

**Petition to the Governor in Council Under  
Subsection 28(1) of the *Broadcasting Act***

**to set aside or  
refer back for reconsideration and hearing**

**Broadcasting Decision CRTC 2022-165**

**issued by the Canadian Radio-television and  
Telecommunications Commission on June 22, 2022**

**Submitted by:**

**FRIENDS**

**August 5, 2022**

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## Executive Summary

1. In Decision CRTC 2022-165 (the “Decision”), the Canadian Radio-television and Telecommunications Commission (“CRTC”):
  - a. failed to require minimum expenditures for local news;
  - b. declined to impose any substantive limits on CBC’s Tandem initiative; and
  - c. failed to ensure that CBC is held to the highest possible standard in terms of accountability in respect of its Canadian programming expenditures and the resources allocated to its licenced and unlicenced broadcasting services.
2. By failing to impose higher obligations on CBC than are imposed on private broadcasters, and in some cases imposing lesser obligations, the Decision derogates from the overall scheme of the *Broadcasting Act* (the “Act”), which clearly confers heightened responsibilities towards Canadian programming on the public broadcaster.
3. While all programming undertakings are required to make “maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming” under subsection 3(1)(f) of the Act, the Corporation’s heightened responsibilities to Canadian programming, including that it be “predominantly and distinctively Canadian” are reflected in subsection 3(1)(m). These contrast with the lesser obligations of private broadcasters, which are required to “contribute significantly to the creation and presentation of Canadian programming”, but only “to an extent consistent with the financial and other resources available to them”, pursuant to subsection 3(1)(s).
4. FRIENDS respectfully requests that the Governor in Council refer the Decision back to the CRTC for reconsideration and hearing. In so doing, the Governor in Council should instruct the CRTC to:
  - a. implement baseline expenditure requirements with respect to local news;
  - b. reconsider the appropriateness of the Tandem initiative; and
  - c. implement baseline expenditure requirements for Canadian programming and establish an appropriate allocation of resources as between licenced and unlicenced broadcasting services.
5. In these circumstances, FRIENDS also respectfully requests that the Governor in Council direct the Minister of Canadian Heritage (the “Minister”) to forthwith proceed with the Government’s plan to modernize CBC/Radio-Canada as set out in the mandate letter issued by the Prime Minister on December 16, 2021.

## The Proceeding and its Key Issues

6. This petition, filed by FRIENDS pursuant to Subsection 28(1) of the Act (the “Petition”), requests that the Governor in Council make an order to set aside or refer back for reconsideration and hearing the Decision.
7. FRIENDS is an independent watchdog for Canadian cultural media policy. It is supported exclusively by after-tax contributions from individual Canadians. FRIENDS is not affiliated with any broadcaster or political party. FRIENDS was an active participant in the lengthy proceeding that led up to the Decision which first commenced in 2016 (the “Proceeding”).<sup>1</sup>
8. The Proceeding sought to address key issues associated with the appropriate level of accountability for CBC over the next licence term, particularly in light of its expansion into unlicensed and unregulated digital activities, and its past conduct in respect of areas such as advertising and local news.
9. During the Proceeding, CBC directly challenged the CRTC’s newly established policy framework of using expenditure requirements as the primary regulatory tool rather than traditionally implemented exhibition requirements.<sup>2</sup> CBC also suggested the counting of digital shelf space hours in the same way as traditional television exhibition hours - an almost meaningless measure given that a broadcast week is limited to 126 hours of programming and digital programming inventory is in the thousands of hours.
10. To its credit, and despite the opposition of CBC and the Corporation’s failure to provide appropriate disclosure of its digital activities, the CRTC imposed cross platform expenditure requirements on Canadian programming (including programming of national interest), and requirements in support of equity-seeking communities, including Indigenous Canadians, racialized Canadians, Canadians with disabilities, Canadians who self-identify as LGBTQ2, and women who self-

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<sup>1</sup> Pursuant to Broadcasting Notice of Consultation CRTC 2016-225. In the result, this Decision will have left the Corporation operating under previous conditions of licence and expectations established in Decision CRTC 2013-263 for nine years, and in a number of areas, new requirements will not take full effect until 2027. Given past practice, while the current licenses were issued for five years, they could easily be subject to future administrative renewals, again extending the *de facto* licence term to seven years or more.

<sup>2</sup> The Commission’s shift to expenditure requirements started in 2010 with the major private English language broadcasters. It became a fundamental aspect of the CRTC’s 2015 *Let’s Talk TV Policy* Framework (<https://crtc.gc.ca/eng/archive/2015/2015-86.htm>, (para 190 & 191):

- “while content quotas of this type may have been useful in ensuring the presentation of Canadian programming in a fully linear television system, they will be a less and less effective tool in an increasingly on-demand environment”; and
- “quotas can also have unintended detrimental effects” such as “excessive” repeat or recycled programming.”

As FRIENDS stated in its Intervention, these concerns apply equally to CBC.

identify as belonging to these communities (collectively “equity-seeking communities”).

11. For reasons that are not clear, however, having taken the bold but appropriate step of indirectly “regulating” CBC’s digital activities through cross platform expenditure requirements and imposing new expenditure obligations in respect of diversity, the Commission did not implement clear or measurable obligations in these and other important areas.

