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July 6, 2016

Dear Mr. Morrison,

Re: Options for a Merit-based CBC Board of Directors Appointment Process

You have asked us¹ to provide an opinion and recommendations on options open to the federal government to move to a merit-based, independent and arm's-length appointment process for the CBC Board of Directors.

Specifically, you asked us to review and opine on options for:

1. Re-constituting CBC's governance structure so that merit-based, arm's-length appointments might commence on a timely basis, rather than awaiting the end of the terms of the previous government's patronage-based appointments, that extend to 2020; and
2. Revising the President-CEO appointment process, with, among other things, options to reform the governance to enable CBC's governing body to hire and fire its CEO.

You also indicated that while Friends of Canadian Broadcasting anticipates that meaningful governance change would require amendments to the *Broadcasting Act*, non-statutory options should also be evaluated.

Part 1 – Considerations and Context

After decades of cuts,² the Canadian Broadcasting Corporation (CBC or the Corporation) is seeing a resurgence in its perceived significance as a key Canadian cultural and journalistic institution.

The strongest evidence of this is the decision of the Liberal government to reverse recent cuts made to the CBC's parliamentary appropriation, with a \$75-million increase in the current fiscal year, and \$150

¹ This opinion is provided by two independent lawyers who have collaborated for the purposes of bringing their respective expertise in broadcasting and media law and practice to bear on this matter of public concern and interest. The opinion combines issues of law and public policy.

² Cuts to the CBC's operating budget were not made only by the Harper government; they were also made by previous governments.

million annually through to 2020.³ Underlying this reinvestment in the CBC appears to be a recognition that changes in the media landscape threaten private media's capacity to support Canadian programming and news, diminish the ability to rely on regulation, and that accordingly, the CBC becomes more, not less, important.

Coupled with this sense of the CBC's increasing importance has been a growing awareness that CBC's governance structure, and in particular, its Board of Directors appointment process, fails to ensure the necessary independence and experience that such a critical public cultural and journalistic institution requires.

In his then-capacity as leader of the Liberal Party, Justin Trudeau captured that sense of unease in stating that government can and needs to make sure that CBC governance is non-partisan, labelling the fact that nine out of 11 (then) board members were Conservative Party donors as "unacceptable", and suggesting that government should make sure that Board members at the CBC "are picked in a non-partisan, transparent, open way, by people that have the interests of the CBC and the Canadian public top of mind".⁴

These April 2015 comments were followed by specific commitments made by Mr. Trudeau on behalf of the Liberal Party on September 22, 2015, to review the process of appointing CBC Board members to ensure they are "merit-based and independent".⁵ More recently, on February 25, 2016, the Liberal government announced a new Governor in Council (GIC) appointment process, "one where an open, transparent, and merit-based selection process will support Ministers in making appointment recommendations for positions within their portfolio. The new strategy will result in the recommendation of high-quality candidates who truly reflect Canada's diversity."

Historical Context and Current CBC Board Make-up

The appointment, tenure, duties and disqualifications of directors of the CBC are set out in subsection 36(2) through section 39 of the *Broadcasting Act, 1991*.

Sections 36(2) and (3) state as follows:

36 (2) There shall be a Board of Directors of the Corporation consisting of twelve directors, including the Chairperson and the President, to be appointed by the Governor in Council.

(3) A director shall be appointed to hold office during good behaviour for a term not exceeding five years and may be removed at any time by the Governor in Council for cause.

Common to cultural agencies such as the National Film Board (NFB), Telefilm, the Canada Council for the Arts, National Museums and National Art Gallery as well as quasi-judicial bodies such as the Canadian Radio-television and Telecommunications Commission (CRTC) and National Energy Board (NEB), the provisions in the *Broadcasting Act* governing Board appointments outline relatively broad criteria only.⁶ Other than disqualifying members for direct conflicts of interest, there is no indication of required expertise or test for independence.

³ <https://www.liberal.ca/files/2015/09/Investing-in-Canadian-culture-and-middle-class-jobs.pdf>

⁴ Interview conducted for Friends on April 16, 2015, <http://www.friends.ca/leaders-series>

⁵ <https://www.liberal.ca/files/2015/09/Investing-in-Canadian-culture-and-middle-class-jobs.pdf>

⁶ A point also made by the Lincoln Committee in its report of June 2003, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting*, pp. 550 – 553, <http://www.parl.gc.ca/content/hoc/Committee/372/HERI/Reports/RP1032284/herirp02/herirp02-e.pdf>

The appointment process for CBC directors, including the Chairperson and President, has been subject to various previous reviews and recommendations,⁷ some of which are reflected in the current *Broadcasting Act*.

