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October 12, 2016

Honourable Mélanie Joly
Minister of Canadian Heritage
House of Commons
Ottawa, ON K1A 0A6

Dear Minister:

Re: Public Consultation on Canadian Content in a Digital World - Submission of Unifor

The scope of this policy review can appear unmanageable at first. Unifor applauds the audacity of the undertaking.

Our $50B media industry stretches across multiple platforms, regions, localities, languages, peoples, and ethnicities throughout the country. You have said that "everything is on the table" in reference to established policy and legislation.

The challenge transfixing everyone's attention is the future direction of commercially successful Canadian media content. To that end, your Consultation Paper "Focussing the Conversation" has emphasized the success of high-quality content that travels well to foreign markets. Indeed, a recent report on the future of streaming content suggests this is where commercial opportunity may be found in our digital future.[1]

Successful business models for Canadian content are the foundation of any sound public policy whose primary goals are cultural sovereignty and a robust Canadian news media.

Yet we must keep in mind that Canadian policy makers of all political stripes —even the former Harper government— have never pursued unregulated media consumption as a chief policy goal. That is because the Canadian media landscape, left to natural continental market forces, would be overwhelmed by a tide of American news, information and entertainment products. We have always regulated commercial media, and where needed we have always supplemented commercial media with government support.

[1] "The Future of Television" (September 2016), a report by the Boston Consulting Group, pp.18-28.

Accordingly, Unifor believes it is the task of Canadian policy makers to uphold and strengthen our long held commitment to Canadian media content in its current state to a future dominated by the online distribution of news, information, and entertainment.

Why we regulate Canadian media:

The technology-driven changes to our media industry do not mean we should abandon historical "Canadian content" policy goals where they appear in tax law, government budgets, and especially the Broadcasting Act. If anything, now we have the opportunity to clarify the policy goals, and to re-fashion our ways of reaching them in the digital age.

Unifor believes that the fundamental policy goal is to support production and distribution of high quality Canadian news, arts and entertainment that promote an informed citizenry, and to allow for the continued expression of Canadian cultural identity.

What has happened is that online media distribution —which we are currently calling "Over The Top" (OTT)— has disrupted the broadcasting business model. The internet has similarly disrupted newspapers and magazines.[2]

As of today, government intervention supporting Canadian content, including news, has been mostly confined to television: the current tools are film production tax credits, CBC funding, and also CRTC regulations or licence conditions pertaining to exhibition, revenue, and expenditure.

Television regulation was originally based on the premise of limited public airways, i.e. a scare resource. Everyone agrees OTT has changed that.

But if OTT has solved the shelf space problem, policy makers still need to keep in mind three important points:

1) The "finite shelf space" became a very long shelf indeed thanks to cable television. Nevertheless foreign domination of the Canadian broadcasting market was no less of a threat in the 500 channel universe than it was in the era of the rabbit-ear antenna.

2) The real problem we continue to face is the overwhelming economy of scale that US producers enjoy over Canadian producers. Left to natural economic forces, that scale allows the US to export a large volume of fully monetized programming into Canada's small English speaking market. That market domination is expressed not just by Canadians' consumption of American media, but by the loss of Canadian advertising and subscriber revenue to foreign media creators.

3) The threat of that foreign domination of Canadian markets by American media has not diminished with OTT. As noted by the recent report of the Boston Consulting Group,[3] OTT is exponentially increasing market share and is dominated by American tech giants who enjoy enormous advantages of economy of scale.

[2] Note the recent (September 2016) reduction or elimination of print editions of Rogers' major magazines. http://www.theglobeandmail.com/report-on-business/rogers-retreats-from-print-in-radical-media-division-overhaul/article32163670/. The Canadian online magazine market is itself under threat from Amazon's foray into the the market for bundled digital magazine content.

[3] "The Future of Television," page 8.

The Media Industry's ongoing contribution to Canadian content:

Governments are the biggest financial contributors to Canadian media content, chiefly through approximately $900M[4] of provincial and federal tax credits to the film industry and the $1B annual funding for the CBC.[5] This commitment to Canadian content should continue, if not strengthen.

