



April 13, 2021

Aimée Belmore
Clerk of the Standing Committee
on Canadian Heritage
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON, K1A 0A6
Delivered via email: chpc@parl.gc.ca

Dear Ms. Belmore,

Re: Bill C-10 – An Act to amend the *Broadcasting Act* and to make related and consequential amendments to other Acts

Shaw Communications Inc. (**Shaw**) appreciates the opportunity to submit this brief to the House of Commons Standing Committee on Canadian Heritage, as part of its study of Bill C-10 – *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*.

Shaw is a leading Canadian connectivity company. Through Shaw Cable, we provide broadcasting distribution services to customers across British Columbia, Alberta, Saskatchewan, Manitoba, and Northern Ontario. In addition, through Shaw Direct, we use our digital direct-to-home satellite network to serve Canadians anywhere in Canada, including in rural and remote areas, with a full slate of broadcasting services in both official languages, as well as Indigenous and other languages.

Shaw uses our advanced networks and platforms to deliver broad and affordable viewing choices to Canadians and to provide invaluable viewing prioritization and revenue to Canadian broadcasters and programmers in a manner that cannot be replicated by online undertakings. The importance of our network-based contributions is the foundation of our attached submission which, above all, urges the avoidance of asymmetrical treatment of online undertakings and traditional undertakings, as well as an appropriate reflection of broadcasting distributors' true contributions to Canada's broadcasting system.

Please do not hesitate to contact us if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Cynthia Rathwell".

Cynthia Rathwell
Vice President, Legislative & Policy Strategy
Shaw Communications Inc.

**SUBMISSION OF SHAW COMMUNICATIONS INC.
TO THE HOUSE OF COMMONS STANDING COMMITTEE ON CANADIAN
HERITAGE**

**Study of Bill C-10 – An Act to Amend the *Broadcasting Act* and other Consequential
Acts**

Introduction

1. Shaw Communications Inc. (**Shaw**) appreciates this opportunity to contribute to the important work of the House of Commons Standing Committee on Canadian Heritage (the **Committee**) in its study of *Bill C-10 – An Act to Amend the Broadcasting Act and other Consequential Acts*.
2. Shaw is a leading Canadian connectivity company whose role as a network provider is critical to the realization of the cultural objectives of the *Broadcasting Act* (the **Act**). Shaw Cable serves Canadians across Western Canada and Northern Ontario with cable and internet protocol television (**IPTV**) services, and Shaw Direct, one of Canada's two direct-to-home (**DTH**) satellite providers, offers video services across the country including in rural and remote areas, as well as Northern and Indigenous communities, in English, French, Indigenous and third languages. Shaw's satellite network also distributes television and radio services to small cable companies throughout Canada.
3. As a broadcasting distribution undertaking (**BDU**), Shaw's most important contribution to Canada's broadcasting system is to build and continuously advance robust networks (wireline and satellite), which deliver comprehensive and high-quality content, including a predominance of Canadian programming. Shaw invests billions of dollars annually, to build, expand, and continuously upgrade our converged hybrid fibre-coaxial wireline network, and to bring world-class television innovations to Canadian consumers, including our next-generation IPTV platform. Shaw has also invested billions of dollars to launch additional satellites and continuously improve the quality of Shaw Direct's services and the capacity of the satellite network.
4. Shaw's network investments and innovations are critical to the achievement of the Act's objectives and represent contributions that online undertakings will never replicate within Canada's broadcasting system. In particular, Shaw's cable, IPTV and satellite networks:
 - deliver a predominance of Canadian programming services and content, including a large number of independent services such as The Weather Network, Uvavut TV, and OUTtv, and a host of public interest, mandatory carriage services, including Aboriginal Peoples Television Network, Accessible Media Inc., and Cable Public Affairs Channel;
 - prioritize the carriage of local broadcasters and their news content;
 - enable broadcasters to monetize their domestic program rights through simultaneous substitution; and,

