and consumer interests. Telecommunications today centres on the internet: the regulatory framework must be constructed from an internet centric viewpoint. Telecommunications is a technical area, complex, and the regulators' decisions may have tremendous impacts on the lives of Canadians. It requires expertise that is different from that of broadcasting regulation. As radio spectrum management should logically fall to the telecommunications regulator, the complexity of its decision making will only grow. More expertise and more focus will be required of the regulator in relation to telecommunications and spectrum management.

26. The telecommunications regulatory function should be separated from the broadcasting regulatory function.

27. The Act should either establish a self-standing telecommunications regulatory agency or an independent telecommunications regulator that is functionally separate from broadcasting regulation within the CRTC. The National Library and National Archives formerly provided an example of such an arrangement. Similarly the Department of Justice and the Office of Public Prosecutions shared common services. Each had separate heads and professional staff, but was supported by common financial and human resource personnel.

28. Appointment of telecommunications regulators should require a background in engineering, managing networks, economics, competition policy, law, or computer security. Other regulators should be appointed who have experience in the provision of internet-based services to the public. The needed qualifications do not pose a barrier to desired diversity in the mix of appointees.

29. The telecommunications regulator should have a Chief Technology officer, whose responsibility would be to provide the regulator with up to date perspectives on technical issues that come before the regulator. The Chief Technology officer should assist the regulator to exercise a true challenge function where technological issues are said to prevent the implementation of regulatory objectives.

Passive Infrastructure

30. The present *Telecommunications Act* does not give sufficient authority to the telecommunications regulator to enable it to ensure that telecommunications common carriers have access to poles, antennae, conduits and rights of way at reasonable prices and under reasonable terms and conditions. This is particularly vital for new entrants, but remains important for incumbent carriers as well.

There are too many instances of provincial and municipal utilities being unwilling to afford access to utility infrastructure on reasonable terms and conditions. The telecommunications regulator should be able to direct that access to infrastructure necessary be afforded to telecommunications carriers, and determine the terms and conditions, including the price at which access must be given. This issue will be particularly important as cell sizes shrink with high-bandwidth technologies such as 5G, and physical emplacements of equipment multiply a hundredfold.

Content of Messages

31. Section 36 requires that the content of messages should not be controlled nor its meaning or purpose altered by the carrier without the consent of the CRTC. This is language is too broad, and can lead to attempts to misconstrue the statute, as the recent Fair Play application for website blocking has made clear.

32. Section 36 should be amended to set out the limited circumstances under which the CRTC could consent to a carrier request to alter the meaning or purpose of a communication or control the meaning of a communication. The current open-ended provision invites abuse and, potentially, regulatory overreach.

Confidentiality of Information

33. S. 39 of the current *Telecommunications Act* deals with the designation of confidential information. This provision is overly protective of carrier interests, and leads to hearings where decisions are made on the basis of information not available to the other parties or to the public.

34. The Act should be amended to provide a narrower scope for the designation of confidential information.

35. The Act should also provide that experts and counsel for a party to a hearing be given access to confidential information so long as it is not disclosed to the party itself (modelled on the *Canadian International Trade Tribunal Act*).

36. The Act should permit the regulator to share information with other government departments or agencies where the CRTC might require their expertise (as, for example, to obtain advice from CSE on cyber security, or to jointly consider a telecommunications merger with the Competition Bureau). Such sharing would require that the receiving agency keep that information confidential in the same manner as must the telecommunications regulator.

Independent Information Gathering

37. The CRTC has historically been dependent on the parties before it for information. In reality, public interest or third-party interveners cannot be expected to have sufficient capacity or resources to challenge the evidence presented by the major carriers. It is reasonable to expect the

telecommunications regulator itself to seek out information from both governmental and non-governmental sources that may assist it in evaluating a particular application.

38. A revised *Telecommunications Act* should provide explicitly that the telecommunications regulator can seek both governmental and third-party information that may assist the regulator in deciding any matter before it.

Competition

Relations with the Commissioner of Competition

39. Competition economics and law are extremely complex, and require a mastery of facts and theory that even an expert tribunal can find overwhelming. It is unlikely that the telecommunications regulator will be able duplicate the expertise that is resident in the Competition Bureau, nor should it be forced to do so.

40. At present, the Commissioner of Competition has the right to intervene before the telecommunications regulator. This is not enough given the centrality of telecommunications carriage to the economy as a whole and the user experience of Canadian businesses and individual consumers.

41. The telecommunications regulator must be able to share information with the Commissioner of Competition, but further, the regulator should be able to seek the opinion of the Commissioner of Competition on competition-related issues. The request for such opinion and the advice provided by the Commissioner of Competition should be on the public record. The telecommunications regulator would not be bound by the opinion of the Commissioner of Competition, or accept it only partly, but would be required to explain publicly any divergence from the opinion of the Commissioner. The present provisions dealing with mergers of banks as found in the *Bank Act* or mergers of airlines as found in the *Canada Transportation Act* provide analogous provisions that serve as a model. Issues of this nature might, for instance, include assessing the adequacy of competition for the purposes of exercising the power of forbearance, or assessing the decline of competition such as to terminate a forbearance order.

Wholesale Competitors and Resellers

42. The current Act fails to promote competition sufficiently. Canadians are largely at the mercy of the telecommunications common carriers when it comes to the price, quality, and type of services made available. This harms consumers and businesses who might otherwise enjoy more and innovative service offerings made possible by third party resellers. The lack of competition also proves a drag on the economy as a whole, as it tends to delay innovation and investment

by the customers of telecommunications carriers, causing the economy as a whole to underperform.

43. It should be an explicit objective of the Act to encourage competition and innovation by ensuring there are healthy wholesale and resale markets.

44. The regulator must abandon the notion that facilities-based competition is the only way to create a competitive market for telecommunications services. That may have been a valid concern in in telecommunications services in the pre-internet era. In the internet age, it is time that the regulator promote competition based on software capabilities and innovation. By facilitating wholesale customers, the regulator can obtain results that are equally effective as are those of facilities-based competition. Indeed, experience with facilities-based competition has demonstrated that it results in inefficiencies and capital waste.

45. The regulator should be directed to ensure that technical barriers to wholesale and resale must be overcome, access facilitated, and any new service offered by telecommunications common carriers should be offered only when access by wholesale customers and resellers has become technically feasible and enabled. The Act should require the regulator to ensure that there is no lag between the introduction of a new service and the ability of third parties to lease that service at wholesale prices for resale purposes.

46. The fact remains that the infrastructure of wireline communication services to homes and businesses continue to be owned by common carriers possessing market power that have no incentive to offer telecommunications services at wholesale. Twenty years after the introduction of competition in local telecommunications markets, only incumbent cable and telephone companies have the ability to reach most businesses and consumers in Canada. With capital costs of new infrastructure rising, it is unlikely that substantial inroads will be made by third parties who wish to offer full facilities-based competition. It is clear that the real prospect of competition will come from wholesale and resale customers seeking to differentiate themselves from the carriers and from each other by offering cheaper and innovative – often niche – services.

47. Access to underlying facilities by wholesale customers will also lead to more intensive use of infrastructure, which in turn will encourage more rapid updating of facilities and spur investment by the common carriers and by businesses that are reliant on telecommunications services.

48. The idea that competition should only be supplied by facilities-based end-to-end carriers who own all their physical facilities (towers, transmission facilities, fibre or copper lines) has been obsolete for some time. Legislation must bury this false and restrictive view of the real scope for competition.

Structural Separation

49. Vertical integration of telecommunications carriers into broadcasting and online content services creates economic incentives for anti-competitive behaviour, in particular self-dealing, whereby the integrated carrier confers preferential treatment on its vertically integrated broadcasting and content services. The CRTC's decision in the Mobile-TV case is an example.