12. In particular, of grave concern to FRIENDS and its over 360,000 supporters, the Commission:

- a. did not impose minimum expenditure requirements for local news, and even reduced existing exhibition obligations for local news by eliminating traditionally applicable requirements in metropolitan markets;
- b. failed to require CBC to eliminate the Tandem initiative; and
- c. failed to ensure that CBC is held to the highest possible standard in terms of accountability in respect of its Canadian programming expenditures and the resources allocated to its licenced services.

13. In addition, the Decision did not address a number of other issues of concern to FRIENDS supporters and other Canadians, including:

- a. imposing a specific “predominantly and distinctively Canadian”<sup>3</sup> cultural criteria test, to ensure that CBC English Television does not continue to stray from its mandate by exhibiting non-distinctive popular fare like *Family Feud Canada*, and *Battle of the Blades*<sup>4</sup>;
- b. in light of previous radio cuts and the projected fifteen-fold increase in digital audio content expenses, imposing a specific expectation requiring the maintenance of relative investments;<sup>5</sup> and
- c. requiring greater public disclosure and oversight of CBC’s digital activities, including non-broadcasting activities, such as the Corporations alpha-numeric websites.<sup>6</sup>

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<sup>3</sup> An obligation unique to CBC, as set out in subsection 3(1)(m)(i) of the Act.

<sup>4</sup> In its Intervention, FRIENDS proposed a specific test based on commissioned research. Our view is that “predominantly and distinctively Canadian” must mean more than just produced by Canadians and that there should be substantive cultural criteria as well, such as whether the characters, setting, attitudes, references, or issues depicted in the programming are Canadian or directly relevant to Canadians.

<sup>5</sup> FRIENDS Intervention in the Proceeding, para 118.

<sup>6</sup> An aggregate financial summary provided by CBC after numerous requests from FRIENDS and other intervenors for greater financial disclosure revealed that the Corporation spends over \$200 million and growing on Curio and other websites. “Amounts reflect content and production spend projected primarily on CBC.ca/Radio-Canada.ca. These are websites that consist primarily of alphanumeric text and meet the description of a non-programming service.” June 12, 2020 Response to CRTC Information request.

14. These are particularly crucial issues, given that CBC benefits from taxpayer dollars amounting to \$1.29 billion in parliamentary appropriation in 2021 (having been increased by the Liberal government by \$150 million in 2016 and slated to increase by \$400 million per the 2021 Liberal party platform).<sup>7</sup>
15. FRIENDS nevertheless respects that, pursuant to the Act, the Governor in Council may only set aside or refer back for reconsideration and hearing licencing decisions of the CRTC to the extent that they derogate from the attainment of the objectives of the broadcasting policy for Canada set out in Subsection 3(1) of the Act.
16. In FRIENDS respectful submission, the three issues identified in paragraph 12 above meet that standard. We acknowledge that the issues identified in paragraph 13 could influence the Governor in Council's decision on this Petition, but would be more appropriately addressed by the Minister in implementing the Government's plans to Modernize CBC/Radio-Canada.

### **The Commission erred in not requiring minimum expenditures for local news**

17. The CRTC's failure to impose substantive expenditure-based requirements in support of local programming and local news represents a major error, inconsistent with the Commission's own past practices and government policy.
18. Further, given the clear importance of local news, its vulnerability in today's media ecosystem and CBC's uneven historical performance, FRIENDS firmly believes that CBC requires an explicit condition of licence (a "COL") that stipulates a minimum level of expenditures on local programming, including local news, averaged across the markets in which it operates, and that the Commission erred in the Decision by not applying such a COL.
19. When FRIENDS filed its intervention in February 2020 (the "Intervention"), it was against a backdrop of very mixed messaging from CBC in terms of news, particularly local news.
20. On the one hand, on her appointment, CBC's President declared local news a clear priority:

"There is nothing more important than local stories and local news. That's what will tie us together going forward as a country. It is absolutely central to

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<sup>7</sup> <https://cbc.radio-canada.ca/en/impact-and-accountability/finances/annual-reports/ar-2020-2021/financial-sustainability/year-in-review-our-results-government-funding> "Parliamentary appropriations for operating expenditures increased by \$193.3 million (17.6%) in 2020-21. While our base appropriation remained unchanged from last year, we recognized \$119.4 million of retroactive salary inflation for fiscal years 2018-19 through 2020-21."

democracy and dialogue in this country. So you can rest assured that it will be absolutely central in everything that we do going forward.”<sup>8</sup>

“First off, local and regional CBC content, across the board, is the heart of the organization...If we don't reflect Canadians where they are, wherever they are, we are not doing our job.”<sup>9</sup>

21. Consistent with the Corporation's requirement for accountability to Parliament and Canadians, CBC's then Strategic Plan Summary, filed with the Minister, also stated that the Corporation would:<sup>10</sup>

- be a beacon for truth and trust against “fake news” and algorithms that put democracy and the respect for different perspectives at risk;
- strengthen its role as Canada's most trusted media brand; and
- strengthen its connection with Canadians with significant local and regional content that is relevant to people in their communities.