- provide Canadians across the country, including in rural and remote areas and the Far North, with comprehensive access to high-quality programming.
5. Notwithstanding our extensive investments and central role in supporting the regulated broadcasting system, since 2012, BDUs, including Shaw, have experienced accelerated subscriber losses¹ as a result of intense competition from online giants like Netflix and Amazon Prime. The competitive impact of these services on BDUs has been intensified by the significant regulatory and financial advantages that these online programming providers have enjoyed as a result of a regulatory approach that constrains BDUs through highly prescriptive obligations and hefty regulatory charges and fees, while affording a light-handed exemption-based regulatory approach to online media.
 6. The rapid pace of technological change will continue to radically disrupt Canada's broadcasting system and all facets of content creation and distribution. Canadian broadcast distributors need to invest and innovate to continue to offer cable, IPTV, and DTH products that can compete with online undertakings – whether those undertakings are online streamers (e.g. Netflix and Disney+) or online distributors (e.g. Amazon Prime Video Channels²). Indeed, Canadians' access to and engagement with their broadcasting system and, in particular, local broadcasters and Canadian programmers, will depend on a modernized regulatory framework that recognizes and supports the fundamental importance of BDUs' network and platform investments while eliminating regulatory asymmetries between BDUs and online undertakings.
 7. In this regard, Shaw appreciates the Government's commitment to modernizing Canada's cultural policy framework through legislative reform and the Preliminary Draft Policy Direction³ (**Draft Direction**) to the Canadian Radio-television and Telecommunications Commission (**CRTC**) that was tabled at the Committee in March 2021. Shaw largely supports the passage of Bill C-10, subject to the following recommendations, which we urge this Committee to adopt in its final report to Government:
 - **Recommendation 1:** That a Policy Direction to the CRTC regarding the regulatory approach to be taken in view of the amendments to the *Broadcasting Act* be finalized in the form set out in the Draft Direction.

Rationale: The Draft Direction provides critical guidance that empowers, and requires, the CRTC to implement Bill C-10 in a fair, equitable, and sustainable manner.

¹ Canadian Radio-television and Telecommunications Commission, *Communications Monitoring Report, 2020*, Figure 1.6 Subscribers by type of service and number of households (million), p. 19.

² Amazon Prime Video Channels allows customers to access live/linear television channels (including channels originating over-the-air) – content primarily available through BDUs.

³ Department of Canadian Heritage, Preliminary Draft Policy Direction to the Canadian Radio-Television and Telecommunications Commission (Draft as of August 2020), online: <https://www.ourcommons.ca/content/Committee/432/CHPC/WebDoc/WD11173039/11173039/DepartmentOfCanadianHeritage-DraftPolicyDirection-e.pdf>

- **Recommendation 2:** Amend proposed s.11(3.1) of the *Broadcasting Act*⁴ to remove the CRTC's power to impose fees unrelated to regulatory cost-recovery on licensed broadcasting undertakings – particularly since the section prohibits the imposition of such fees on online undertakings.

Rationale: Subsection 11(3.1), as drafted, would entrench asymmetrical regulatory fees between traditional licensees and unlicensed services, contrary to the principles and requirements established in the Draft Direction and Bill C-10.

- **Recommendation 3:** Reject the proposed consequential amendment to ss.31(1) and (3) of the *Copyright Act*,⁵ in order to maintain the existing definition of “retransmitter” and ensure that the authority to define “retransmitter” remains with Parliament.

Rationale: Bill C-10's consequential amendments to the *Copyright Act* would delegate the authority to define “retransmitter” from Parliament to the Governor in Council. Any change to the definition of retransmitter would have material implications for Canada's broadcasting and copyright policy framework and could incite trade challenges; therefore, the power to amend it should remain with Parliament alone.

8. Shaw's specific proposed amendments in connection with Recommendations 2 and 3 are set out in Appendix A to Shaw's submissions.

Recommendation 1: Approval of the Draft Policy Direction

9. Shaw supports the Bill's proposed introduction of s.5(2)(a.1), which requires that the broadcasting system is regulated in a manner that is “fair and equitable as between broadcasting undertakings providing similar services.”⁶ That said, fairness and equity will not be achieved by merely requiring online undertakings to promote and contribute to the creation of Canadian content, while maintaining the existing requirements on traditional licensees. In order to achieve parity within the regulatory framework, the existing, highly prescriptive, regulatory obligations and significant financial burdens imposed on BDUs must be rebalanced and lightened.
10. For too long, there has been a misapprehension that the primary contribution of BDUs to the broadcasting system should be a revenue-based monetary contribution to fund Canadian programming. In reality, the most important and appropriate contributions of BDUs – expressed clearly in the Act at s.3(1)(t) – are the provision of efficient, affordable and technologically advanced networks that prioritize Canadian programming services and local stations, and reasonable terms for contracts that govern the distribution of the services of Canadian programmers. Accordingly, regulatory rebalancing should be undertaken by the Commission pursuant to its consideration of a revised regulatory approach following to the passage of Bill C-

⁴ Bill C-10 – *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, 2nd Sess, 43rd Parl (First Reading) (**Bill C-10**), subclause 9(8).

⁵ Bill C-10, subclauses 34(2)-(4).

⁶ Bill C-10, subclause 4(1).

10, to reflect the full value of the network-based contributions (including priority carriage, predominance of Canadian services and simultaneous substitution) made by Canadian BDUs.