The 1988 Broadcasting Bill (C-136), which ultimately culminated in the *Broadcasting Act, 1991*, concluded a three-year reappraisal of Canadian broadcasting policy, which, among other things proposed:

- The explicit recognition and “protection” of the arm’s-length principle with respect to the journalistic, creative and programming independence of the CBC;
- The splitting of the then Presidency into two separate and distinct roles, Chairperson of the Board and Chief Executive Officer (CEO); and
- The appointment of the President-CEO by the Board, subject to GIC approval.⁸

These proposed changes are largely reflected in the current *Broadcasting Act*, under which the CBC Board is composed of a maximum of 12 members appointed by the GIC “during good behaviour”, including the Chairperson of the Board. While subject to approval by the GIC for appointment and dismissal, the President and Chairperson of the Corporation are not necessarily Order in Council appointments.⁹

⁷ See, for example, the *Fourth Report of the Standing Committee on Communications and Culture*, February 12, 1987, the *Report of the Mandate Review Committee - CBC, NFB, Telefilm* (Department of Canadian Heritage, 1996), and the *Lincoln Committee Report* of June 2003, Chapters 18 and 19.

⁸ As articulated in the Mulroney government policy statement, *Canadian Voices Canadian Choices*, issued June 23, 1988, by then Minister Flora MacDonald at p. 56. Bill C-136 was passed by the House of Commons on September 28, 1988, but failed to clear the Senate before Parliament was dissolved two days later for the 1988 general election. Bill C-136 had two provisions related to the Board’s power to appoint the President:

39(1) The Board shall, subject to the approval of the Governor in Council, appoint a President of the Corporation, who shall hold office for a term not exceeding five years and may be removed by the Board at any time with the approval of the Governor in Council.

40(4) In the event of the absence or incapacity of the President or if the office of President is vacant, the Board may authorize an officer of the Corporation to act as President, but no person so authorized by the Board has authority to act as President for a period exceeding sixty days without the approval of the Governor in Council.

Only the latter survived (in almost identical form) in Bill C-40 which became the *Broadcasting Act, 1991*, proclaimed June 1, 1991.

⁹ As is further discussed below, while as directors the President and Chairperson are appointed by the GIC, this is not necessarily the case in their specific capacities. Indeed, the only place where the appointment of the Chairperson and President is specifically addressed in the Act is with respect to the power of the Board to fill a vacancy. See sections 41(3) and 42(3). Also, as noted in the Lincoln Committee Report at page 553:

Appointments by the Governor in Council are made by an Order in Council. An Order in Council is a particular kind of subordinate legislation issued by the Governor in Council indicating that the Cabinet has taken a particular decision. An Order in Council appointment must be tabled in the House of Commons and the appointment may be reviewed — but not revoked — by a committee of the House. Thus, an Order in Council appointment of a member to the Board of Directors of the CBC or the CRTC may be examined by the House of Commons Standing Committee on Canadian Heritage.

As of today's date, the CBC Board has two vacancies. Of the current ten-member board, eight members have historically been Conservative Party donors.¹⁰ Also of relevance:

- The current President and CEO of CBC/Radio-Canada was first appointed for a five-year term beginning January 1, 2008. On October 5, 2012, he was reappointed for a second five-year term, set to expire on or about December 31, 2017.
- In addition to two vacancies, four current Board members, including the Chairperson, also have terms expiring in the latter half of 2017. Other members have varying term expiry dates, with the final two members' terms due to expire in mid-2020.¹¹

The Government's New Approach to Governor in Council Appointments

Effective March 21, 2016, the government's "new approach" to GIC appointments was articulated as one that "supports an open, transparent, and merit-based selection process – one that will result in the recommendation of high-quality candidates who achieve gender parity and truly reflect Canada's diversity. The new approach will be:

- Open and transparent
- Representative of Canada's diversity
- Merit-based [with specifics in each area]"¹²

Under "Frequently Asked Questions", two important qualifications to this new approach have been provided:

1. There will be exceptions to this process. For example, where legislation prescribes specific processes for an appointment; and
2. Until the new process is put into place, appointments/re-appointments will only be made to positions that are essential for the continuity of government business and to ensure that services continue to be delivered to Canadians without interruption.

On or about May 17, 2016, Canadian Heritage Minister Mélanie Joly stated that she considers appointments to the CBC/Radio-Canada board of directors to be a priority and that the Liberal government intends to announce an appointments process in the coming weeks.¹³

Part II - The Issues - Options for Revitalizing the CBC Board

The basic question raised by the foregoing is how best to advance Mr. Trudeau and the Liberal Party's commitments (now the Prime Minister and the government's commitments) to an open, transparent and merit-based selection process for CBC Board appointments.

This question can be subdivided into five key issues that will be the subject of this opinion:

¹⁰ As at the election of the new Liberal government on October 19, 2015, of 11 then-members, nine were Conservative Party donors.

¹¹ <http://www.cbc.radio-canada.ca/en/explore/board-of-directors/remi-racine/> and

<http://www.appointments.gc.ca/prflOrg.asp?OrgID=CBC&lang=eng>

¹² <http://www.appointments-nominations.gc.ca/prsnt.asp?menu=1&page=approt&lang=eng>

¹³ <http://news.nationalpost.com/news/canada/secret-cbc-documents-from-board-of-directors-meetings-havent-been-made-public-since-last-august>

First, should the process for the CBC be generally the same as for other GIC appointments, or should it be different? If different, why? Do any differences merit an exception to the new appointment process, or would they merely be a particular manifestation of it?