22. On the other hand, when asked by the Commission about the possible application of spending requirements for locally-reflective news, the Corporation stated “CBC/Radio-Canada does not have a statutory mandate to provide local programming.”<sup>11</sup>

23. CBC's position that it has no legal obligation to provide local programming flies in the face of decades of CRTC regulation and portends a future in which the supply of local news and information programming is severely curtailed. Indeed, available evidence suggests that CBC has been systematically reducing its commitment to news and local news.

24. For example, in the early days of the COVID-19 pandemic when the country needed its national public broadcaster more than ever, CBC suspended its evening and late-night TV newscasts.

25. As pointed out by FRIENDS in its Intervention:

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<sup>8</sup> <https://www.macleans.ca/culture/television/catherine-tait-named-as-cbc-president-first-woman-to-hold-role/>, as retweeted by the then Minister of Canadian Heritage. Full Quote <https://ipolitics.ca/2018/04/03/catherine-tait-to-become-cbc-president-the-first-woman-to-hold-role/> April 3, 2019.

<sup>9</sup> <https://www.cbc.ca/news/canada/british-columbia/catherine-tait-future-of-cbc-the-early-edition-1.4836696>, September 24, 2018.

<sup>10</sup> Part of CBC's reporting obligations as set out in Sections 54 & 55 of the Act.

<sup>11</sup> DM#3733727 - Response - 9 October 2019 - CBC Application Form TV and Radio, Q 28.b. Neither do private broadcasters.

According to the [then most recent] 2019 CRTC Communications Monitoring Report, total CBC/Radio Canada conventional station news spending fell from \$207 million in 2014 to \$102 million in 2017, increasing to \$121 million in 2018. It is noteworthy that these reductions occurred despite local programming exhibition conditions of licence, which the Corporation states they “continue to meet”.<sup>12</sup> If that is so, then quality is surely the victim.”

In one year alone (from 2016 to 2017), CBC English news expenditures dropped 43%, from \$92.6 million to \$52.9 million.<sup>13</sup> Radio-Canada news spending dropped 39%, from \$80.9 million in 2016 to \$49.2 million in 2017.<sup>14</sup> More recently, in November 2019, the Corporation announced the elimination of up to 30 English news positions “to manage a decrease to the CBC News operating budget.”<sup>15</sup>

26. At the time of filing our Intervention, FRIENDS indicated its appreciation for the fact that CBC changed its reporting of digital activities in 2016. Prior to this time, some digital news expenditures would have been included in TV news expenditure numbers. We nevertheless stated: “As CBC has given no indication to the contrary, we assume that pre-2016 news numbers have a very small digital component.”

27. While the Corporation had ample opportunity to comment on and even rebut the foregoing observation, at no time did it do so.

28. In the Decision, the Commission acknowledged CBC’s prior licence term declines in news expenditures on its licenced television services:

...for the CBC’s licensed conventional television stations and discretionary services (excluding CBC News Network and ICI RDI) during the current licence term, there have been declines in total expenditures, expenditures on programming and production, and expenditures on news. From the 2013-2014 through 2019-2020 broadcast years, the CBC’s annual spending on English-language news on licensed conventional television stations decreased by \$67.5 million, and annual expenditures on French-language news decreased by \$20.2 million.<sup>16</sup>

29. However, with no evidentiary basis, the Commission merely accepted CBC’s position that the “apparent” reduction in local news funding was not real and merely

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<sup>12</sup> DM#3733727 - Response - 9 October 2019 - CBC Application Form TV and Radio, Q. 27(a).

<sup>13</sup> DM#3755582 - Response - 9 October 2019 - CBC TV Financials.

<sup>14</sup> DM#3755615 - Response - 9 October 2019 - SRC TV Financials.

<sup>15</sup> <https://www.nationalobserver.com/2019/11/15/news/layoffs-hit-cbc-news-amid-operating-budget-decline>.

<sup>16</sup> Decision, para 423.



due to “a change to its accounting practices” and the Corporation’s increasing use of digital media platforms for news.<sup>17</sup>

30. Moreover, while imposing expenditure obligations in other priority areas, such as Canadian programming overall, and genres including programming of national interest, production from equity-seeking communities generally and OLMC and Indigenous production in particular, the Commission declined to impose expenditure requirements on news or local news, stating simply:

If the CBC can fulfill its obligations (relating, for example, to regional relevance, balanced news, and hours of local programming) while reducing related news expenditures, it should not be prevented from doing so [emphasis added].

Although the imposition of a condition of licence would provide a sustained commitment on the part of the CBC to news and local programming across all platforms, while giving the CBC the flexibility needed to adjust expenditures in response to fluctuations in revenues or expenses, it would not address concerns regarding spending in metropolitan versus non-metropolitan markets, and would not necessarily mean that the CBC is directing spending to local programming that includes news. Further, while much news-related spending can be planned, it must be recognized that a significant portion of the spending is either cyclical (such as election periods) or related to breaking news or long-term events (such as the pandemic).

In light of the above, the Commission finds that it would not be appropriate at this time to impose on the CBC an expenditure requirement relating to news programming.<sup>18</sup>

31. No rationale was provided by the CRTC for the different (exhibition rather than expenditure) treatment of news, including local news, as opposed to other genres of Canadian programming.<sup>19</sup> No explanation was provided by the CRTC for why expenditure obligations are not the “more adaptable and appropriate regulatory tool”<sup>20</sup> for news, including local news. Instead, without any reason or justification, the CRTC decided that expenditure requirements matter for every declared priority genre of programming - except news.