11. To this end, Shaw supports the Draft Direction, as it promotes a sustainable, equitable, and flexible approach to broadcasting regulation that would – if properly implemented – result in meaningful reform and increased parity among licensed and unlicensed players. In particular, the Draft Direction requires the Commission to:

- apply a more flexible, proportionate, transparent, and consistent approach to charges and expenditures related to supporting Canadian content (s.5), that is informed by data (s.5(a)), imposed on BDUs only “where appropriate” (s.5(c)), and subject to regular review to ensure the financial contributions are “required to support the objectives of the broadcasting policy” (s.5(g));
- “regulate and supervise the Canadian broadcasting system in a manner that is flexible, fair, and equitable” (s.6) and which:
 - “streamlines regulatory obligations so all broadcasting undertakings are in a position to compete in the modern broadcasting environment” (s.6(e));
 - provides “flexibility and predictability, while recognizing the distinct business models in the modern Canadian broadcasting system” (s.6(f));
 - “emphasizes the importance of continued access by Canadians to a wide range of programming and services through whatever means of broadcasting it may be provided” (s.6(h));
- “adopt an equitable approach to regulation”, including licensee fees, charges and expenditures, that allows “broadcasting undertakings to contribute to and benefit from the Canadian broadcasting system” (s.10); and
- “address unjustified regulatory asymmetries in the Canadian broadcasting system [...] including between online undertakings and licensed broadcasting undertakings” (s.10).

12. These requirements, as set out in the Draft Direction, are critical to establishing a regulatory framework that recognizes and supports BDUs’ primary contributions to the broadcasting system, namely:

- building and continuously investing in the networks that enable Canadians across the country to access comprehensive and high-quality content, including a predominance of priority local television stations and Canadian programming services; and
- launching products and next-generation television experiences that enhance value for customers and sustain their engagement with licensed Canadian services while concurrently facilitating their access to unlicensed online services.

13. Online undertakings offer none of these significant contributions to the system. Indeed, notwithstanding any new contribution requirements that may be imposed upon them pursuant to

regulatory change resulting from Bill C-10, online undertakings will foreseeably continue to drive the attrition of traditional broadcasting in Canada.

14. Accordingly, we urge the Committee to recommend that the Draft Direction be enacted as-is, to ensure a flexible and equitable approach to regulation. At minimum, Shaw urges the Committee to recommend the maintenance of the above-noted provisions in the final version of the Draft Direction.

Recommendation 2: Removal of the CRTC's Power to Impose Part II Fees on Licensed Broadcasting Undertakings

15. As noted above, proposed s.11(3.1) of the Act⁷ would preclude the CRTC from imposing on unlicensed broadcasting undertakings fees that are unrelated to the Commission's regulatory cost-recovery, but places no such limitation in the case of licensed BDUs and broadcasters. By contrast, licensed BDUs and broadcasters are currently subject to fees unrelated to regulatory cost-recovery, known as "**Part II Fees**", and s.11(3.1) fails to embody a symmetrical requirement that they too be relieved of such payments. Part II Fees are a significant economic burden for licensees: in 2019, Canada's licensed broadcasting industry was subject to \$120M in Part II Fees, over \$17M of which was imposed on Shaw alone.
16. There is no justification for empowering the Commission to continue imposing Part II Fees on licensed BDUs and broadcasters, while precluding the Commission from doing so in the case of online undertakings. Part II Fees flow directly to general revenues and are akin to a tax. Maintaining s.11(3.1) in its current form would entrench ongoing regulatory asymmetry, compounding the competitive challenges that Canada's BDUs and broadcasters face as we compete against global powerhouses like Facebook, Amazon, and Netflix.
17. The asymmetrical application of s.11(3.1) is also in direct conflict with Bill C-10's proposed objective that the broadcasting system is regulated in a manner that is "fair and equitable as between broadcasting undertakings providing similar services"⁸, as further emphasized and articulated in the Draft Direction. Moreover, as recognized in the Draft Direction's introductory statements, "online undertakings [...] provide broadcasting services similar to that provided by licensed Canadian broadcasting undertakings." Notwithstanding this recognition, and contrary to s.5(2)(a.1), the proposed s.11(3.1) introduces a limitation on regulatory fees that would not apply fairly or equitably between "broadcasting undertakings providing similar services." Such a proposal is neither fair nor logical.
18. Accordingly, we urge this Committee to recommend that proposed s.11(3.1) of the Act, be amended to prevent the Commission from imposing fees unrelated to regulatory cost-recovery on both licensed and unlicensed broadcasting undertakings.