50. In addition, in a largely deregulated telecommunications market, vertical integration makes it difficult, if not impossible, to discern flows of revenue between the common carriage, broadcasting and online content businesses. This means that consumers of telecommunications services may be unknowingly subsidizing the broadcasting and/or online content ventures of common carriers. That outcome would represent another form of anti-competitive behaviour, conferring a potentially significant advantage not available to other providers of broadcasting and content services.

51. Accordingly, ISCC believes that common carriage should be required to be carried out in a corporate entity that is structurally separate from any vertically integrated, or otherwise affiliated, broadcasting or online content services. This would protect telecommunications customers who may otherwise be subsidizing the carriers' affiliated businesses.

52. A further concern is that, in a largely deregulated telecommunications market where incumbent, former-monopoly local access network operators also lease wholesale capacity to local service competitors, the incumbent has the opportunity, and economic incentive, to allocate to its own retail service lower costs for network access than it allocates to wholesale competitors. This form of anti-competitive behaviour was less of a concern when the regulator had access to cost allocations related to retail prices. But this is no longer the case. The internal accounting of vertically integrated carriers is not transparent — especially with respect to sales and promotions. The decisions that comprise the CRTC's net neutrality policies highlight the lack of transparency in this regard, and the potential for abuse.

53. The telecommunications regulator should be explicitly empowered to order structural separation between common carriage network services and other aspects of a common carrier's business – whether broadcasting and online content, or local retail telecommunications services. This could be used by the regulator to ensure that all those who make use of the local network infrastructure to deliver services to end-users compete on a level playing field and competitors are treated no differently from the common carrier's treatment of its own retail operations. The United Kingdom, Australia and New Zealand are currently implementing this model of regulation.

Net Neutrality

54. ISCC believes that the CRTC has handled the issue of net neutrality well, and that the current non-discrimination/undue preference provisions have proved effective thus far to ensure net neutrality. However, the concept of net neutrality should be one of legislative policy and not of regulatory policy that can changed at the discretion of the regulator or by direction of the Cabinet. We have above suggested wording in the statement of objectives of the new *Telecommunications Act*.

Consumer Interests

55. The current Act does not make a single reference to interests of either the business or individual consumers of telecommunications services. This is a significant oversight, and a misdirection of the regulator. The objectives of the Act should make specific mention of the critical importance of regulating in the interest of the consumers of telecommunications services.. We have suggested wording in statement of objectives of the new Telecommunications Act.

56. The Act should direct that the CRTC, in making decisions under Part III, place the interests of the consumers of telecommunication services at the heart of its decision- making.

57. While clearly the regulator must take into account a large number of competing factors and interests in its decision-making, ISCC believes that the telecommunications regulator should, where other factors are equal, be required to decide in the interest of consumers.

Safety, Security and Privacy

58. The Act should have an objective of ensuring the safety and security of communications and communications infrastructure.

59. The Act should give the CRTC the power to set standards of security of networks and to oversee their compliance.

60. Privacy in the internet world is a legitimate concern of all Canadians. While the policy responsibility for privacy is assigned to the Privacy Commissioner, ways must be found to permit the telecommunications regulator and the Privacy Commissioner to cooperate on privacy issues involving the internet as well as to provide that rulings by the Privacy Commissioner may be applied by the telecommunications regulator. Since PIPEDA has been introduced, giving it jurisdiction over the privacy practices of federally regulated carriers, the

objectives of the *Telecommunications Act* do not need to make an explicit reference to privacy.

3. Radiocommunication Act

General Comments

61. Spectrum licences are the licensing to common carriers of blocks of radio frequencies within distinct geographic areas. The carriers then use those frequencies to enable unlicensed devices – cell phones, smart phones, pagers – to connect to the carrier networks.

62. Canada issued its first mobile spectrum licences in 1985 to the then incumbent regional telephone companies and a national licence to Rogers Cantel (later purchased by the Rogers communications group of companies). These licensees then launched Canada's first cellular services – which have grown into today's comprehensive wireless services market.

63. In those 33 years, wireless communications have grown to represent 50% of telecommunications carrier revenues. It produces rates of return that would have been the envy of earlier generations of regulated telecommunications providers.

64. Wireless services have become nearly ubiquitous, and certainly indispensable to its 31 million Canadian subscribers. Moreover, since the arrival of the smart phones and tablets, mobile wireless services are a key means by which millions of Canadians access the internet while on the move – but not just on the move: smart phones have increasingly replaced landlines as residential and office phones. Canadians use their wireless devices to pay bills, watch online content, listen to music, use social media platforms, do homework, access databases, and connect with their employers, customers and friends.

65. Despite the extraordinary growth and diversification, all is not bliss in the wireless world. Repeated attempts to expand the number of facilities-based competitors have repeatedly failed. Set asides for new entrants have failed to result in new independent wireless carriers emerging.Instead of enhanced facilities competition, we observe that only the incumbent wireline telecommunications companies and incumbent cable companies have the revenues and infrastructure to support expansion into the wireless market. Meanwhile, two national carriers, Bell and Telus, rather than developing their own national wireless networks, share their networks such that each acts as a

MVNO in the other's territory, so real facilities-based competition is unlikely to exceed three carriers in any market.

66. The new entrants faced formidable hurdles. The first was the need to build out their networks. Doing so was made more difficult by the difficulty of assembling the needed infrastructure: wireless communications depends on towers and antennas, but also on wireline backhaul, and that is dependent on poles, rights of way, and access to conduits. The incumbent carriers and cable systems had those rights already in place. The new entrants faced local resistance to the erection of towers, the reluctance of municipal utilities to share poles and rights of way, and the difficulty of negotiating matters such as tower sharing agreements with incumbents. Nor were the new entrants, possessors of banks of legacy spectrum – originally allocated to the incumbents free of charge. And the incumbents did not take the threat of new entrants eating their lunch lightly: flanker brands of the major incumbents quickly lowered prices to meet the competitive threat. Each new independent entrant suffered either a quick or a lingering death. This pattern has repeated through at least three cycles of spectrum licensing, both in discretionary spectrum licensing and the award of spectrum through auctions.

67. 5th Generation wireless networks will only compound the problems that have surfaced in the wireless world. While much about their ultimate configuration remains unknown, we do know that they will be extremely infrastructure-heavy, will require minimal latency (for operations such as autonomous vehicles), and will demand ever more spectrum, which means that the cycle for spectrum planning, reharvesting spectrum from current uses, and the issue of spectrum licences will have to be both accelerated and systematic.

68. In light of the above, ISCC believes that both legislative change and a reallocation of governmental responsibilities will be necessary to address the legacy issues of wireless competition and to meet the challenges that intensified spectrum usage will pose.

Spectrum Management Legislation

69. ISCC recommends that spectrum management legislation be introduced to deal with the planning of spectrum use, the allocation of frequency blocks for specific purposes, the award of spectrum licences by auctions, the imposition of terms and conditions on spectrum licences, and the termination of licences and the refarming of outstanding spectrum to other uses. The Australian *Radiocommunications Act* provides an instructive model of such legislation.

70. Spectrum management legislation could be either self-standing, or merged into a new *Telecommunications Act*.

71. ISCC also considers that the spectrum planning and management functions should be confided to the telecommunications regulator. The current system of

spectrum planning and licensing is vested in the Department of Innovation, Science and Economic Development. Its processes have proven too slow. The focus of the Department is too diffuse, covering broad policy areas what are too demanding of Ministerial time. Especially with the impending adoption of 5th Generation wireless technologies, a more efficient means must be found to consult on, plan, and implement spectrum usage. The telecommunications regulator would be the best place to vest these responsibilities.

Competition

72. We have outlined above some of the problems encountered in the efforts to encourage competition in the wireless industry. ISCC takes the view that only wholesale access to the incumbents' wireless networks will maximize the use of those facilities, and offer Canadians innovative service choices while sparking price competition. ISCC recommends that wholesale access to incumbent networks should be mandated in the new spectrum management legislation or the new *Telecommunications Act*.