32. All of which, ironically enough, was preceded by the following statement:

the Commission’s overarching desired outcome is that the CBC provide relevant local, regional and national news and information that meets the needs of all

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<sup>17</sup> Decision, paras 430 & 433.

<sup>18</sup> Pars 434 & 435.

<sup>19</sup> The Commission did define in *general* ways when it would use exhibition vs expenditure requirements. See for example para 55. What it failed to do is apply its “tests” in a consistent or clear manner.

<sup>20</sup> Para 60.

Canadians, including Indigenous Peoples, Canadians who live in remote and rural communities, and OLMCs, on its licensed audiovisual and audio services, as well as on its DMBUs.<sup>21</sup>

33. Despite the professed recognition by both CBC and the CRTC regarding the vital importance of news, including local news, this Decision leaves CBC with no material new requirements in this regard. In fact, its requirements have been reduced.
34. FRIENDS believes the Commission's position here to be at best inconsistent and, at worst, hypocritical. The CRTC has correctly characterized CBC's obligations towards news and local news in its *words*, but utterly failed to ensure them through their *actions*.
35. CBC's failure to give meaningful priority to news and local news - from the aforementioned expenditure reductions to the Corporation's cancellation of local newscasts during the early days of COVID<sup>22</sup> - is precisely why legally binding meaningful requirements are necessary now.
36. Further, by imposing lesser obligations on CBC with regard to local news than those imposed on private broadcasters, the decision clearly derogates from the overall scheme of the Act, which generally confers heightened responsibilities towards Canadian programming on the public broadcaster, and specifically requires it to "reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions".<sup>23</sup>
37. As stated by Vice Chair Simard in her dissent:
- In my view, this lack of specific and measurable targets in the broadcasting licences that will take effect 1 September 2022 is to be seen in the light of the conditions of licence to which private broadcasting companies of major groups must be accountable .... The disparity between the legal obligations imposed on the CBC and those imposed on private broadcasting undertakings becomes more pronounced when the CBC is exempted in the majority decision from meeting the "local programming" requirements set out in the *Policy framework for local and community television*.<sup>24</sup>
38. In addition, the Decision derogates from government policy as expressed in the Mandate Letter to the Minister which called for "increasing the production of national, regional and local news" on CBC.<sup>25</sup>

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<sup>21</sup> Para 402.

<sup>22</sup> Noted by the Commission at para 491.

<sup>23</sup> Section 3(1)(m)(ii).

<sup>24</sup> Broadcasting Regulatory Policy [2016-224](#).

<sup>25</sup> <https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-canadian-heritage-mandate-letter>

39. Despite the above, FRIENDS is *not* calling for a re-introduction of exhibition requirements for local programming, including news. As FRIENDS understands and supports the CRTC's move towards expenditure requirements as the proper regulatory tool, and indeed recommended such in our Intervention, we are instead calling for a local programming cross platform expenditure requirement.

40. As stated in our Intervention:

The importance of local news to democracy, the evidence of declines in private media's capacity to provide local news, the growing number of Canadians getting news from Facebook (a company that expressly allows politicians to quickly and easily broadcast lies to a potential audience of 23 million Canadians), the crucial increased need for trusted news media, and CBC's mixed record on funding local news and projected apparent expenditure declines all call for a more robust and substantive set of commitments.

...

[Accordingly] FRIENDS believes that cross-platform expenditure commitments [to local news] would be the most appropriate for four reasons:

1. CBC has repeatedly stated that its news reporting is increasingly integrated and cross-platform within each of CBC and Radio Canada;<sup>26</sup>
2. CBC has redirected financial resources from traditional local TV to digital platforms;
3. The use of cross-platform expenditure commitments would provide necessary accountability, along with appropriate flexibility on allocation of news resources; and
4. As the Commission concluded in its Create Decision, the value of an exhibition requirement on digital platforms is questionable. While "shelf space" and discoverability requirements can ensure the availability of Canadian content, exhibition takes on a whole new meaning in the on-demand context.

41. FRIENDS, therefore, continues to recommend that a cross-platform expenditure commitment to local news<sup>27</sup> of 15% of revenue be applied to all CBC English local TV stations and predominantly news and information sites in aggregate.<sup>28</sup> An

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<sup>26</sup> DM#3733727 - Response - 9 October 2019 - CBC Application Form TV and Radio, Q 29 & 31.

<sup>27</sup> We have not used the term "locally reflective news", as is the case for private broadcasters, as it is unclear that such a strict definition is necessary or appropriate, given the Commission's historic acknowledgement of CBC's dual local and regional role.