Second, should the appointment process for the CBC simply address vacancies that currently exist or arise in the natural course, or should government do something to hasten a changeover of the current Board, all of whom were appointed under previous rules?

Third, if there is a need or desire to hasten the changeover of the current Board, can it be done under the current legal framework, and, if so, what are the options?

Fourth, what are appropriate options for an “open, arm’s-length, merit-based appointments process” for the CBC Board? What lessons can be learned from international experience?

Fifth, are there any other governance issues central to an independent CBC, and not addressed through the appointment process, that also need to be considered?

Sixth, if the answer to the third question is negative and/or to ensure future appointments are truly independent, is legislative change desirable, and, if so, what are the options?

Issue One – Does CBC Merit a Different Board Appointment Process?

The underlying thesis of this opinion is the notion that CBC is important, deserving of a governance structure that ensures its independence, and should be led by a board of competent, dedicated and experienced members. We believe this is consistent with statements made by Mr. Trudeau on behalf of the Liberal Party in the weeks leading up to the general election, and the Liberal government since.

The question addressed here is whether the CBC is materially different from other agencies of government, and deserving of a different or exceptional process or criteria.

We will not argue that appointments to the CBC are more important than judicial appointments, Senate appointments or even necessarily quasi-judicial appointments such as the CRTC or NEB. When laws, lives and whole industry sectors are at stake, appointments should receive the highest levels of due diligence.

But while the CBC may not hold this level of importance, we believe it is both sufficiently important, and sufficiently different from other agencies, to merit special attention.

With increases in parliamentary appropriation and real and anticipated declines in private media, CBC is becoming an increasingly significant cultural and journalistic institution.

True journalistic and creative independence requires a far higher level of independence than that enjoyed by other government agencies. Most agencies may be arm’s-length, but they are nevertheless expected, if not required, to follow or be aligned with government policy objectives.¹⁴

Not so journalistic and creative independence, which requires being indifferent to government views. It can, in fact, be about ridiculing and criticizing government – about biting the hand that feeds it.

To do this can require enormous courage. And most of all, it requires a safe harbour.

¹⁴ For example, the CRTC must follow policy directions and can have its decisions appealed or reviewed. Courts interpret laws; they do not create them.

Section 46(5) of the *Broadcasting Act*, introduced for the first time in the 1991 *Act*, sets out the CBC's mandate for journalistic independence:

(5) The Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence.

As a declarative statement, in a section addressing the Corporation's objects and powers, it is a powerful indicator of Parliament's intent that CBC be free from interference in pursuing its journalistic and creative mandate. It is, however, meaningless if the mechanisms, checks and balances of governance – internal and external to the Corporation – do not ensure it occurs.

One such check is in respect of the financial provisions governing the Corporation under the *Broadcasting Act*¹⁵, which at section 52(1) states:

52 (1) 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.

Thus, while the Government ultimately determines its parliamentary appropriation, and CBC must conform its corporate plan to that overall funding,¹⁶ government is statutorily precluded from limiting any specific journalistic or creative endeavours.

The importance of the Board's independence flows naturally from this.

What government cannot do directly through budgetary control, it might seek to do indirectly through its choice of directors. The fact that there is nothing explicit in the terms of reference for directors that requires independence is what has permitted previous governments, both Liberal and Conservative, to appoint directors¹⁵ with clear partisan links.

It is this clear and demonstrable failure of the current appointment process to ensure that directors are truly independent of government, and independent of the views of a past or present government, that calls for different, if not exceptional, measures to be taken for CBC appointments.

When a statutory objective or mandate of a government agency is not being met through its existing appointment process – in this case, independence – it must follow that the appointment process should change so the statutory objective can be met.

The Government's new "open, transparent, and merit-based selection process" for GIC appointments certainly provides an appropriate general framework. But the need for independence at the CBC, at the Board and staff level, may well necessitate selection criteria and safeguards that are unique to it.

The comments that follow address the extent to which these selection criteria and safeguards are deemed simply particular to CBC, exceptional or need to be entrenched in statute.

¹⁵ Another check is Section 68.1 of the *Access to Information Act*, which states "This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration."

¹⁶ See Section 55(1) of the *Act*. Obviously, government's ultimate control over CBC's budget means there cannot be absolute independence. Concern that inadequate funding may compromise the quality and integrity of public service broadcasters is one held the world over.

Issue Two – Can the Appointment Process for the CBC Simply Address Vacancies?