⁷ Bill C-10, subclause 9(8).

⁸ Bill C-10, subclause 4(1) introducing *Broadcasting Act*, s.5(2)(a.1).

Recommendation 3: Rejection of the Proposed Amendments to s.31 of the *Copyright Act*

19. The second critically important amendment to Bill C-10 is the elimination of subclauses 34(2)-(4): the proposed consequential amendments to ss.31(1) and (3) of the *Copyright Act*. Section 31 of the *Copyright Act* establishes Canada's statutory licence for the retransmission of local and distant broadcast signals, which is only available to a "retransmitter", defined as a facilities-based BDU. Bill C-10 proposes to repeal the existing definition of "retransmitter" and to replace it with a definition that will be enacted by the Governor in Council pursuant to regulation. Shaw urges this Committee to ensure that the authority to amend Canada's retransmission regime remains with Parliament and to recommend that the foregoing amendments are eliminated from the Bill.
20. The *Copyright Act*'s retransmission regime reflects a carefully crafted balance between Canada's broadcasting and copyright policy objectives and has critical implications for Canada's broadcasting system. Any attempt to broaden the definition of retransmitter could upend this balance and, in so doing, trigger trade challenges and demands by American broadcasters for new rights and compensation for the retransmission of US signals, which could ultimately lead to new costs for consumers and/or signal access denials. As such, any change to the definition of retransmitter (and thus the scope of the current retransmission regime) should only occur by virtue of a substantive legislative amendment passed by Parliament – not an amendment that merely confers the power to define "retransmitter" on the Ministers responsible for the *Copyright Act* at any given time.
21. US networks and private affiliate groups have long opposed Canada's statutory licence regime and recently pushed aggressively for the elimination of the regime in the negotiations of the Canada-United States-Mexico Agreement (**CUSMA**). Fortunately, Canada's trade negotiators succeeded in preserving the *Copyright Act*'s retransmission regime in CUSMA; however, Bill C-10's proposal to enable the expansion of the retransmission regime by simple regulatory amendment will leave Canada vulnerable to renewed attacks.
22. Given the importance of the retransmission regime to Canada's broadcasting system as well as its sensitivity as a trade issue, it would be inappropriate to remove Parliament's authority to define "retransmitter" and delegate this power to the Governor in Council. Accordingly, we urge this Committee to recommend that no amendments are made to s.31 of the *Copyright Act*, by deleting subclauses 34(2)-(4) of the Bill.

Conclusion

23. Bill C-10's proposed amendments to the *Broadcasting Act*, together with the Draft Direction, demonstrate the Government's commitment to:
 - rectifying the current regulatory framework's unjustifiable asymmetrical treatment of traditional and online broadcasting undertakings; and
 - promoting a more sustainable, innovative, and competitive broadcasting system that supports Canadians as creators, consumers, and citizens through the provision of robust licensed broadcasting and distribution services, as well as unlicensed services.

24. The Standing Committee on Canadian Heritage has a critical role to play in delivering on this potential by recommending:

- the enactment of the Draft Direction;
- the symmetrical application of Bill C-10's prohibition against charges unrelated to regulatory cost-recovery (such as Part II Fees); and,
- the maintenance of Parliamentary authority over Canada's retransmission regime.

25. Shaw appreciates the opportunity to assist this Committee in its study of Bill C-10.

Appendix A – Shaw’s Proposed Amendments to Bill C-10

Recommendation 2 – Amend clause 9(8) of Bill C-10: Subsection 11(3.1) of the *Broadcasting Act* (amendments in bold, strikethrough):

(8) Subsection 11(3) of the Act is replaced by the following:

Exceptions

(3) No regulations made under subsection (1) shall apply to the Corporation or to persons carrying on programming undertakings on behalf of Her Majesty in right of a province.

Restriction — non-licensees

(3.1) The only fees that may be established with respect to a broadcasting undertaking ~~that may be carried on without a licence~~ shall be fees that relate to the recovery of the costs of the Commission’s activities under this Act.

Recommendation 3 – Amend clauses 34(2)-(4) of Bill C-10: Subsections 31(1) and (3) of the *Copyright Act* (amendments in bold, strikethrough):

~~(2) The definition new media retransmitter in subsection 31(1) of the Act is repealed.~~

~~(3) The definition retransmitter in subsection 31(1) of the Act is replaced by the following:~~

~~retransmitter has the meaning assigned by the regulations;
(retransmetteur)~~

(4) Paragraph 31(3)(a) of the Act is replaced by the following:

~~(a) defining “retransmitter” for the purposes of this section;~~

(a.1) defining “local signal” and “distant signal” for the purposes of subsection (2); and