<sup>28</sup> Such a percentage would be consistent with, but slightly higher than, the commitments of the major privately-held English TV groups. A locally reflective news expenditure requirement of at least 11% of the previous year's revenues has been applied to each of the English-language private groups' local

appropriate percentage should also be set for CBC French local TV stations and associated sites (branded Radio-Canada Premiere/Info, e.g. [ici.radio-canada.ca](http://ici.radio-canada.ca)). Consistent with the group flexibility constraints applied to private broadcaster groups, FRIENDS recommends that no more than 20% of required local TV news expenditures revenue be permitted to be spent on CBC's digital platforms.<sup>29</sup>

42. FRIENDS would have no objection to this obligation being translated into a percentage of Canadian programming expenditures, subject to our comments below about a firm baseline expenditure commitment for Canadian programming expenditures.

### **The Commission erred in not curtailing CBC's Tandem Advertising Program**

43. In its Intervention, FRIENDS argued that CBC should "eliminate advertising from all English TV, as well as all digital services over the course of the licence term, and that all news programming be ad-free by December 31, 2021". We also argued that, at minimum, CBC should be required to terminate its Tandem initiative.

44. In recommending that CBC reduce, if not eliminate, its reliance on advertising, particularly in relation to news programming, FRIENDS was cognizant of the fact that the issue is effectively one of "joint" jurisdiction as between the Government and the CRTC.

45. In the Decision, the CRTC declined to impose any substantive limits on CBC TV and digital advertising.

46. Regarding Tandem, the Decision states that "the revenue-generating activities of the Tandem initiative are onside with the general approach that has been taken with the CBC in the past and consistent with the context in which the CBC currently finances its operations."<sup>30</sup>

47. In FRIENDS respectful submission, this statement is simply false.

48. The record of this Proceeding confirms that:

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television stations, and 5% to each of the French-language private groups' local television stations. <https://crtc.gc.ca/eng/archive/2017/2017-148.htm>, para 59 <https://crtc.gc.ca/eng/archive/2017/2017-143.htm> para 96.

<sup>29</sup> Private TV groups have flexibility but also limits on how much conventional TV CPE can be shared with discretionary services. TV stations are allowed to share 100% of their CPE between themselves, as well as to count CPE from qualifying discretionary services within their group towards meeting up to 25% of their CPE requirements (the 25% cap). FRIENDS proposed rule is analogous to this, but would limit TV station sharing with digital platforms to 20% of expected expenditures, given the much higher revenue base of TV. <https://crtc.gc.ca/eng/archive/2017/2017-148.htm>, para 20.

<sup>30</sup> Para 585

- a. Tandem is a new program, initiated by current management on September 17, 2020;
- b. as confirmed by a letter signed by 500 current and former CBC staff, including journalists,<sup>31</sup> Tandem represents a wholesale departure from past advertising practice; and
- c. Tandem undermines CBC's credibility as a non-biased source of news and information programming.

49. Interestingly, despite the Commission's finding that Tandem is "onside", the Decision proceeds to nevertheless impose one safeguard and three monitoring "expectations" on CBC, namely:

- a. a requirement that the public be able to clearly distinguish Tandem content from news and information; and
- b. expectations that CBC implement "tools" to avoid confusing CBC's audiences, increase accountability and transparency, and ensure that no CBC journalist or host is associated with Tandem.<sup>32</sup>

50. The Commission's actions regarding Tandem are perplexing. If the Commission is saying that Tandem is "onside" then why are such constraints necessary? And if constraints are necessary, why are they in the form of expectations and not binding conditions of licence? Instead, here we have an acknowledged problem that the Commission "solves" by imposing immeasurable and nonbinding conditions.

51. While, under the Act, the CRTC is legally empowered to set appropriate conditions in respect of advertising – including, as has been done in respect of CBC radio, requiring no advertising at all<sup>33</sup> – over the years, it is fair to say that successive governments have sent "mixed messages" in this regard.

52. In 2016, then CBC Management were so concerned about their reliance on the increasingly unpredictable stream of revenue from advertising (which had been encouraged under the Harper government), that CBC itself recommended the public broadcaster move to an ad-free model, in return for \$400 million in additional public funding.<sup>34</sup> On point, this government recently indicated that its policy direction is to reduce CBC's reliance on advertising, and eliminate it on news altogether.

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<sup>31</sup> <https://www.theglobeandmail.com/arts/article-hundreds-of-cbc-staff-sign-open-letter-against-broadcasters-paid/>

<sup>32</sup> Paras 589, 590, 593.

<sup>33</sup> Limited CBC radio advertising was authorized by the Commission in the 2013 renewal decision, but that authorization was not renewed in 2016 given CBC's non adherence to a precondition that it maintain radio operating budgets. <https://crtc.gc.ca/eng/archive/2016/2016-353.htm>

<sup>34</sup> <https://www.cbc.ca/news/canada/cbc-radio-canada-ad-free-proposal-1.3871077>

53. Most notably, in the Prime Minister's Mandate letter, the Minister was directed to, among other things, modernize CBC/Radio-Canada, proceeding in a manner that respects the public broadcaster's independence by "... providing additional funding to make it less reliant on private advertising, with a goal of eliminating advertising during news and other public affairs shows"<sup>35</sup>

54. Regardless of the Commission's position on CBC advertising more generally, its failure to act in respect of Tandem is, in FRIENDS' view, a complete derogation from the objectives of the Act:

- Tandem contravenes subsection 3(1)(l), which requires that "the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains". Tandem neither informs, enlightens and entertains. It is simply an advertising revenue grab;
- Tandem should not be permissible for CBC simply because it is a common commercial practice among private broadcasters. The scheme of the Act places a far higher onus on CBC to contribute to the overall broadcasting system than private broadcasters. Among other things, pursuant to subsection 3(1)(l), CBC's programming must be "predominantly and distinctively Canadian" and "actively contribute to the flow and exchange of cultural expression", while private broadcasters need only "contribute significantly to the creation and presentation of Canadian programming ... to an extent consistent with the financial and other resources available to them". Not only are Canadians legally entitled to expect more and better from CBC, Tandem programming cannot possibly be seen to "actively contribute to the flow and exchange of cultural expression" in any kind of positive way; and
- any Governor in Council decision on a derogation from the objectives of the Act must be read in light of subsection 2(3) which states that "This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings" and subsection 52(1) which states "Nothing in sections 53 to 70 shall be interpreted or applied so as to limit the freedom of expression or the journalistic, creative or programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers." Simply put, if the CRTC and government cannot compromise CBC's journalistic independence and integrity, nor can CBC management.

55. Moreover, FRIENDS submits that the only tangible safeguard, albeit an expectation, "that no journalist or host will be involved in the inception, creation, production, or dissemination of any advertising or branded content on any of its services", while

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<sup>35</sup> <https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-canadian-heritage-mandate-letter>

helpful, is self-evidently not sufficient to ensure that “the public can clearly distinguish advertising from news and information content”.<sup>36</sup> The vast majority of Canadians would not be aware of the identities of all of CBC’s journalists and hosts. Accordingly, nothing in the Commission’s safeguards would legally prevent CBC from airing Tandem programming that, on its face, appears to include a trusted CBC’s journalist or host. In any event, it is CBC *brand* association that is the broader issue, not just the association with *individual* CBC personalities.

56. Thus, we are left with a situation where, despite an infusion of \$115 million annually from this government, the opposition of CBC’s journalistic staff, multiple intervenors, thousands of FRIENDS supporters, and a clear derogation from the Mandate letter, CBC’s use of Tandem is being allowed to continue. Without any evidence to suggest otherwise, the cost to CBC in terms of the erosion of its credibility and the public trust will exceed the incremental revenue generated by Tandem.

57. FRIENDS respectfully requests that the Governor in Council put an end to the Tandem initiative.

### **The Commission erred in not establishing binding legal baselines for Canadian programming and expenditures on CBC’s licenced services**

58. The creation and presentation of Canadian programming have been hallmarks of Canadian broadcasting policy for over half a century. All broadcasters have obligations towards the creation and presentation of Canadian programming set out in section 3(1)(e) & (f) of the Act, and CBC has heightened requirements pursuant to section 3(1)(m).<sup>37</sup>

59. In failing to establish binding legal baselines for Canadian programming on CBC’s licenced services, FRIENDS submits that the Decision derogates from the attainment of the objectives of the Act and erred in its obligations to appropriately regulate the Corporation’s activities and regulate them to a higher standard than private broadcasters.

60. As detailed and prescriptive as they first seem, the extensive set of Canadian programming expenditure obligations in the Decision are, in FRIENDS respectful submission, a house of cards.

61. How is that so?

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<sup>36</sup> Decision, paras 570, 593.

<sup>37</sup> Robert Fowler famously wrote in his 1965 Federal Committee report that “*in broadcasting all that matters is program content; all the rest is housekeeping.*”  
<https://www.thecanadianencyclopedia.ca/en/article/robert-maclaren-fowler>

- a. The foundational Canadian programming requirement of 85% is expressed as a percentage of *programming expenditures*. Nothing would prevent CBC from spending less on programming, and more on overhead, alphanumeric services, digital infrastructure etc. and less on Canadian programming. In other words, there is no baseline for Canadian programming expenditures because the 85% requirement is 85% of some unknown and potentially declining number;
- b. If 30% of CBC's programming expenditures must be produced by independent producers from equity-seeking communities, but no overall expenditure requirements exist for independent production in general, half the equation is missing - there is a numerator but no denominator - meaning the 30% requirement for equity-seeking communities is unindexed to any measurable factor and therefore meaningless;
- c. There are no requirements to maintain spending on traditional licenced television services. Digital services, which while only indirectly regulated pursuant to the Decision, could continue to see the resources directed to them increase without budgetary constraint, with nowhere near the regulatory oversight of traditional television. Remaining exhibition requirements on traditional television could be met with ever less expensive, even repeat, fare; and
- d. With no Canadian programming exhibition requirements, CBC could simply choose to put more and more cheap day time foreign programming on air during prime time hours. Even private broadcasters, who have no requirement under the Act to air predominantly Canadian programming, have a prime-time exhibition requirement.

62. Rather than impose critical and traditionally applicable requirements on CBC with respect to its Canadian programming, the CRTC has adopted a laissez-faire approach. The Commission's rationale for not imposing percentage of revenue expenditure requirements on CBC rests on its status as a non-profit.<sup>38</sup> Apparently, the CRTC's believes that, notwithstanding its higher obligations, CBC, as a non-profit, needs greater flexibility to navigate an evolving system than private broadcasters.