If the CBC Board appointment process is to be truly “open, transparent, and merit-based”, it would appear prudent and logical that the government address, as a priority, legacy appointments that conflict with this approach.¹⁷

Following through with pre-election commitments aside, there is also an urgency for the CBC to review and revise the approach to its mandate, given the added parliamentary appropriation that has already been committed and the well-recognized pressures across the entire Canadian broadcasting and communications system.

That said, there is, at least at first glance, something internally inconsistent about arguing in favour of an independent CBC Board on the one hand, and seeking to curtail the terms of current appointees on the other. Despite the fact that the motivation may be a good and valid one, removal of current ‘during good behaviour’ directors could still be seen as a direct assault on the independence of the CBC Board. It could also create a precedent for future governments to undermine the Board’s independence through their own new appointments.

The conflict here is between appointing appropriate directors and protecting directors once appointed. As it stands, the system has been good at the latter but not at the former. The challenge with CBC Board reform is to become better at the former, while not (unduly) infringing the latter.

We will review potential non-legislative and legislative options to address this.

Issue Three – Can the CBC Board be Changed Without Legislative Change?

There are two possible options that could provide transitional change to the current CBC Board without legislative change. The government could either:

1. Invite present appointees to resign; or
2. Dismiss present appointees who do not voluntarily resign.

Having established a general process and criteria for new appointees – criteria that would presumably exclude an overly partisan Board – the Liberal government could simply encourage or invite current Board members who clearly do not meet the criteria to step down.¹⁸

¹⁷ Otherwise, for example, Conservative Party donors, including the Chair and President-CEO, would continue to constitute a majority on the Board through to the end of 2017. Nevertheless, while the issue of Board members being Conservative Party donors may be the most visible indicator of inconsistency with an “open, transparent, and merit-based” appointments process, it is not the only indicator. Looked at as a whole, the Board – with its make-up of three lawyers, two accountants, digital media, advertising, market research and sales executives and one member with arts board experience – does not include the kind of broadcasting, journalism or public service qualifications, or represent the diversity of Canada, in a way that one might expect from the Board of Canada’s public broadcaster.

¹⁸ This was a route taken by the government with respect to 33 pre-election appointment renewals of various federal agencies and tribunals in December 2015. It is understood that a number voluntarily resigned.

As Board members receive compensation for attendance at Board meetings and other Committees,¹⁹ some reasonable compensation for foregone remuneration might be considered, especially as such amounts are not material in the context of CBC's overall budget, and would help avoid litigation.

Dismissal for Cause

Appointments 'during good behaviour' are intentionally designed to preclude dismissal except in exceptional circumstances, such as clearly inappropriate behaviour (e.g., criminal conduct) or senility.²⁰ Such appointments are an important safeguard in a democratic society, to ensure that institutions of government are impartial and not unduly interfered with; for example, judges being threatened or fired for decisions with which a government of the day is unhappy.

The issue of dismissal of federal Judges is noteworthy both because of the volume of appointments, and hence the inevitable need (occasionally) for dismissal, and the necessity for a very high standard. The system that has evolved to consider the removal of judges includes both procedural checks and balances and specific provisions that expressly permit removal of a judge who "has become incapacitated or disabled from the due execution of the office of judge by reason of

- (a) age or infirmity,
- (b) having been guilty of misconduct,
- (c) having failed in the due execution of that office, or
- (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office."²¹

Such specificity is not provided for other 'good behaviour' GIC appointments, such as the CBC Board. It is reasonable that dismissal of judicial federal appointments would be held to a higher standard – something also evidenced by the fact that CBC directors expressly "may be removed at any time by the GIC for cause".²²

Appointees who can only be removed 'during good behaviour' have three protections.

First, procedural fairness limits *how* the decision to remove a 'during good behaviour' appointee is made, imposing a higher standard of fairness than that owed to a 'during pleasure' appointee, and requiring that, at minimum, the appointee be apprised of the substance of the allegations against him or her and be given a fair opportunity to respond with written submissions.²³

Second, an important component of procedural fairness for a 'during good behaviour' appointee is the decision-maker's duty to give reasons to facilitate substantive judicial review.

Third, the 'during good behaviour' appointee may seek judicial review of the substantive reasonableness of the 'cause' for removal, probing *why* the removal decision was made.

¹⁹ <http://www.cbc.radio-canada.ca/en/explore/board-of-directors/faqs/>

²⁰ For example, with judges, removal may involve an impeachment process. Under the federal *Judges Act*, however, matters not constituting good behaviour are given broad definition.

²¹ *Judges Act*, section 65(2)

²² Section 36(3) *Broadcasting Act*

²³ *Weatherill v. Canada (Attorney General)*, [1999] 4 F.C. 107

Within these protections, however, the GIC has reasonable latitude to define and determine ‘cause’ for removal.²⁴

In our view, the appropriate standard of review for the GIC’s decision to remove a director of the CBC is the deferential standard of ‘reasonableness.’²⁵

This suggests that, while the individual conduct or behaviour of an impugned director may not be at issue, ‘cause’ could go to a broader array of merit-based issues that, if transparently and properly identified, give justification for removal.