Similarly, the television industry has been expected to contribute to Canadian media content by grace of a series of CRTC regulations and rulings. This sharing of corporate wealth comes under two headings. First, the 5% revenue tithe on cable companies ("broadcasting distribution units", or BDUs) worth about $450M[6] annually, dedicated to the Canadian Media Fund and local programming. Secondly, the obligation of major broadcasters to spend $3B[7] annually on Canadian content ("Canadian programming expenditures" or "CPE.")

The policy basis for industry contribution is found in the privileged competitive position of major Canadian media companies. Thanks to a remarkable series of corporate acquisitions over the past 15 years, almost all of the major BDUs and broadcasters are owned by four "vertically integrated" ("VI") media companies. BCE, Québecor, Corus/Shaw, and Rogers each operate as broadcaster (content creator) and distributor (content seller). Together they control 80% of the television market. Importantly, these companies are shielded by foreign ownership laws in our media sector.

Accordingly, a policy *quid pro quo* is self evident: large media companies contribute financial support for Canadian content in exchange for the privileged competitive advantage that comes from Canadian ownership rules and government tolerance of a high level of corporate concentration among Canadian media companies. Being big fishes in a small pond is a money-maker, and we expect large Canadian media companies to share the wealth.

Nevertheless these large media companies, being profit-seeking ventures, occasionally disappoint us. The Chair of the CRTC, Jean-Pierre Blais, recently had this to say about the shortcomings of industry contribution to local television news:

> *Although it grabs fewer headlines, the reduction in funding of local television stations by major broadcasters also gives me cause for concern. Media moguls are indeed allowed to be worried about profits, but both the public and private shareholders of broadcasting assets have a duty to ensure that news reporting and analysis continues to be properly funded. This is to ensure that Canadians, as citizens, understand events occurring around them every day. An informed citizenry cannot be the sacrificial offering on the altar of corporate profits or deficit reduction.*[8]

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[4] In 2014/2015 it was $886M. http://cmpa.ca/sites/default/files/Profile%202015%20%28English%29.pdf
[5] Also provincial support for provincial broadcasting authorities such as TVO/TFO in Ontario.
[6] Based on $900M revenue for non-exempt Cable, IPTV and DTH distributors in 2014/15.
http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2015/cmr4.htm#a43a
[7] Including CBC television. See note 6 above for the reference.
[8] Public Remarks dated January 29, 2015, Jean Pierre Blais. http://news.gc.ca/web/article-en.do?nid=924999

Unifor has often cited these comments. The CRTC's final rulings on compelling greater industry support for local television news have, in our opinion, been a mixture of success and disappointment.[9]

For the purposes of this public consultation, we want to emphasize the larger point: industry support for Canadian media content is important and remains fully justified as public policy.

Regulatory mistakes not to be repeated:

In rethinking policy, it is useful to review recent policy errors so as to avoid them in the future and to find suitable corrections. Unifor regards many of the changes made by the CRTC in the recent Let's Talk TV (LTTV) process to be severely harmful to Canadian content.

LTTV was driven by populist consumer politics of the former government; in fact explicitly so. For example, the CRTC's repeal of the simultaneous substitution policy for a single show, Bell Media's broadcast distribution of the Super Bowl, was based on a handful of public complaints regarding the inability to view slickly-produced US commercials. The decision was made without regard to Bell Media's $80M four-year investment in Canadian distribution rights. Aside from the significant damage to Bell Media's reasonable business expectations, this unprincipled decision was a major contributor to 400 Bell Media layoffs in November 2015.

The same populist impulse (delivered in the 2013 Throne Speech and then affirmed by a cabinet directive to the CRTC) was behind the decision to implement "pick and pay."