63. Or, has the majority simply decided to "trust" CBC Management to do the right thing in the above areas.

64. What could go wrong?

65. In FRIENDS submission, "what could go wrong" is that Canadian programming expenditures, including monies directed to equity-seeking communities, may end up being significantly less than the CRTC is expecting.

66. What could go wrong is the Corporation could, for example:

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<sup>38</sup> Decision, para 61.



- a. effectively reduce spending on Canadian programming, by letting non-programming expenditures eat up more and more expenses;
- b. double down on Tandem now that it has been given a green light from the Commission. The result could be an increase of such “advertising” online and on English TV, with less and less spending on actual programming;
- c. cancel or reduce news in metropolitan markets and reinvest savings in non-news programming. (Recall CBC’s history of cancellations of local newscasts two years ago during COVID; and also in 1992.<sup>39</sup> Reductions in spending were noted at para 26 & 28 above);
- d. put more and more foreign programming on CBC Television in pursuit of audiences and easy advertising revenues;
- e. make its Canadian programming less distinctive. The CRTC has effectively chosen to define ‘distinctiveness’ exclusively in terms of the amount of programming produced by, and not directed to, equity-seeking communities. Under such an approach, nothing would prevent, for example, CBC from hiring Indigenous independent producers to produce mainstream fair designed to maximize ratings, rather than producing programming that reflects Indigenous culture or interests;
- f. radically increase its relative investments in digital far beyond the projections filed with the CRTC, cutting investments in traditional radio and traditional television; and
- g. invest more in online alpha-numeric news and information rather than broadcasting.

67. CBC’s continued, unhindered ability to move resources, including required Canadian programming expenditures, from licenced and fully regulated radio and television services to digital platforms, with no apparent mandated meaningful disclosure of its digital activities (including its alpha numeric news and information services) is, in FRIENDS’ view, a particularly grave abandonment of accountability. The notion that CBC could, without regulatory restrictions, checks or balances, move an unlimited amount of resources from radio and/or TV to digital should be considered unacceptable and rejected by the Governor in Council.

68. While not expressed with as many examples, these are clearly the concerns shared by the dissenting Commissioners.

69. Vice Chair Simard pointedly stated in her dissent that she “was open to the idea of exploring different models that combine or do not combine exhibition and expenditure requirements for the CBC to meet its regulatory obligations. However, I believe that the exhibition-expenditure model adopted in the majority decision has, on the one

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<sup>39</sup> Cancellation of late night local newscasts. See, for example, <https://archive.macleans.ca/article/1994/9/26/inside-the-cbc>

hand, prematurely and unnecessarily sacrificed the requirements for the exhibition of Canadian content on traditional platforms and, on the other hand, given the CBC excessive latitude through expenditure requirements without real limits. [emphasis added]

70. Similarly, Commissioner Lafontaine summarized her dissent by stating:

I therefore disagree with the overall licensing framework set out in the majority decision for the broadcast of Canadian programming on the Corporation's linear television services and audiovisual online platforms, for three overarching reasons.

First, the cross-platform expenditure framework approved in the majority decision does not establish any minimum spending requirements for the Corporation's licensed television services ...

Second, the licensing framework approved in the majority decision does not include appropriate licensing requirements that ensure the national public broadcaster will fulfill its public service mandate under the *Broadcasting Act* ...

Third, the majority decision has replaced legal licensing obligations (that is, conditions of licence) with reporting obligations, a perception survey and community/producer consultations ...

71. Moreover, both dissents pose a crucial question: other than "trust", on what basis should CBC have lesser obligations in a number of key areas than private broadcasters?

72. There is certainly no legal basis. In fact, the opposite is true. As already noted, the Act clearly and appropriately places a far higher onus on CBC to contribute to the system than private broadcasters. With over \$1.2 billion in tax payer money going to the Corporation annually, how can it be otherwise? Moreover, nothing in the Act suggests that the Corporation should be subject to lighter touch regulation from the CRTC.<sup>40</sup>

73. Accordingly, FRIENDS submits that, at minimum, CBC should:

- a. have its overall exhibition obligations towards Canadian programming on its conventional network and stations reinstated;

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<sup>40</sup> The CRTC's powers over CBC, should the Corporation not conform with a COL, are more constrained than with private broadcasters. For example, unlike with private broadcasters, it does not have the power of revoking a licence (s.24(2)). Moreover, conditions of licence applied to the Corporation are subject to Ministerial directive (s.23). However, such differences are *post-application* of COLs not *pre-application*.

- b. have a new overall percentage of revenue cross platform commitment to Canadian programming, reflecting the last three years spending imposed
- c. have a maximum spending of 25% of revenues to digital services, to ensure that spending on licenced and regulated services are not unduly cut and withdrawn from CBC's audiences.<sup>41</sup>

74. Consideration should also be given to a cap on CBC's alphanumeric (i.e non-broadcasting) digital activities and a specific requirement to maintain a minimum level of spending on CBC radio. Such matters could, however, be addressed by the Minister directly.

**The Decisions Derogate from Attaining the Objectives of the *Act and should be set aside or referred back for reconsideration and hearing***

75. For all of the foregoing reasons, FRIENDS submits that the Decision derogates from the attainment of the objectives of the broadcasting policy for Canada set out in subsection 3(1) of the Act, and in particular objectives 3(1), (e), (f), and (m) of the Act.