It could be argued that, the government having established transparent, justifiable, merit-based criteria for non-partisan appointments, the present appointees to the CBC Board – who would no longer meet the criteria – would (using the language of the *Judges Act*) be “placed ... in a position incompatible with the due execution of that office” and could be removed.

The strength of the argument, and the deference given by the Courts if the matter were litigated, would depend on the procedure followed, how well articulated the new Board selection criteria were and, how defensible removal of Conservative party donors and, potentially, other appointees would appear to be in that light.

Dismissal of Chairperson and President in that Capacity

A more specific issue arises in the case of dismissal of the Chairperson and/or President *in that capacity*.

As, pursuant to section 36(2), the President and Chairperson are also directors, it is clear that *in that capacity*, they, like other directors, are appointed ‘during good behaviour’. In their capacities as President and Chairperson, however, their appointments may well be something else.²⁶

²⁴ These protections may be tested in respect of the recent dismissal from the CRTC of a ‘during good behaviour’ appointee, Commissioner Raj Shoan, “for cause” on the basis that his “actions are fundamentally incompatible with his position and that he no longer enjoys the confidence of the Governor in Council to be a Commissioner of the CRTC”. Order in Council 2016-0651, dated June 23, 2016.

²⁵ *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 98. para. 27

Applying the four *Pushpanathan* factors to Part III of the *Broadcasting Act*, the following observations arise:

- (i) There is neither a privative nor an appeal clause, a neutral factor;
- (ii) The GIC presumably has greater expertise than the judicial branch in determining whether a director of the CBC has exhibited ‘good behaviour’ and the considerations relevant to that determination, a factor suggesting deference;
- (iii) To evaluate a CBC director’s ‘good behaviour’ or lack thereof is arguably a polycentric analysis that demands the GIC to consider various constituencies’ interests and to weigh competing values, including the CBC’s institutional independence and the objectives of a state-funded national broadcaster, a factor suggesting deference; and
- (iv) There are arguably two inextricable questions of law and fact embedded within section 36(3) of the *Broadcasting Act*. The mixed nature of the determination is a neutral factor.
 - a. A question of law: what is the appropriate standard of ‘good behaviour’?
 - b. A question of fact: has the appointee failed to meet this standard, such that the GIC has ‘cause’ to remove him or her?

Thus, with two of four factors suggesting deference, and the other two neutral, we believe the appropriate standard of review for the GIC’s decision to remove a director of the CBC is the deferential standard of ‘reasonableness.’ In addition, per *Wedge v. Canada (Attorney General)*, [1997] F.C.J. No. 872 (F.C.T.D.), the Courts are reluctant to limit the scope of discretion vested by Parliament in the GIC.

In an analogous situation, the Federal Court recently examined the dismissal of the President of the Nuclear Safety Commission, in that capacity, but not as a Board member. The Court noted that the applicable legislation made Board membership of the Commission ‘during good behaviour’, but was silent on the position of President. The Court concluded that the lack of a specific legislative requirement that the President position is appointed ‘during good behaviour’ means it defaults to ‘at pleasure’.²⁷

This would suggest that, statutorily at least, removal of the current CBC Chairperson and/or President, in those capacities, while allowing them to remain as Board members if they so choose, could be an option worthy of consideration.

Certainly, changing the Chairperson and President would send an important signal.

In the case of the current appointees, however, their respective Order in Council appointments specifically to their posts are “during good behaviour”.²⁸

Whether this was designed to afford that status given the nature of office, or to tie the hands of a future government (by making it harder to dismiss the Chairperson and President), is unknown.

In any event, the removal of the current CBC Chairperson and/or President in that capacity, while allowing them to remain as Board members, would potentially be more supportable than the removal of regular directors from the Board entirely, for both symbolic and legal reasons.

First, given the clear difference between the current and previous government’s behaviour towards the CBC, appointing new and more appropriate directors into the two most important positions on the Board would seem reasonable to most Canadians.

Second, because Board voices would not be removed, but rather moved to a more appropriate status in the circumstances, the argument that the government was quashing voices would be moot.

Third, the removal of the Chairperson and/or President as ‘during good behaviour’ appointees, if allowed to remain as directors, would at most constitute a breach of the terms of the appointment. It would not constitute a breach of legislation. Moreover, because these appointments are so central to the governance and operation of the CBC, the argument in favour of dismissal ‘for cause’ (given the lack of alignment between previous and current government priorities) would be stronger.

²⁶ Section 36(2) of the *Broadcasting Act* makes the appointment of the President and Chairperson subject to GIC approval, but is silent on the nature of the appointment.