73. Matters such as tower sharing, access to poles and rights of way, spectrum hoarding, and anti-competitive behaviour are not addressed in the *Radiocommunication Act*, and yet are key to realising the full potential for radiocommunication services and competition in those services. Those issues should be specifically addressed in the powers given to the telecommunications regulator in the new *Telecommunications Act*.

Secondary Markets

74. ISED and its predecessor departments have for many years adopted market-friendly policies. Those policies have not been backed by a legislative framework permitting the full implementation of those policies. The review of the *Telecommunications Act* presents the perfect opportunity to plant the roots

for a true market oriented approach to spectrum management and spectrum markets.

75. The current Act discourages the free play of market forces. For example, all changes in licence ownership must be individually approved by the Minister. A forward-looking and market-oriented Act would include such features as:

- Ensuring that the sale or leasing of radio spectrum bands and their subdivision by any means that makes sense to the parties, including by geography and time, are effective without regulatory approval or intervention;
- Providing that spectrum assets can be secured and foreclosed in accordance with current financial practices; and,
- Require the registration of transfers and security interests in spectrum licences in order to be effective against third parties.

76. With these measures in place, secondary markets in spectrum can be created and managed within the confines of ordinary legal and commercial processes. The current discretion that remains in the hands of the Minister – even if largely unexercised – adds time, cost and uncertainty to what are otherwise purely market transactions.

Fallow Spectrum

77. Legislation dealing with spectrum planning and management must address mechanisms to discourage spectrum hoarding and create incentives for the transfer of underutilized spectrum to more intensive or economically important uses. The legislation should contemplate the recycling of spectrum now used for broadcasting to other uses as technology either reduces the spectrum needed for broadcasting purposes, or other technologies become the primary means for delivering scheduled programing

Radiocommunication Act

78. The *Radiocommunication Act* has proved itself effective at covering matter such as radio interference, conditions of device and operator licences, their renewals, and device-specific licence fees. ISCC believes that, apart from the creation of discrete legislation to deal with spectrum planning and management, the present *Radiocommunication Act* can largely be retained.

79. ISCC believes that responsibility for implementing the *Radiocommunication Act* should remain under the responsibility of the Minister for ISED.

Encrypted Programming Signals or Networks Feeds

80. Paragraphs 9(1)(c) and (d) of the *Radiocommunication Ac*t that create the offence of decrypting encrypted programming signals and rebroadcasting decrypted programming, together with the right of civil action that flows from those provisions

(sections 18 and 19). These provisions do not deal with true radiocommunication issues: they are properly matters of copyright infringement and enforcement. The provisions should be moved to the *Copyright Act* in the course of the current review of that Act.

4. Governance and Effective Administration

General Comments

81. In the opinion of ISCC, the most critical issue of governance is the necessity of separating the broadcasting regulator from the telecommunications regulator. All other issues pale in comparison. How this issue is decided will largely determine whether Canada will have policies that foster innovation, strike the right balance between the interests of telecommunications providers and their business and residential customers, and find the correct balance between carriage providers and wholesale telecommunications service providers.

82. The most consequential institutional reform would be the modification of the current combined regulator to provide two specialized tribunals: one for broadcasting and the other for wireline and radio-based telecommunications common carriage.

83. The premises that dictated the combination of telecommunications and broadcasting under one regulator in the 1960's have proven both false and costly. The use of the term "convergence" persists beyond any usefulness. The internet has not resulted in the merger of broadcasting with telecommunications but rather the opposite: broadcasting is now merely one application among many communicated over the internet using the carriage services provided by telecommunications common carriers. Cable television systems have resolved into two-way carriers - on which broadcasting is again but one application. Going forward, it will be essential to recognize that in delivering programming, neither Bell nor Telus have suddenly become Broadcasting Distribution Undertakings: they remain telecommunications carriers and must be regulated as such. Similarly, the formerly unifunctional cable systems have evolved into important telecommunications carriers, and the issues respecting wholesale access to their carriage capacity has become a critical issue in telecommunications policy.

84. These issues, and many more that confront the telecommunications regulator, are vital to the health of the Canadian economy at large: their significance for the evolution of the innovation economy, the realization of digital policy, and the maximization of consumer interests is vital. The job of regulation requires and demands specialization, the application of complex technical knowledge and economic theories to the resolution of ever more complex technical and economic issues. This is no longer a job for the generalists who have traditionally been

appointed to the CRTC. This is a job that requires significant professional knowledge and experience.

85. Second, the issues that are now and that will in the future to be faced by the telecommunications regulator: the need to seek the expertise of other agencies of government in dealing with issues that come before it. As we said before, the telecommunications regulator needs to be able to seek the input of the Commissioner of Competition on issues of competition. Likewise the telecommunications regulator should be able to seek the expertise of departments such as the Communications Security Establishment, the Department of National Defence and the Department of Public Safety on matters such as network security and security standards. In matters of privacy, the telecommunications regulator must be able to work closely with the Privacy Commissioner.

86. Third, should the telecommunications regulator be a law enforcement agency? There has been mandate creep associated with the Unsolicited Telecommunications provisions of the *Telecommunications Act* (section 40), the Do Not Call provisions (ss.41.1 – 41.5), and especially the administration and enforcement of the core provisions of what is popularly called Canada's Anti-spam Legislation (CASL). While these provisions are desirable in themselves, it is not clear that it is truly within the scope of a telecommunications regulator to police the activities of advertisers, business users of the internet, and telemarketing operations. ISCC believes that these activities could better be settled on agencies having genuine law enforcement expertise (e.g. the Competition Bureau), or on a specialized branch within the Department of Industry, Science and Economic Development. ISCC does not believe that the specialized skills demanded of the telecommunications regulator fit well with the law enforcement and quasi-judicial functions required of decision makers under these provisions, which extend far beyond carrier regulation and potentially intrude into all sectors of the economy.

87. ISCC proposes that confidential information divulged to the telecommunications regulator may be shared with any federal department or agency whose expertise may be required by the CRTC in any matter before it. It is imperative that any receiving

agency be bound to the same confidentiality requirements as are imposed on the telecommunications regulator in respect of the shared information.

5. Broadcasting Act

General Comments

88. The closed economic ecosystem of Canadian broadcasting, supported as it was by direct and indirect regulatory and taxation measures, is unsustainable in the internet

environment. The following phenomena are eroding the economic protections for broadcasters that have sustained Canadian broadcasting for the last two generations:

- the increasing acquisition and retention of world rights to audio-visual content by streaming services is reducing the availability and raising the costs of quality foreign content;
- simultaneous substitution is inapplicable in an online on-demand environment; and,
- restrictions on the deductibility of advertising by Canadians on streaming websites is technologically incomprehensible and economically ruinous for Canadians competing in world markets.

89. What then should be the focus of the broadcasting regulator? ISCC proposes that the broadcasting regulator should increasingly be the gateway to governmental policies and programs aimed at incentivizing distinctly Canadian content.

90. More specifically, it should be the role of the broadcasting regulator to:

- distribute public funds for the support of Canadian content;
- administer an expanded regime of tax credits, refundable tax credits and tax remissions for investment in qualified Canadian content;
- promote Canadian content domestically and abroad; and,
- aid the discoverability of Canadian content on the internet.

Broadcasting Definitions

91. It is critical that broadcasting be defined so as to exclude purely online on-demand audio-visual content.

92. In the internet ecosystem there is an urgent need to define what is subject to regulation and what may be done without a licence: that is to say, what can be communicated without the permission of the state. ISCC believes that the current legislative definition of broadcasting, properly construed, excludes online on-demand content. The CRTC, on the other hand has, since the 1990's, claimed the jurisdiction to regulate online audio-visual content. It has used that assertion of jurisdiction to exempt, on conditions, online content services. This leaves online content services providers in the position that the CRTC could, at any given moment, subject them to

regulation as broadcasters. It also leaves any communications by video, such as a YouTube posting, equally subject to state licensing.