The public debate on the wisdom of the pick-and-pay decision is well known to the Minister. For those that followed the CRTC hearings closely on this matter, it is well known that Unifor and other participants submitted the *only* impact analysis of pick and pay ("the Miller study")[10] upon the future revenue of regulated Canadian media distributors and broadcasters. The projected loss of cable revenue, Canadian programming expenditures, and jobs by 2020 was dismissed by the Chair in the CRTC's written reasons, despite the absence of any other impact analyses (including any undertaken by the Commission). A year later, Unifor and others submitted a refreshed analysis ("Nordicity/Miller")[11] to the CRTC based on the suite of LTTV regulatory changes actually implemented by the Commission, projecting a $399M loss in Canadian Programming Expenditures by 2020. While the CRTC asked a series of questions about the study's assumptions, the projections were again ignored in the Commission's written decision.

[9] CRTC decision 2016-224.

[10] "TV Environmental Scan," (June 2014), Peter Miller.

[11] "Canadian Television 2020: Where Does it Go Now," Nordicity-Miller (November 2015). The projection is a $399M LTTV-related loss of Canadian Programming Expenditures; a direct GDP impact of $803M and a direct loss of employment in the sector of 6,830 full time equivalent jobs. A companion report on Local TV was published at the same time: "Near Term Prospects for Local TV in Canada" (November 2015)

For those who remain skeptical about the projected decline of BDU revenue triggered by the CRTC's LTTV policy, it is important to remember that the funding of Canadian Content through contributions to the Canadian Media Fund, mandatory Canadian Programming Expenditures for broadcasters, and subsidies to local programming are directly linked to a percentage of those revenues. As those revenues decline as a direct result of pick and pay, so will funding for Canadian media content *unless it is replaced by something else.*

In addition to the revenue and funding impacts of pick and pay, the same CRTC ruling eliminated the "preponderance rule" that required consumers to select Canadian channels totalling at least 51% of their cable subscription.[12] While current subscriptions to *regulated BDU-based* Canadian channels are much higher than 51%, they are highly unlikely to remain so in a future that combines pick and pay channel selection with unregulated OTT streaming.

This brings us to the CRTC's most serious error in LTTV: the dogged refusal to reconsider the New Media Exemption Order (NMEO).

Over the past decade, the CRTC has repeatedly deflected the policy imperative to bring internet streaming into the regulated system by suggesting it was complementary rather than competitive with regulated BDUs and broadcasters, i.e. that it was not capturing significant market share. This is palpably untrue now, as recent data from the Boston Consulting Group has stated.[13]

As it stands today, foreign OTT providers such as Netflix have approximately 3.5 million Canadian subscribers, evade sales tax,[14] have no obligations to produce Canadian content, and make no contributions to the Canadian Media Fund or local programming.

To rub salt into the policy wound, the Commission decided in LTTV to "level the playing field" between Canadian OTT products and Netflix by exempting those Canadian OTT products like *CraveTV* and *Shomi* from Canadian content obligations. In less than a year, Rogers launched high profile promotions to its internet subscribers to enroll in Netflix, the competitor to its own media division. Shortly afterwards, Rogers and Shaw Media withdrew their *Shomi* OTT product from the market because it could not compete with the overwhelming market scale of Netflix.

[12] This decision remains of questionable legality given the provisions of section 3(1)f of the Broadcasting Act.

[13] Boston Consulting Group's "The Future of Television" and also John Anderson's CCPA study "An Over the Top Exemption," (June 2016). Netflix's market share aside, aspiring video streaming companies on both sides of the 49th parallel are devising business plans to distribute conventional television content outside the regulated system. Last week, Bell Media launched a law suit against VMedia's business plan to retransmit (without permission) Bell Media's conventional television content from over-the-air and specialty stations. In the US, the FCC is contemplating forcing cable companies to provide all of their content on streaming applications for which set-top boxes are not required. See Greg O'Brien's emphatic assessment of the threat to Canadian cable revenues and its impact on Canadian content funding unless the DMEO is rescinded. https://cartt.ca/article/analysis-how-fcc%E2%80%99s-set-top-box-rules-can-kill-canadian-television.

[14] Because the federal government elects not to collect it at source or require Canadian consumers to pay it. See explanation in John Anderson, "An Over the Top Exemption," (June 2016) pp.16-17. https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/06/Over_the_Top_Exemption.pdf

This policy mess should not distract us from the most salient point: the Commission's decision on pick and pay is a self-inflicted drain on the revenue stream supporting Canadian content; the Commission's continuation of the NMEO deprives us of the natural replacement of that revenue.