²⁷ *Keen v. Canada (Attorney General)*, [2009] 4 F.C. 353

<http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/56541/index.do?r=AAAAAQAMa2VlbiBudWNsZWYyAQ>

²⁸ For example, the Order in Council for the President reads:

His Excellency the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, pursuant to section 36 of the *Broadcasting Act*, re-appoints Hubert Lacroix of Westmount, Quebec, as President of the Canadian Broadcasting Corporation, to hold office during good behaviour for a term of five years, and fixes his remuneration and employment conditions as set out in the annexed schedule, which remuneration is within the CEO 7 range (\$363,800 - \$428,000), effective January 1, 2013. (PC Number 2012-1290)

<http://www.pco-bcp.gc.ca/oic-ddc.asp?lang=eng&Page=secretariats&txtOICID=&txtFromDate=&txtToDate=&txtPrecis=hubert+lacroix&txtDepartment=&txtAct=&txtChapterNo=&txtChapterYear=&txtBillNo=&rdoComingIntoForce=&DoSearch=Search+%2F+List&viewattach=26758&blnDisplayFlg=1>

Issue Four – Options for an Open, Arm’s-length, Merit-based CBC Board Appointments Process

An open, arm’s-length, merit-based appointment process can take many forms. What form should it take for the CBC?

In this section we briefly canvass lessons to be learned from international experience with public service broadcasters and Canadian experience with other types of appointments.

Around the world, public broadcasters have governance structures that seek to create a buffer between them and the state. A primary concern is appropriate independence from government. Expertise is often another key consideration. The following are highlights from a number of public broadcasters in western nations:²⁹

- Japan’s NHK has a Board of Governors of 12 members appointed for three years by the Prime Minister, “from among persons capable of making a fair judgment on public welfare and who have extensive knowledge and experience. In such a case, when making such appointment, consideration shall be given to the fields of education, culture, science and technology, industry and other fields and to ensure that all regions across the country are fairly represented”.³⁰ Members “shall not be dismissed against their will”, except as necessary to keep the number of members belonging to the same political party at four or less or for reason of mental or physical disorder or if the Prime Minister deems that the member has “breached an obligation in his or her duties or the member has committed some other inappropriate act”.³¹ The President is appointed by the Board of Governors.³²
- South Africa’s SABC has a 12 non-executive-member Board, which also includes a Group Chief Executive Officer, the Chief Operations Officer and the Chief Financial Officer. The 12 non-executive members are appointed by the President for up to five years on the advice of the National Assembly. Members of the Board are required to have suitable qualifications, expertise and experience in various broadcasting related areas, to be committed to fairness, freedom of expression, the objects of the SABC and accountability, and to represent a broad cross-section of the population.³³

²⁹ The distinction between true public service broadcasters (PSBs) and state broadcasters is obviously critical in this regard. The public broadcasters noted here are publicly funded but not state controlled. Their goal is not merely to provide entertainment, but to promote access to education and culture, develop knowledge, and foster interactions among citizens. To achieve this goal, it is generally recognized that PSBs must be (1) universally available, (2) diverse in the genres of programs offered, the audiences targeted, and the subjects discussed, (3) independent and (4) distinctive as compared to commercial offerings.

³⁰ *Broadcast Act, 1950*, as amended, articles 30, 31.

http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Resources/laws/pdf/090204_5.pdf

³¹ *Ibid*, articles 33, 36, 37

³² *Ibid*, article 52

³³ *Broadcasting Act*, No. 4 of 1991

<http://www.wipo.int/edocs/lexdocs/laws/en/za/za047en.pdf>

Key Excerpts from the *South African Broadcasting Act*:

13(2) The non-executive members of the Board must be appointed in a manner ensuring

(a) participation by the public in a nomination process;
 (b) transparency and openness; and
 (c) that a shortlist of candidates for appointment is published, taking into account the objects and principles of this Act.

(4) The members of the Board must, when viewed collectively--

- The UK's BBC is governed by the BBC Trust under an agreement with the UK government that includes a provision guaranteeing independence.³⁴ Trustees are appointed by the Queen on advice from the DCMS (Department for Culture, Media and Sport) ministers through the Prime Minister. Trustees are chosen on merit and the process is overseen by the Office of the Commissioner for Public Appointments.³⁵ The Trust sets the "strategic objectives of the BBC", but a separate Executive Board (half from BBC staff; half appointed by the Trust) is "responsible for the operational delivery of BBC Services and the direction of BBC editorial and creative output". This structure has been criticized for allowing an unacceptable lack of accountability on the one hand and a lack of real independence on the other. Under reforms to come into effect in 2017 there would be only one board – the Unitary Board.³⁶

(a) be persons who are suited to serve on the Board by virtue of their qualifications, expertise and experience in the fields of broadcasting policy and technology, broadcasting regulation, media law, frequency planning, business practice and finance, marketing, journalism, entertainment and education, social and labour issues;

(b) be persons who are committed to fairness, freedom of expression, the right of the public to be informed, and openness and accountability on the part of those holding public office;

(c) represent a broad cross-section of the population of the Republic;

(d) be persons who are committed to the objects and principles as enunciated in the Charter of the Corporation.

Section 6(2) formally guarantees the freedom of expression, and journalistic, creative and programming independence.