93. It is intolerable that an industry that is increasingly important to Canadians, and increasingly important as a vehicle of Canadian self-expression, should be at the mercy of a regulatory policy shift. The definition of "broadcasting" must be reformulated to specifically exclude all on-demand transmission of audio-visual content over the internet.

94. This would be consistent with the constitutional underpinnings federal jurisdiction over broadcasting. The jurisdiction of Parliament over broadcasting derives from the 1932 *Radio Reference*, where the Privy Council recognized federal jurisdiction over radio communication. In its decision, the Court asserted two grounds upon which federal rather than provincial jurisdiction prevailed over radio. First, and of no import in the present context, was the power to make and implement treaties. There are no treaties governing online content services. The second pillar, and the only one of importance today, was its determination that radio transmissions fell under the power to regulate interprovincial undertakings. Because over-the-air broadcasters are transmitted by means of radio waves that inescapably transmit over interprovincial boundaries, broadcasters become subject to federal jurisdiction as being undertakings that link on province with another (like telegraphs and railroads). By contrast, online content providers and their clientele are the customers of the telecommunications carriers that are interprovincial undertakings. As the Supreme Court of Canada's *Fastfreight* decision demonstrated, the customers of interprovincial undertakings are not thereby interprovincial undertakings.

95. The present claim by the CRTC to jurisdiction over internet content services and its ability to exempt the transmitters of such programs from licensing is based on an erroneous view of its powers and the scope of Parliament's powers with respect to entities that do not use airwaves or who do not possess the infrastructure to transmit across provincial or international boundaries.

96. ISCC also believes that the transmission of online content at the demand of a user is not a broadcast, but rather is a private communication of that content. As such, that communication enjoys the free speech protections guaranteed under the *Canadian Charter of Rights and Freedoms*.

97. The accelerating delivery of content online means that fewer and fewer content originators (at least proportionally) will be subject to CRTC regulation. This could be a very good thing. Freed from such restrictions such as format regulation, Canadian content requirements, and public service obligations, internet content services will be free to seek niche audiences both domestically and abroad, potentially reaching

audiences that have never previously existed, or that had never previously had a vehicle for their self-expression.

Broadcasting Policy Objectives

98. The objectives of the *Broadcasting Act* were developed in an era when the Canadian broadcasting system was a closed ecosystem with mutually reinforcing measures that provided relatively assured revenue streams to broadcasting licensees. Due to the ability of the state to guarantee the value of a broadcasting licence, it could demand that licensees of various categories make significant contributions toward the attainment of regulatory objectives: particularly that of Canadian content.

99. We have shifted to an open system in which licensees face real economic competition from both players outside the Canadian regulatory system (e.g. Netflix, You Tube, Spotify), and from Canadian services that are purely internet based and not subject to regulation.

100. If, as ISCC recommends, the CRTC becomes less of a regulator and more of a vehicle for the implementation of government programs designed to support uniquely Canadian content, then many of the existing objectives can be imposed on the CRTC to serve as guidelines for the kind of content it should be supporting. The objectives thus become the criteria for determining who gets state support or the benefit of generous tax credits to help assist the production of Canadian content.

101. It is unrealistic to expect that the Canadian licensed broadcasting sector will ever, on its own, be able to generate the revenues that would permit the creation of the kind of programing envisaged by the objectives that now govern the *Broadcasting Act*. Instead, the focus will have to be shifted to the criteria for eligibility to public support for Canadian content.

Support for Canadian Content and Creative Industries

102. Content competition has increased sharply and the economics of program delivery have fundamentally changed. The profitability of broadcasting and online content delivery vehicles is shrinking. Netflix, while seemingly dominant, has yet to produce an operating profit. The competition for quality content is intense, and acquisition costs are high. Neither online content services, nor traditional broadcasters, will be able to sustain the kinds of profits that permitted the broadcast regulator to dictate Canadian content requirements and expect them to be fulfilled.

103. It is unlikely that either the traditional broadcasters or their online content competitors, domestic or foreign, will be able to contribute significantly to funds to support independent production. The focus of both traditional and online actors will be on providing content that will attract audiences that will deliver profits. The surplus profits for contributions to production funds that are currently required by the

CRTC are in danger of disappearing. The growing demand for world-wide distribution rights will hinder the continued existence of a separate Canadian rights market. In such circumstances, it cannot be expected that the Canadian broadcasting geese will continue to lay golden eggs. If the Canadian public wishes distinctive Canadian content, and it cannot be provided by competitive forces, then it will have to be paid for by a combination of direct subsidies and tax incentives.

104. The existing scheme of the *Broadcasting Act* is not essential to the production of uniquely Canadian content. The dependence of Canadian private sector broadcasters on foreign (mainly US) productions for its profitability is breaking down. Over the last two generations, little of those profits were invested in Canadian scripted content, despite a virtually guaranteed profitability. The gradual drying up of US productions will challenge Canadian private sector broadcasters to develop uniquely Canadian content that will find an audience in Canada as well as an audience abroad. ISCC is optimistic that market forces will increasingly force private broadcasters to look to Canadian content to provide unique and compelling content for their audiences.

105. ISCC does not believe that it is in the interests of the industry itself, or of the Canadian public, to require that either domestic or foreign online content services should be subject to *Broadcasting Act* or to the contribution requirements that have evolved under its regulatory scheme. The competition provided by online content providers to the private broadcasting sector is contribution enough. That alone will discipline the behaviour of private broadcasters in a way that the CRTC has never and will never be able to do.

Democracy, News and Citizenship

106. ISCC agrees that news and information is critical to the development and maintenance of a healthy democracy. ISCC does not believe that legislative measures are necessary or helpful to the resolution of issues surrounding fake news, platform manipulation, and the use of bots as a multiplier of extreme or misleading views. The basis of a democratic society is an informed electorate. Where once voters had to discern the biases displayed by print journalism and editorials, now the electorate must use its judgment to distinguish fact from fiction, lies from truth, and opinion from fact in an online environment. The remedy for the kinds of manipulations that we have seen displayed on online platforms such as Facebook, Instagram or, possibly, Google is digital literacy rather than digital censorship.

107. The recent exposure of techniques used to exploit ostensibly neutral platforms such as Facebook and equally neutral search engines such as Google has led to a significant public reaction, to which both Facebook and Google are responding. The ultimate resolutions arrived at by these powerful entities may well be unsatisfactory –

but the issue will have been clearly brought to the attention of the public, and market forces may well find solutions that are compatible with an informed citizenship.

108. ISCC believes that, again, modest investments of public funds in public digital education, perhaps combined with support for news gathering and disseminating organizations, would be superior to legislative mandates This would be a far less dangerous approach to a knot of issues that engage fundamental free expression rights.

Cultural Diversity

109. The internet has radically democratized access by producers of content to, literally, billions of potential consumers, just as audiences can now enjoy the works of virtually any producer of content. There is no lack of cultural diversity on the internet. Canadians are free to communicate and be communicated to in any language that an individual may have mastered or that a community may have adopted. There are virtually unlimited cultural styles and emphases available to the discerning consumer. Unlike in the traditional broadcasting environment, the internet frees linguistic and cultural groups, down to the level of the individual, to create, disseminate, and consume content.

110. If the concern is for production values, or the output of the cultural institutions of particular communities, then the solutions are to be found not in legislation, but in access to funding. In principle, that funding should come from the sponsoring community, but it is open to the broadcasting regulator to open up funding or incentives to what are seen to be representative organizations of particular cultural communities.