76. These sections are set out, for convenience, below:

**Broadcasting Policy for Canada**

***Declaration***

**3. (1)** It is hereby declared as the broadcasting policy for Canada that

...

e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

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<sup>41</sup> Consistent with private broadcaster's cross platform spending limitation of 25% to discretionary services. <https://crtc.gc.ca/eng/archive/2017/2017-148.htm> para 20, 31. "The Commission notes that this limit was established to help ensure that sufficient funds are allocated to local programming, local news and other Canadian programming on local television stations."

...

- (m) the programming provided by the Corporation should
- (i) be predominantly and distinctively Canadian,
  - (ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,
  - (iii) actively contribute to the flow and exchange of cultural expression,
  - (iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,

....

77. The creation and presentation of Canadian programming has been at the centre of the Canadian broadcasting system – and the centre of the Act – from its earliest days. Canadian programming is cited a dozen or more times in subsection 3(1) of the Act, and is clearly the primary manner in which the Act’s various social and cultural objectives are fulfilled.
78. While all programming undertakings are required to make “maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming” under subsection 3(1)(f), the Corporation’s heightened responsibilities to Canadian programming, including that it be “predominantly and distinctively Canadian” are reflected in subsection 3(1)(m). These contrast with the lesser obligations of private broadcasters, which are required to “contribute significantly to the creation and presentation of Canadian programming”, but only “to an extent consistent with the financial and other resources available to them” (subsection 3(1)(s)).
79. The CRTC’s failure to ensure that the Corporation’s obligations in respect of local news and exhibition of Canadian programming are at least greater than those of private broadcasters is a *prima facie* indication that the Decision derogates from the objectives of the Act.<sup>42</sup>
80. While the Commission has wide latitude and discretion to determine which objectives under Subsection 3(1) of the Act are more or less important in a given situation, that discretion needs to be exercised prudently and with due consideration of the clear priorities established in the Act.

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<sup>42</sup> An unacknowledged consequence of the CRTC’s decision-making in this Decision is that the regulator may be poised in the future to reduce Canadian content obligations to private broadcasters as well. This decision may be the canary in the coal mine.

81. In particular, mere administrative convenience or conjecture cannot take priority over clearly enunciated objectives such as:

- the programming provided by the Canadian broadcasting system should include a significant contribution from the Canadian independent production sector (subsection 3(1)(i)(v));
- each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming (subsection 3(1)(f)); and
- the programming provided by the Corporation should be predominantly and distinctively Canadian (subsection 3(1)(m)(i));

82. Under the Act, the Corporation must be held to the highest standard. Providing flexibility, as in being “sensitive to administrative burden”, is a *regulatory policy* objective set out at subsection 5(2)(g) of the *Act*, and pursuant to subsection 5(3) subsidiary to *broadcasting policy* objectives:

(3) The Commission shall give primary consideration to the objectives of the broadcasting policy set out in subsection 3(1) if, in any particular matter before the Commission, a conflict arises between those objectives and the objectives of the regulatory policy set out in subsection (2).

83. In framing its rationale for reductions in exhibition obligations and the failure to impose complete or rigorous expenditure requirements as providing “flexibility” – in other words, administrative concerns – the Commission has breached its obligation to give precedence to matters of support for Canadian programming.

### **The Governor in Council should instruct the Minister to proceed with the Government’s commitments to Modernize CBC/Radio-Canada**

84. A referral back by the Governor in Council, followed by the Commission’s adoption of FRIENDS proposals, would do much to reverse the damage caused by the insufficiency of regulatory oversight over CBC’s last licence term and that which could transpire in light of the unjustified flexibility afforded by this Decision.

85. This, however, should only be seen as a starting point.

86. The Mandate letter to the Minister asks that he:

- Modernize CBC/Radio-Canada, proceeding in a manner that respects the public broadcaster’s independence by:

- Updating CBC/Radio-Canada’s mandate to ensure that it meets the needs and expectations of Canadian audiences, with unique programming that distinguishes it from private broadcasters;
- Reaffirming its role as public broadcaster in protecting and promoting the French language and francophone cultures in Quebec and across the country;
- Increasing the production of national, regional and local news;
- Strengthening Radio Canada International, so that it can continue to advocate for peace, democracy and universal values on the world stage;
- Ensuring that Indigenous voices and cultures are present on our screens and radios;
- Bringing Canada’s television and film productions to the world stage; and
- Providing *additional funding* to make it less reliant on private advertising, with a goal of eliminating advertising during news and other public affairs shows.

87. The “additional funding” promised in the 2021 Liberal Party Platform was \$400 million annually.

88. Departmental officials have suggested that these initiatives will be undertaken as soon as the Department’s legislative agenda permits. Given that that agenda includes the *Online Streaming Act*, the *Online News Act* and anticipated *Online Harms* legislation, FRIENDS fear is that CBC will never get the attention it so clearly requires.

89. Accordingly, FRIENDS respectfully requests that, in addition to referring back the Decision for reconsideration, the Governor in Council direct the Minister to forthwith proceed with the Government’s plan to modernize CBC/Radio-Canada.