The only conclusion for policy makers responsible for both Canadian media policy and the public treasury is that government may be forced into either standing by while Canadian content and local news wither away on their watch, or else be compelled to commit significant public dollars to make up the difference.

Why we need to intervene to save news, including "print" journalism

Public policy impacting our media has long been dominated by video and broadcasting concerns.

Comparatively, there has been little public policy in regard to print journalism for newspapers and magazines: the most significant has been the Income Tax provisions prohibiting Canadian businesses from deducting the cost of advertising in foreign-owned and controlled media being distributed in Canada. Modest as it is, the Income Tax policy is a clear acknowledgement of the importance of protecting a Canadian-owned and controlled print journalism from potentially overwhelming American competition.

It is not necessary to recite a litany of losses, layoffs, and closures in print media to make the point.[15]

From a public policy perspective, it is helpful to be clear about the nature of the problem that urgently needs to be addressed. Unifor submits that the nature of the problem is the permanent market failure,[16] not merely the temporary market disruption, of "serious journalism." We define serious journalism to mean the coverage of local, regional and national news that is necessary to informed voter participation and to hold powerful institutions to account.

Serious journalism has been synonymous with print journalism, long the home of the most well-resourced and in-depth journalism. While television news has excelled at breaking news and local reflection, print journalists do almost all of the investigative journalism (although CBC has ramped up its efforts on this as well).

All of this is at existential risk.

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[15] "Impact of Digital Technology on the Canadian Newspaper Industry," Nordicity (2015), p.15.

[16] "Permanent market failure" is shorthand for how almost all observers of the newspaper industry would describe the market situation beginning in 2011 and continuing through the present day: an uninterrupted downward slope of advertising revenue (mostly double-digit percentages, annually), employment footprint, and news coverage capacity, coupled with a stubborn reluctance of digital ad rates to reflect anything greater than 25% of print ad rates. No observers are stating with any confidence where and how this slope may level off in terms of revenue, employment, and coverage. While some media companies continue to hold out hope to remain the "last man standing," there is likely a consensus that the local and regional news coverage provided by urban dailies is approaching an existential point on the slope.

The overwhelming case for "failure" over "disruption" of print media by digital news is now verified in expert detail by the authors of a recent Nordicity study.[17] In addition, we note some telling statistics cited in John Anderson's recent study[18] on OTT streaming broadcasting where he observes that US tech giants Google (50%) and Facebook (14%) totally dominate the Canadian digital advertising market while the print-based Torstar follows at a puny 3.3% (*Postmedia* and the *Globe and Mail* are even less).

The Anderson study also points out that the all-media advertising market share of Canadian newspapers has fallen to a 13% (from 38% in 2006), compared to 34% for the internet content providers and 30% for television. And those figures are from two years ago.

Even if there is any room left for debate on "failure *vs.* disruption," our nation cannot afford to gamble that it's all rosy just over the digital horizon. The risk to democracy of the Canadian news industry collapsing is too high, even in the short run.

The old media model was based upon newspapers and television being rich enough to fund newsrooms large enough to do serious journalism, both in breadth of topic and depth of investigation. Newspapers in particular punched above their weight in terms of drawing advertising dollars because they were by far the dominant media, allowing them to leverage high advertising rates.

That's all gone now. Over the past 20 years, the industry has adjusted to the gradual erosion of that advertising dominance by reducing editorial coverage, contracting out jobs, introducing labour-reducing technological change, and through the "scale" cost-savings generated by the corporate consolidation of media. On the last point, Unifor believes there are few opportunities for efficiencies remaining through further corporate consolidation (e.g. the remaining profitable media companies like Bell Media buying up the Postmedia or Torstar newsrooms) and in any event it is highly inconsistent with democratic values. Allowing large American or British media companies to snap up Canadian media is an even worse idea.