111. ISCC cautions, however, that the online environment is subversive of supposedly representative organizations, and will offer both content and economic competition to officially recognized and funded organizations. That is a basic feature and strength of the internet.

Governance and Effective Administration

112. The most important step that can be taken toward better governance and effective administration of any future *Broadcasting Act* would be the creation of a distinct broadcasting regulator – separate from the telecommunications regulator. As we have suggested above, we believe that the new *Broadcasting Act* should confer on the broadcasting regulator an active role as the portal to funding and tax incentives for the creation, promotion and discoverability of Canadian content.

113. Canadian specialty channels do not operate over-the-air. They are carried by common carriers, BDU’s or satellite services. Their primary competition is with domestic and foreign websites. There is little reason for their continued regulation as

they neither use valuable spectrum, nor do they possess market power, as there already are online competitors to their services. The future *Broadcasting Act* should establish a mechanism to permit the full deregulation of specialty services. That mechanism should be forward looking to ensure that, as over-the-air services move to alternative delivery mechanisms, they too can be relieved of regulatory obligations.

114. This legislative review also provides an opportunity to explore more effective means of awarding licences, giving a greater role to market forces. For instance, auctions might prove more effective than regulatory hearings to determine who should be issued licences in many markets and formats. Similarly, incentives should be provided for over-the-air broadcasters to release spectrum and move to alternative means of program delivery.

115. A major issue has continued to be the concentration of ownership of broadcasting undertakings. The resolution of the impacts of ownership concentration on competition is one on which the broadcasting regulator neither has nor can be expected to have special expertise. Provision should be made in the new *Broadcasting Act* for consultation with the Commissioner of Competition, including the disclosure of information to the Commissioner and the publication of opinions or advice received from the Commissioner.

6. Interim Measures

116. As the Legislative Review Panel is unlikely to finish its final report, nor new legislation be introduced prior to the next federal general election, ISCC would like to suggest a limited number of measures that could be taken under existing legislation that would potentially have significant positive impact in the short term, without prejudicing needed legislative reforms.

Wholesale Access to Wireless Services

117. The CRTC has made a finding that incumbent wireless carriers have market power and that there is a lack of competition in the market for wireless services. Despite that finding, the CRTC failed to approve measures that would increase competition in the market for wireless services. The Legislative Review Panel should, as an interim measure, recommend that the Governor in Council exercise its power of direction under s. 8 of the *Telecommunications Act* to require that the CRTC approve

wholesale access by mobile virtual network operators to the facilities and services of incumbent facilities-based wireless carriers.

Report on Mandated Access to Wholesale Services

118. By subparagraph 1(c)(ii) of OiC 2006-1534, the Governor in Council directed the CRTC to review its regulatory framework for mandated access to wholesale telecommunications services. The purpose of the directed review was to increase incentives for innovation and investment in, and construction of, competing telecommunications and network facilities. The CRTC was further ordered to determine where mandated services were not essential services and the appropriate pricing of mandated services. The CRTC was directed to take into account the principles of technological and competitive neutrality, the potential for incumbent to exercise market power, and the impediments faced by new and existing carriers to develop competing network facilities. Ten years on, the incumbent telecommunications and cable-TV operators retain market dominance across Canada, and continue to exercise market power in many local access markets. Vertical integration and consolidation has reinforced the incumbents' market dominance to include wireline and wireless access, internet access, broadcasting and broadcasting distribution and content services. The CRTC has found, in relation to net neutrality, that incumbents have engaged in behaviour that violated subsection 27(2) of the *Telecommunications Act*. The Competition Bureau has concluded that incumbents exercise market power in the wireless industry. The market share of non-incumbent competitors remains so small as to warrant concerns that the sustainability of competitive markets may be in jeopardy.

119. Because the wholesale access framework has proven deficient to ensure the development of competing telecommunications network facilities, it is timely for the Governor in Council to direct, under section 14 of the *Telecommunications Act*, that the CRTC re-examine its framework policies for mandated access to wholesale telecommunications services, particularly the extent to which that framework

a. advances policy objectives (c), (f), and (h) of the *Telecommunications Act*; and,

b. deters economically efficient entry that would otherwise enhance competition and more effectively protect the interests of business and individual consumers of telecommunications services.

Standstill Direction

120. So long as the CRTC continues to assert that it has jurisdiction to regulate internet streaming services and content as broadcasting, there will continue to be cloud hanging over the internet and its Canadian content providers and Canadian users of those services. That cloud can easily be dispelled. The Governor in Council should, under the authority of section 7 of the *Broadcasting Act*, direct the CRTC not to

extend broadcasting regulation in any form to online services pending the coming into force of a new *Broadcasting Act*.

Vertical Integration

121. Among the most important and controversial decisions in recent years was the decision of the CRTC to permit the vertical integration of telecommunication common carriers and broadcasting undertakings. There has been no follow up public assessment by either the CRTC or the government to determine whether that policy has met the expectations of the regulator. The Governor in Council should order the CRTC, under section 15 of the *Broadcasting Act* and section 14 of the *Telecommunications Act*, to inquire into, and report back on, the state of vertical integration and consolidation of broadcasting undertakings and telecommunications common carriers in Canada.

122. In particular, the CRTC should report on whether, and to what extent:

a) vertical integration and consolidation have:

- contributed to achieving the objectives of the *Broadcasting Act*;
- been beneficial or problematic for the production and exhibition of Canadian content;
- been beneficial or problematic for Canadians as citizens and as consumers of broadcasting and telecommunications services;
- had an impact on the state of competition and innovation in, and on pricing of, broadcasting and telecommunications services in Canada; and,

b) structural separation of broadcasting and telecommunications entities would have beneficial or harmful impacts for competition, innovation, Canadian content,

and Canadian broadcasting audiences and Canadian consumers of telecommunications services.

123. The CRTC should be directed to seek the advice of the Commissioner of Competition with respect to this report, and that advice should be published as an annex to the report of the CRTC.

7. Conclusion

124. In this submission, ISCC has attempted to emphasize legislative measure that are needed to ensure that Canadians benefit to the greatest extent possible from the wealth of opportunities both economic and cultural offered by the internet.

125. ISCC sees telecommunications law and policy as key to ultimate success of Canada in the global digital economy. To capitalize on the opportunities that lie before us, Canada must develop a legislative framework that aspires to world class infrastructure, encourages competition at all levels of telecommunications services and places the consumer interest at the heart of regulatory decision making.

126. At the heart of this submission lies the need for clear and distinct policy frameworks for telecommunications and broadcasting. The marriage of telecommunications and broadcasting regulatory agencies has been a failure, and much to the detriment of effective telecommunications regulation. Only a separate telecommunications regulator, with members who have relevant expertise, can face and master the panoply of issues that will come before the telecommunications regulator in the coming years. The cultural and telecommunications departments were split decades ago and the regulators should follow suit.

127. Attempts to regulate the internet under the *Broadcasting Act* will engender a storm of public opposition. A recommendation to do so by the Review Panel would destroy its credibility in an instant. We urge the Review Panel to support a revised definition of broadcasting that makes explicit that a new *Broadcasting Act* does not give the broadcasting regulator jurisdiction over purely online content.

128. Finally, ISCC would like to stress that the most perfect legislation in the world will not be sufficient to ensure the transition to the digital economy. Canada's telecommunications infrastructure needs to be built out. Access to high speed broadband services should be a birthright of citizenship. Government support for broadband connectivity has been modest and peripheral. Canada should make digital citizenship a centrepiece of economic and cultural policy. To achieve that, Canada should seek to ensure that every Canadian resident has access to gigabyte broadband

service within the next ten years, and back that commitment with commensurate funding.

*****END OF SUBMISSION*****

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Submission to the Legislative Review Panel

APPENDIX 1

Responses to Specific Questions

1. Universal Access and Deployment

1.1 Are the right legislative tools in place to further the objective of affordable high-quality access for all Canadians, including those in rural, remote and Indigenous communities?