³⁴ Until the end of 2006, the BBC was overseen by a Board of Governors which had the dual tasks of safeguarding the BBC's independence and setting its objectives as well as monitoring its performance at achieving said objectives. The Board's role included appointing the Director-General and other Executive Committee members. The position of the Board of Governors was considered as part of the review process that preceded the finalization of the latest Royal Charter. In January 2007, the Governors and the Executive Committee were replaced by the BBC Trust and a new Executive Board (including, for the first time, non-executive members) whose respective roles were defined as follows:

The Trust will act as the BBC's sovereign body and have ultimate responsibility for the licence fee. It will be responsible for outlining and monitoring the BBC's performance, in addition to approving the highest-level strategies and budgets, and holding the Executive Board to account for delivery of services.

The Executive Board will be responsible for the day-to-day management of the BBC, developing programme strategies, delivering the BBC's services and taking all detailed financial and operational decisions within the framework established by the Trust.

DCMS press notice 033/05, Green Paper is "blueprint for a strong, independent BBC" – Jowell, 2 March 2005

³⁵ The BBC Trust is required by the current Charter to have one member designated for each of the constituent Nations of the United Kingdom: England, Scotland, Wales and Northern Ireland. Each person so designated is required to be suitably qualified by virtue of their "knowledge of the culture, characteristics and affairs of the people in the nation" and their "close touch with opinion in that nation". The current practice is for those who apply to be shortlisted and interviewed. The interview panel is chaired by a senior civil servant from DCMS and also includes an independent assessor, an assessor from the Nation itself and the BBC Chair. The recommendation is then passed to Ministers. (White Paper, para 83)

³⁶ Other proposals of the White Paper (released May 2016; also called the *The Clementi Report* for its author David Clementi) include:

- Non-Executives be appointed by the BBC Board, the appointments to be led by the Nominations Committee (para 86)
- The appointment of the Director General, and any other Executives appointed to the Board, be made by the Board, led by the Nominations Committee (para 87)
- In response to suggestions that the appointment of the Chairperson be entirely independent of government, following the model of appointment of the Chair of the Recognition Panel for self-regulation

- Australia's ABC has a Board consisting of the service's Managing Director and a staff-elected director plus a Chair and four to six directors appointed by the Governor in Council, as set out in statute.³⁷ Governor in Council appointed directors must have:
 - (a) experience in connection with the provision of broadcasting services or in communications or management;
 - (b) expertise in financial or technical matters; or
 - (c) cultural or other interests relevant to the oversight of a public organisation engaged in the provision of broadcasting services.

A Nominations Panel vets and reports on potential appointees.³⁸ Members of Parliament and senior political staff members are ineligible for appointment (including 12 months post holding that position).³⁹
- France Télévisions, which integrates five different French public broadcasters, has a 15-member Board of Directors. Directors have a five-year mandate.⁴⁰ Make-up of the Board is statutorily specified as the Chair plus two persons representing Parliament, five persons representing the State, five qualified persons nominated by the Conseil supérieur de l'audiovisuel⁴¹ (CSA) and two persons representing the workforce. This structure is designed to ensure that the national programming companies are broadly representative of society as a whole and to prevent undue influence by any particular political constituency.
- Governance of public service broadcasting in Germany was designed to forestall any reversion to central control, resulting in the creation of a system of regional public broadcasters that have gone to great lengths to integrate a great number of 'societally representative groups', feedback and decision-making. Today, nine regional radio and TV broadcasters, financed by household licence fees, cooperate with two national television services, ARD and ZDF, and two national radio networks. This primarily decentralized broadcast model relies on regional public broadcasting agencies and administrative councils – the latter including political parties, pressure groups, and associations, which differ across regions, but all include regional governments in a direct or indirect role.⁴²

of the Press. "On this model a small independent appointments committee would be established by the Commissioner of Public Appointments. The Committee would be expected to follow a transparent process to determine a short list and, following interview, to agree on one candidate. The final decision would rest with this independent Committee. If this process were followed, the individual chosen would still be subject to a confirmatory hearing by the CMS Parliamentary Committee to determine suitability. Whilst the appointment would be independent of Government, the candidate would have, and should recognise, a responsibility to Parliament". (Pg 36, para 79, 80)

³⁷ *Australian Broadcasting Corporation Act 1983*, as amended, Section 12(1)

<https://www.legislation.gov.au/Details/C2016C00300>

³⁸ *Ibid*, Section 24B. Further described below

³⁹ *Ibid*, Section 12(5) & (5A). The Act also has specific provisions on removal of non-executive directors at Section 18. While the Act does not contain any specific clauses on independence, the High Court of Australia has ruled generally that the basic democratic institutions of Australia, as established by its constitution, create an implied freedom of political communication, which the elected government cannot abrogate.

⁴⁰ http://www.francetelevisions.fr/conseil_administration

⁴¹ An independent broadcasting regulatory body, established in 1989, that governs public and private operators. A key power of the CSA is the appointment of the Chairs of the national program companies (sociétés nationales de programme), such as France Télévisions.