In sum, the disruption of the print business model by online content providers is permanent and dramatic. In fact it is approaching an existential moment. True, the Postmedia refinancing in July 2016 may have given us more runway. But the Torstar fortress walls have been breached with no clear path to recovery. Even the billionaire Thomson family is shedding journalists at the Globe and Mail. The decline in editorial staffing in both newspaper and television newsrooms is unmistakable.[19]

Nor should we take much comfort in the rise of social media journalism. Mostly video-driven opinion and issue advocacy, outlets such as the Young Turks, VICE or Al-Jazeera Plus are welcome additions to our media world because they engage younger citizens in politics. Despite the welcome addition of these new media sources, they generally do not broadcast

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[17] "Impact of Digital Technology on the Canadian Newspaper Industry," cited above.
[18] "An Over-the-Top Exemption," Canadian Centre for Policy Alternatives (2016)
[19] In addition to the data submitted to the Public Policy Forum regarding reduced editorial employment in print journalism, Unifor has submitted similar data to the CRTC regarding television editorial employment.

"serious journalism" as we define the news coverage that offers investigated, well researched, and balanced coverage of politics and powerful institutions.

Unifor also submits it would be naïve to count on the emergence of an ecosystem of professional-amateur and amateur hyperlocal digital news websites to replace the capacity for serious journalism that properly financed print and TV newsrooms represent.

Equally, we cannot for a moment expect or desire the CBC to fill the void.

Minister, we cannot hold elected representatives and powerful private institutions to account when there is no journalist to cover the story, investigate it, analyze it, publish it or broadcast it.

Local Television News is also under threat:

The Minister will be well informed about the parallel crisis in local television news. A great deal of the CRTC's (and public's) attention has been drawn to the problem over the last decade:

- The regulatory and political drama over retransmission fees, followed by the Supreme Court of Canada's decision to strike down the CRTC's "fee for carriage" solution to declining broadcaster revenues (2009-2012);

- The CRTC's temporary band-aid solution of the Local Programming Improvement Fund (2010-2014);

- The submission of the Nordicity/Miller financial projections[20] to the CRTC suggesting that local TV stations in small and medium sized markets are in declining financial health, and indeed many small market stations are on the brink of going dark;

- The CRTC Chair's controversial declaration during the LTTV hearings that existing BDU contributions to community programming could be reallocated to local programming, which the Commission subsequently implemented[21] by diverting a portion of community cable TV programming dollars to small market stations and giving VI broadcasters *the option* to redirect a further slice of these community programming dollars to their own local TV stations.

The Commission has issued a notice of consultation for group licencing of television stations which will complete the implementation of its policy framework on local television.

[20] "Near Term Prospects for Local TV in Canada" (November 2015) cited above.
[21] CRTC Policy Framework 2016-224.

Policy Options for Achieving Public Policy Goals in a Digital World:

Minister, Unifor respectfully recommends the following policy actions:

(1) *In respect of local television news,* the Minister should continue to closely monitor the decline in local television news, paying special attention to the CRTC's annual monitoring reports.

(2) *Fair dealing*: good public policy allows creators to monetize the fruit of their labour. This points in the direction of retransmission rights for broadcasters; copyright amendments to facilitate that policy; and respecting the monetization of Canadian distribution rights, the opposite of what recently occurred in the CRTC's Super Bowl ruling.

(3) *Tax policy:* Unifor strongly supports the important efforts of federal and provincial governments to extend film production tax credits.

The government should also begin collecting sales tax on foreign OTT media. As well, the government should extend the advertising expenditure tax write-off from print to video (i.e. broadcasting and OTT).

Finally, the government should ease the tax burden in respect of philanthropic support for Canadian media. As a corollary to the last point, the Income Tax should also be amended to allow charitable status for non-profit news outlets.

(4) *Support for the CBC:* we cannot emphasize this point enough. We applaud the government's commitment in the last budget.

(5) *Strengthen industry contributions to Canadian content:* Unifor strongly urges the government to adapt the current regime of financial support for Canadian content, including local programming, by extending it to OTT (foreign and domestic) and by ending the New Media Exemption Order by legislation.