This question is misconceived. While ISCC keenly agrees with the objective, we believe that only government infrastructure investments, of a scale far more ambitious than any that a Canadian government has thus far offered, can be expected to permit affordable high-quality access for all Canadians. The current legislation has been used to gradually expand broadband to rural and remote communities in less than a generation. A far more ambitious government led initiative is necessary to close the gap between the bandwidth poor and the bandwidth rich, and so unlock the human capital and potential that Canada has to contribute to the digital economy.

1.2 Given the importance of passive infrastructure for network deployment and the expected growth of 5G wireless, are the right provisions in place for governance of these assets?

The issues surrounding access to municipal and utility owned infrastructure, the length of planning approvals and consulting processes are major barriers to timely deployment of 5G networks, just as they are to the laying of fibre optic cables or stringing wires on utility poles. The telecommunications regulator should be given the power to decide that telecommunications carriers be given access to passive infrastructure as well as on the terms and conditions of that access– including price, specify the time limits within which applications for planning approvals must be given, and to override, when necessary, technical and regulatory barriers to access to contested infrastructure.

2. Competition, Innovation, and Affordability

2.1 Are legislative changes warranted to better promote competition, innovation, and affordability?

2.1 The future *Telecommunications Act* should specifically mandate wholesale access and resale of carrier capacity to foster competition. That Act should also explicitly empower the telecommunications regulator to order structural separation of all or part of an integrated telecommunications carrier where the regulator considers that separation would improve competition in the market for telecommunications services. The Act should permit fuller

cooperation between the telecommunications regulator and the Commissioner of Competition, including the power of the regulator to delegate aspects of its decision making to the Commissioner.

3. Net Neutrality

3.1 Are current legislative provisions well-positioned to protect net neutrality principles in the future?

3.1 The new *Telecommunications Act* should specifically require the telecommunications regulator to pursue net neutrality in its regulatory policies and decisions respecting telecommunications carriage.

4. Consumer Protection, Rights, and Accessibility

4.1 Are further improvements pertaining to consumer protection, rights, and accessibility required in legislation?

4.1 The consumer interest should be embodied as a core objective of the new *Telecommunications Act* and as the key criterion in making decisions under what is now Part III of the current Act.

5. Safety, security and privacy

5.1 Keeping in mind the broader legislative framework, to what extent should the concepts of safety and security be included in the *Telecommunications Act/Radiocommunication Act*?

5.1 The issues of safety, security and privacy are critical to the interests of Canadians, whether individuals, business or governments. Both security and safety should be added to the objectives of the Act, while a legislative mechanism should be found to ensure that the telecommunications regulator is able to cooperate with the Privacy Commissioner on privacy issues.

6. Effective Spectrum Regulation

6.1 Are the right legislative tools in place to balance the need for flexibility to rapidly introduce new wireless technologies with the need to ensure devices can be used safely, securely, and free of interference?

6.1 It could be that a revised *Radiocommunication Act* could provide specifically for a requirement that devices be secured to some appropriate standard. However, manufacturers would not likely build models merely for the Canadian market. Only concerted efforts by

regulators of major national markets are likely to have the power to ensure that any particular security standard is met.

The *Radiocommunication Act* already has the tools to monitor the security of devices sold in Canada and force withdrawal of devices that may not met safety standards. It is a matter of continued testing to ensure that products in the market are safe.

A constant problem is the after-market modification of radio devices such that their use may engender safety or interference issues. It would be appropriate to legislate in that respect, but enforcement will remain a very difficult task.

7. Governance and Effective Administration

7.1 Is the current allocation of responsibilities among the CRTC and other government departments appropriate in the modern context and able to support competition in the telecommunications market?

7.1 As ISCC has argued above, there needs to be a separation between broadcasting regulation (content) and telecommunications regulation (carriage). For the latter functions, there needs to be an ability to share information and to seek advice from other centres of expertise. ISCC has also argued that some spectrum management functions should be transferred from ISED to the telecommunications regulator. Additionally, there needs to be legislation that actually addresses spectrum management and spectrum planning.

7.2 Does the legislation strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?

7.2 ISCC considers that the current powers of the Governor in Council in respect to the telecommunications regulator have proved to be effective and to minimally impair the ability of the CRTC, as telecommunications regulator, from making independent, evidence-based decisions. ISCC does not believe that major changes need to be made to the power of direction, those of review, nor of the power to require reports on issues of public interest.

8. Broadcasting definitions

8.1 How can the concept of broadcasting remain relevant in an open and shifting communications landscape?

8.1 The current definition of broadcasting is overbroad. It has led to the CRTC vastly expanding its jurisdiction to include internet audio-visual content services. This regulatory overreach must be reined in if Canadians are to participate in the

global content market. The definition should be modified to exclude CRTC jurisdiction over all online, on-demand audio-visual content.

8.2 How can legislation promote access to Canadian voices on the Internet, in both official languages, and on all platforms?

8.2 ISCC sees no useful way in which legislation will promote access to Canadian voices on the internet. This is a matter for governmental funding and encouragement, not for legislative mandate.

9. Broadcasting Policy Objectives

9.1 How can the objectives of the *Broadcasting Act* be adapted to ensure that they are relevant in today's more open, global, and competitive environment?

9.1 As suggested above, many of the objectives now imposed on the licensed broadcasting system can be reframed as the criteria for public assistance to the production of uniquely Canadian content.

9.2 Should certain objectives be prioritized? If so, which ones? What should be added?

9.2 The objectives that should be given priority are those that relate to Canadian scripted programing – which has always proved the most difficult to fund and for which to find broadcasting windows.

9.3 What might a new approach to achieving the Act's policy objectives in a modern legislative context look like?

9.3 Achieving the objectives of the *Broadcasting Act* in the new environment means how to use private funding and public support and tax incentives to produce uniquely Canadian content.

10. Support for Canadian Content and Creative Industries

10.1 How can we ensure that Canadian and non-Canadian online players play a role in supporting the creation, production, and distribution of Canadian content?

10.1 Canadian and non-Canadian online actors play a threefold role in supporting the creation, production and distribution of Canadian content. First, they invest and distribute Canadian content. Second, they compete for profitable content, forcing Canadian private sector broadcasters to seek out opportunities to invest in Canadian content that may, through domestic and international distribution, return profits. Third, by undermining the market for Canadian distribution rights to foreign productions, private sector broadcasters are forced to develop unique Canadian offerings. ISCC views these competitive factors as real and ample contributions to the health of the Canadian broadcasting system – which has too long been at the mercy of

private broadcasters who have been, at best, reluctant investors in Canadian production – especially in scripted programing.

10.2 How can the CRTC be empowered to implement and regulate according to a modernized Broadcasting Act in order to protect, support, and promote our culture in both official languages?

10.2 ISCC believes that the role of the broadcasting regulator should be less about regulation and more about support. If the Government wishes certain kinds of programs to be developed within Canada, then it follows that governmental fiscal and taxation policies be increasingly the method by which those policy goals be attained. A significant policy question will be whether domestic or foreign online services will be eligible for subsidies or tax incentives for the production of Canadian content that meets government standards. If the objective is to ensure the production and distribution of uniquely Canadian content, as opposed to propping up the licensed broadcasting system, then it would follow that online content providers should be eligible for the same subsidies and incentives as are available to licensed broadcasters.

10.3 How should legislative tools ensure the availability of Canadian content on the different types of platforms and devices that Canadians use to access content?

10.3 ISCC believes that resort to legislative tools to ensure that Canadian content is available on the different internet based platforms and devices that Canadians use to access internet content would be counter-productive, beyond the reach of Parliament, and a serious infringement on free expression. Other tools are available to the government to ensure that Canadian content is available and findable on the internet – those should be the priority of the governmental policy.