(6) *Compel OTT and ISP providers to pay their fair share:* the government should be innovative enough on the public policy front to capture a portion of the profit of ISP distributors of digital media. The policy argument in favour of this bold move is that foreign OTT distributors (in both text and video) and Canadian ISP distributors are the prime beneficiaries of the shift in audience from conventional media to digital media. It would be a minor burden to require them to share that profit with creators of Canadian content.[22]

(7) Dedicate a portion of the industry funding from recommendations (5) and (6) to provide a journalism innovation fund and/or an investigation journalism fund for which all

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[22] The government must resist the US tech giants' regulatory strategy of donating one-time or transitional support for Canadian news companies in making the transformation to digital. The policy rationale for such an idea is that serious journalism is only in a crisis of temporary market disruption, rather than permanent market failure, which is not true.

A "co-opetition" between the tech giants and Canadian news companies will predictably be cited by those US companies as "paying their fair share" to the digital news industry. We believe that if Google and Facebook enter the digital market as distributors through business partnerships with Canadian media companies, it will be because it's a good business opportunity for both parties. We don't need to turn it into an instrument of public policy because above all it will not solve the problem of digital advertising being Hoovered up by Google and FB to the permanent detriment of Canadian news organizations.

media outlets, large and small, would be eligible. Receipt of this funding should trigger "feet-on-the-street" requirements for editorial coverage.

(8) *Don't loosen foreign ownership restrictions on Canadian news media*: Unifor strongly opposes a greater role for foreign ownership or foreign capital in Canadian media. While it is true that we suffer from an acute shortage of willing and wealthy Canadian philanthropists to foot the bill for Canadian journalism, we very much doubt that there are any foreign philanthropists whose motives can be trusted. And we further believe that the market failure in Canadian news journalism cannot be attributed to a lack of "at scale" media moguls; rather, we are limited by an audience market of 35 million people who desire news about their nation and their communities, a scale problem that is not going to change no matter the size of the media company that wishes to dominate it.

Is all of this for nought if we sign the TPP?

Lastly, the government should not undermine its efforts to support Canadian media by signing the Trans Pacific Partnership trade agreement.

Recent policy analysis by Michael Geist warns of the straightjacket effect of agreeing to the TPP's rules that tilt against regulation of domestic media markets, enabled by enforcement provisions that will allow deep-pocketed American companies to demand removal of those regulations.[23] This is one more reason why the federal government should not ratify the TPP.

In Conclusion:

The current policy consultation appears to deal with news and, on the other hand, arts and entertainment, in parallel streams of review.

As the Minister will appreciate from the foregoing remarks, we see the entire range of Canadian media products in the digital world being challenged by the same problem: the domination of the digital advertising market by foreign media companies, associated with price degradation of digital advertising.

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[23] http://www.michaelgeist.ca/2016/03/the-trouble-with-the-tpp-day-50-the-case-against-ratifying-the-trans-pacific-partnership/

> "The Canadian position on trade and culture has been consistent for decades with successive governments requiring a full exemption for the cultural industries. The TPP adopts a different approach with exceptions to the cultural exception. That includes limitations on financial contributions for Canadian content development and measures restricting access to online video content. While there is some debate on the full implications of the TPP provision, it seems certain that attempts to expand the Cancon system would be challenged under the agreement…
>
> "The TPP's investor-state dispute settlement provisions have rightly attracted considerable attention given the risks that come with a process that gives companies the right to sue governments for hundreds of millions of dollars. The TPP ISDS rules do not meet the Canadian government's own standard for dispute settlement as reflected in the Canada – EU Trade Agreement. The CETA provisions include a clear affirmation of governmental power to regulate, an appellate process, and rules designed to ensure fairness and non-bias in settlement cases. The TPP does not contain equivalent provisions as it entrenches, rather than reforms, a flawed system. The potential costs of ISDS are huge…"

Unifor believes that government policy must address this growing problem of monetizing Canadian media products, whether it is in news, arts or entertainment. This means adapting our existing policy and regulatory tools for life in the digital age.

Respectfully on behalf of **Unifor**:

HOWARD LAW
Director, Media Sector

HL:ds:cope343