11. Democracy, News, and Citizenship

11.1 Are current legislative provisions sufficient to ensure the provision of trusted, accurate, and quality news and information?

11.1 No legislative provisions will ensure the provision of trusted, accurate and quality news and information. No agreement can be reached on what those terms may mean now or in the future. The guarantee for a healthy marketplace of ideas lies not in legislative measures but in the free play of ideas – both those of the soft centre and those of the harder fringes. No legislative measure can hope to combat the manipulation of opinion or platforms. The protection of the public lies in an educated and informed public.

11.2 Are there specific changes that should be made to legislation to ensure the continuing viability of local news?

11.2 No legislative measure can ensure the viability of local news. Only by strengthening the economic supports for local news can its viability be made more secure. Needless to say,

economic supports for particular news outlets presents its own problems in terms of invidious influences on news and editorial content.

12. Cultural Diversity

12.1 How can the principle of cultural diversity be addressed in a modern legislative context?

12.1 Cultural diversity can be one of the principles embedded in the support mandate for Canadian content given in its legislative objectives to the broadcasting regulator. While a legislative commitment to cultural diversity may be an important signal to the broadcasting regulator and the broadcasting industries, the most significant support for cultural diversity will come from choices surrounding the conditions that must be met to receive the benefit of direct and indirect government financial support for diverse programing.

13. National Public Broadcaster

This issue is beyond the mandate of ISCC.

14. Governance and Effective Administration

14.1 Does the Broadcasting Act strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?

ISCC takes no position on this question.

14.2 What is the appropriate level of government oversight of CRTC broadcasting licencing and policy decisions?

ISCC takes no position on this question.

14.3 How can a modernized Broadcasting Act improve the functioning and efficiency of the CRTC and the regulatory framework?

A new *Broadcasting Act* should ensure that the telecommunications regulator is a distinct body from the broadcasting regulator. The broadcasting regulator should be mandated to consider new methods for the award of broadcasting licences. For instance, the creation of performance conditions of licence and then the auctioning of the licence to the highest bidder could be considered. This would eliminate the time consuming and contentious process of regulatory beauty contests by which broadcasting licences are currently awarded. It might help ensure that the conditions of licence are actually followed by the successful licensee.

14.4 Are there tools that the CRTC does not have in the Broadcasting Act that it should?

The broadcasting regulator should have the ability to auction licences, and maximum flexibility to lighten the compliance and regulatory burden placed on licensees.

14.5 How can accountability and transparency in the availability and discovery of digital cultural content be enabled, notably with access to local content?

ISCC does not believe that this to be a legislative issue, but a technological one, and readily solved by technical means and standards formation.

***** END OF APPENDIX 1*****

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Submission to the Legislative Review Panel

APPENDIX 2

Recommendations

Telecommunications Act

Objectives

1. ISCC would like to suggest the following to replace the current s. 7 of the *Telecommunications Act*:

Objective

The objective of this Act is to ensure that Canadians have access to a robust telecommunications industry that delivers world-class telecommunications services using world-class infrastructure to meet the communications needs of all classes of users.

Guiding Principles

In exercising its powers under Part III of this Act, the Canadian Telecommunications Authority must:

a. place emphasis on the interests of business and individual consumers of telecommunications services;

b. have regard to the safety and security of telecommunications infrastructure and of the users of telecommunications services;

c. ensure that internet service providers treat all data on the internet equally, and not discriminate or charge differently by user, content, website, platform, application, type of attached equipment, or method of communication;

d. rely to the extent possible on market forces to provide telecommunications services;

e. ensure that quality telecommunications services are available at affordable prices in all regions of Canada; and,

f. foster the development of wholesale and secondary markets for telecommunications services. (para. 24)

Need for an Expert Regulator

2. The telecommunications regulatory function should be separated from the broadcasting regulatory function. (para. 26)

3. The Act should either establish a self-standing telecommunications regulatory agency or a telecommunications regulator that is functionally separate from broadcasting regulation within the CRTC. (para. 27)

4. Appointment of telecommunications regulators should require a background in engineering, managing networks, economics, competition policy, law, or computer security. Other regulators should be appointed who have experience in the provision of internet-based services to the public. (para. 28)

5. The telecommunications regulator should have a Chief Technology officer, whose responsibility would be to provide the regulator with up to date perspectives on technical issues that come before the regulator. The Chief Technology officer should assist the regulator to exercise a true challenge function where technological issues are said to prevent the implementation of regulatory objectives. (para. 29)

Passive Infrastructure

6. The telecommunications regulator should be able to direct that access to infrastructure necessary be afforded to telecommunications carriers, and determine the terms and conditions, including the price at which access must be given. This issue will be particularly important as cell sizes shrink with high-bandwidth technologies such as 5G, and physical emplacements of equipment multiply a hundredfold. (para. 30)

Content of Messages

7. Section 36 should be amended to set out the limited circumstances under which the CRTC could consent to a carrier request to alter the meaning or purpose of a communication or control the meaning of a communication: those purposes must be confined to the statutory objectives of the Act. If none can be found, then the provision should become an absolute prohibition. (para. 32)

Confidentiality of Information

8. The Act should be amended to provide a narrower scope for the designation of confidential information. (para. 32)

9. The Act should also provide that experts and counsel for a party to a hearing be given access to confidential information so long as it is not disclosed to the party itself (modelled on the *Canadian International Trade Tribunal Act*). (para. 35)The Act should permit the regulator to share information with other government departments or agencies where the CRTC might require their expertise (as, for example, to obtain advice from CSE on cyber security, or to jointly consider a

telecommunications merger with the Competition Bureau). Such sharing would require that the receiving agency keep that information confidential in the same manner as must the telecommunications regulator. (para. 36)

Independent Information Gathering

10. A revised *Telecommunications Act* should provide explicitly that the telecommunications regulator can seek both governmental and third-party information that may assist the regulator in deciding any matter before it. (para. 38)

Competition

Relationship to Commissioner of Competition

11. The telecommunications regulator must be able to share information with the Commissioner of Competition, but further, the regulator should be able to seek the opinion of the Commissioner of Competition on competition-related issues. The request for such opinion and the advice provided by the Commissioner of Competition should be on the public record. The telecommunications regulator would not be bound by the opinion of the Commissioner of Competition, or accept it only partly, but would be required to explain publicly any divergence from the opinion of the Commissioner. The present provisions dealing with mergers of banks as found in the *Bank Act* or mergers of airlines as found in the *Canada Transportation Act* provide analogous provisions that serve as a model. Issues of this nature might, for instance, include assessing the adequacy of competition for the purposes of exercising the power of forbearance, or assessing the decline of competition such as to terminate a forbearance order. (para. 41)

Wholesale Access

12. It should be an explicit objective of the Act to encourage competition and innovation by ensuring there are healthy wholesale and resale markets. (para.43)

13. The regulator should be directed to ensure that technical barriers to wholesale and resale must be overcome, access facilitated, and any new service offered by telecommunications common carriers should be offered only when access by wholesale customers and resellers has become technically feasible and enabled. (para. 45)

14. The regulator must abandon the notion that facilities-based competition is the only way to create a competitive market for telecommunications services. (para.48)

Structural Separation

15. Common carriage should be required to be carried out in a corporate entity that is structurally separate from any vertically integrated, or otherwise affiliated, broadcasting or online content services. This would protect telecommunications

customers who may otherwise be subsidizing the carriers' affiliated businesses. (para. 51)

16. The telecommunications regulator should be explicitly empowered to order structural separation between common carriage network services and other aspects of a common carrier's business – whether broadcasting and online content, or local retail telecommunications services. (para. 53)

Net Neutrality

17. Net neutrality should be a matter of legislative policy and not of regulatory policy that can changed at the discretion of the regulator or by direction of the Cabinet. We have above suggested wording in the statement of objectives of the new *Telecommunications Act*. (para 54)

Consumer Interests

18. The objectives of the Act should make specific mention of the critical importance of regulating in the interest of both business and individual consumers of telecommunications services. We have suggested wording in statement of objectives of the new Telecommunications Act. (para. 56)

Safety, Security, and Privacy

19. The Act should have an objective of ensuring the safety and security of communications and communications infrastructure. (para. 58)

20. The Act should give the CRTC the power to set standards of security of networks and to oversee their compliance. (para. 59)

21. Privacy is assigned to the Privacy Commissioner, clear mechanisms must be established to permit the telecommunications regulator and the Privacy Commissioner to cooperate on privacy issues involving the internet as well as to provide that rulings by the Privacy Commissioner may be applied by the telecommunications regulator. (para 60)

Radiocommunication Act

Spectrum Management Legislation

22. ISCC recommends that spectrum management legislation be introduced to deal with the planning of spectrum use, the allocation of frequency blocks for specific purposes, the award of spectrum licences by auctions, the imposition of terms and

conditions on spectrum licences, and the termination of licences and the refarming of outstanding spectrum to other uses. (para. 69)

23. Spectrum management legislation could be either self-standing, or merged into a new *Telecommunications Act*. (para. 70)

24. The spectrum planning and management functions should be confided to the telecommunications regulator. (para. 71)

Competition

25. Wholesale access to incumbent wireless networks should be mandated in the new spectrum management legislation or the new *Telecommunications Act*. (para. 72)

26. Matters such as tower sharing, access to poles and rights of way, spectrum hoarding, and anti-competitive behaviour should be specifically addressed in the powers given to the telecommunications regulator in the new *Telecommunications Act*. (para 73)

Secondary Spectrum Markets

27. A forward-looking and market-oriented Act would include such features as:

28. Ensuring that the sale or leasing of radio spectrum bands and their subdivision by any means that makes sense to the parties, including by geography and time are effective without regulatory approval or intervention;
29. Providing that spectrum assets can be secured and foreclosed in accordance with current financial practices ; and,
30. Require the registration of transfers and security interests in spectrum licences in order to be effective against third parties. (para. 75)

Fallow Spectrum

31. Legislation dealing with spectrum planning and management must address mechanisms to discourage spectrum hoarding and create incentives for the transfer of underutilized spectrum to more intensive or economically important uses. The legislation should contemplate the recycling of spectrum now used for broadcasting to other uses as technology either reduces the spectrum needed for broadcasting

purposes, or other technologies become the primary means for delivering scheduled programing. (para. 77)

Radiocommunication Act

32. Apart from the creation of discrete legislation to deal with spectrum planning and management, the present *Radiocommunication Act* can largely be retained. (para. 78)

33. ISCC believes that responsibility for implementing the *Radiocommunication Act* should remain under the responsibility of the Minister for ISED. (para. 80)

Encrypted Programming Signals or Network Feeds

34. Paragraphs 9(1)(c) and (d) of the *Radiocommunication Ac*t that create the offence of decrypting encrypted programming signals and rebroadcasting decrypted programming, together with the right of civil action that flows from those provisions (sections 18 and 19). These provisions do not deal with true radiocommunication issues: they are properly matters of copyright infringement and enforcement. The provisions should be moved to the *Copyright Act* in the course of the current review of that Act. (para. 80)

Governance and Effective Administration

35. The most consequential institutional reform would be the modification of the current combined regulator to provide two specialized tribunals: one for broadcasting and the other for wireline and radio-based telecommunications common carriage. (para 82)

36. Second, the complexity of the issues that are now and that will in the future to be faced by the telecommunications regulator requires the telecommunications regulator seek the expertise of other agencies of government in dealing with issues that come before it. New legislation should provide for that communication. (para. 83)

37. The telecommunications regulator should not be a law enforcement agency. Responsibility for enforcing Unsolicited Communications, Telemarketing, and

CASL provisions should be conferred on the Competition Bureau or a specialized branch within ISED. (para. 86)

Broadcasting Act

General Recommendations

38. The broadcasting regulator should increasingly be the gateway to governmental policies and programs aimed at incentivizing distinctly Canadian content. (para 89)

39. It should be the role of the broadcasting regulator to:

    a. distribute public funds for the support of Canadian content;

    b. administer an expanded regime of tax credits, refundable tax credits and tax remissions for investment in qualified Canadian content;

    c. promote Canadian content domestically and abroad; and,

    d. aid the discoverability of Canadian content on the internet. (para. 90)

Definitions

40. It is critical that broadcasting be defined so as to exclude purely online on-demand audio-visual content. (para 90)

Broadcasting Policy Objectives

41. Many of the existing objectives can be imposed on the CRTC to serve as guidelines for the kind of content it should be supporting. The objectives thus become the

criteria for determining who gets state support or the benefit of generous tax credits to help assist the production of Canadian content. (para 101)

Support for Canadian Content and Creative Industries

42. Neither domestic nor foreign online content services should be subject to *Broadcasting Act* or to the contribution requirements that have evolved under that regulatory scheme. (para. 105)

Democracy, News and Citizenship

43. The remedy for the kinds of manipulations that we have seen displayed on online platforms such as Facebook, Instagram or Google is digital literacy rather than digital censorship. (para.106)

44. ISCC believes that modest investments of public funds in public digital education, perhaps combined with support for news gathering and disseminating organizations, would be superior to legislative mandates. (para. 108)

Cultural Diversity

45. It is open to the broadcasting regulator to open up funding or incentives to what are seen to be representative organizations of particular cultural communities. (para. 110)

Governance and Effective Administration

46. The most important step that can be taken toward better governance and effective administration of any future *Broadcasting Act* would be the creation of a distinct broadcasting regulator – separate from the telecommunications regulator. (para. 112)

47. The future *Broadcasting Act* should establish a mechanism to permit the full deregulation of specialty services. That mechanism should be forward looking to ensure that, as over-the-air services move to alternative delivery mechanisms, they too can be relieved of regulatory obligations. (para. 113)

48. This legislative review also provides an opportunity to explore more effective means of awarding licences, giving a greater role to market forces. (para. 114)

49. Provision should be made in the new *Broadcasting Act* for consultation with the Commissioner of Competition, including the disclosure of information to the

Commissioner and the publication of opinions or advice received from the Commissioner. (para. 115)

Interim Measures

Wholesale Access to Wireless Services

50. The Legislative Review Panel should, as an interim measure, recommend that the Governor in Council exercise its power of direction under section 8 of the *Telecommunications Act* to require that the CRTC approve wholesale access by mobile virtual network operators to the facilities and services of incumbent facilities-based wireless carriers. (para. 117)

Report on Mandated Access to Wholesale Services

51. Governor in Council, under section 14 of the *Telecommunications Act*, should direct the CRTC re-examine its framework policies for mandated access to wholesale telecommunications services, particularly the extent to which that framework

    a. advances policy objectives (c), (f), and (h) of the *Telecommunications Act*; and,

    b. deters economically efficient entry that would otherwise enhance competition and more effectively protect the interests of business and individual consumers of telecommunications services. (para. 119)

Standstill Direction

52. The Governor in Council should, under the authority of section 7 of the *Broadcasting Act*, direct the CRTC not to extend broadcasting regulation in any form to online services pending the coming into force of a new *Broadcasting Act*. (para. 120)

Report on Vertical Integration

53. The Governor in Council should order the CRTC, under section 15 of the *Broadcasting Act* and section 14 of the *Telecommunications Act*, to inquire into, and report back on, the state of vertical integration and consolidation of broadcasting undertakings and telecommunications common carriers in Canada. (para. 122)

54. The CRTC should be directed to seek the advice of the Commissioner of Competition with respect to this report, and that advice should be published as an annex to the report of the CRTC. (para. 123)

***** END OF APPENDIX 2 *****

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