⁴² The German Federal Constitutional Court ruled in 2014 that the Länder Governments in general are part of society and thus should be represented in the councils, but should not dominate the councils. The number of council members who are directly or indirectly sent to the councils by the Länder governments may not exceed one third. ZDF State Treaty Reference 1 BvF 1/11, 1 BvF 4/11, March 25, 2014.

As compared to appointments for other public broadcasters, therefore, there are at least three areas where specific new requirements for the CBC may be warranted.

- First, in respect of the partisan nature of appointees;
- Second, in respect of relevant appointee experience; and
- Third, in respect of some kind of independent third party or secondary review.

Partisan Appointments

In respect of partisan appointments, public broadcaster governance structures in at least three countries recognize the inevitability of such appointments, and explicitly define, rather than prohibit, the number of appointments from a given political party.

The notion that partisan appointments need not be inherently negative, but should be managed, is also one that has met with some recognition in Canada. As cited by the Lincoln Committee, Peter Herndorf, Pierre Juneau and Catherine Murray of the Mandate Review Committee of 1996 argued:

[We] believe that Board members with a strong political background can provide some clear benefits. We want to stress, however, that the integrity of the Board and the independence of the Corporation would be enhanced if directors with known political affiliations represented the full political spectrum and not just the governing party.⁴³

There is a difference between a qualified person who is also active in politics, and someone who is appointed for their partisanship and close ties to the governing party.

Certainly, to go from an extreme of unduly favouring partisan appointments, to refusing to appoint anyone with any kind of political background, seems to swing too far in the other direction.

While we do not favour politicization of CBC appointments, we do believe that the establishment of criteria on what could be considered reasonable political appointments would be sensible. To that end, we believe the following criteria may be appropriate:

- No more than 50% of Board members should have a partisan background;⁴⁴ and
- For every partisan government member, there should, at minimum, be an equal number of members from other political parties.

Relevant Appointee Experience

⁴³ As cited from the Lincoln Committee Report, pp. 558

⁴⁴ We acknowledge issues of definition here. A person who supports a friend who is a political candidate, and hence becomes a donor, is different than the long-time party member and activist. Rather than trying to draw distinctions between the two, however, we feel it may be easier to just limit to 50% directors with any public partisan involvement, be it through donations, membership or more active involvement.

If the Board is to have real rather than just symbolic utility, relevant experience is essential. Not all Board members need have a particular type of experience, but ensuring that the overall make-up of a Board provides good diversity of opinion and expertise makes for good governance.

Many governments have grappled with this issue for their public broadcasters, but in devising qualifications for each and every Board member, have generally failed to come up with anything that isn't so general as to be meaningless.

In this, Australia has devised the most specific solution – requiring that GIC-appointed directors have experience in one of three general categories:

- (a) broadcasting services or in communications or management;
- (b) financial or technical matters; or
- (c) cultural or other relevant interests.

While Canada need not adopt these specific categories,⁴⁵ the general concept seems well worth considering.⁴⁶

Doing so in respect of broadcasting and production experience would, however, constitute a rethink of current legislative provisions that discourage appointment of directors with such experience.⁴⁷ We believe these provisions stem from an outdated view of the dominance and potential conflicts associated with involvement in these sectors, and unnecessarily deprive the CBC of potential directors who would bring real value to the Board.

Diversity of Appointees

In addition to political persuasion and experience, other public broadcasters explicitly seek a diversity of appointees, through, for example, regional representation.

In its new GIC appointment process, the government has appropriately signalled that the achievement of gender parity and the reflection of Canada's cultural diversity, including aboriginal representation, will be an important aspect of future appointments.

⁴⁵ Further discussed below

⁴⁶ These would be in addition to standard educational and experience requirements typically found in specialized GIC position postings.

⁴⁷ The *Broadcasting Act*, section 38, states:

38 (1) A person is not eligible to be appointed or to continue as a director if the person is not a Canadian citizen who is ordinarily resident in Canada or if, directly or indirectly, as owner, shareholder, director, officer, partner or otherwise, the person

- (a) is engaged in the operation of a broadcasting undertaking;
- (b) has any pecuniary or proprietary interest in a broadcasting undertaking; or
- (c) is principally engaged in the production or distribution of program material that is primarily intended for use by a broadcasting undertaking.

These provisions were introduced at a time when CBC would have competed with a relatively small number of private broadcasters. In today's context, we believe the provisions can and should be interpreted broadly to allow the government to appoint directors with broadcasting and production experience, subject to appropriate conflict of interest guidelines. Ultimately, per below, we think these provisions should be amended to allow greater freedom to appoint directors with more current as well as previous experience in broadcasting and production.

We agree that such diversity is important to the CBC, and would concur that it should be an important factor in choosing future CBC directors.

Third Party or Secondary Review

As in Canada, a number of countries vest the appointment power in the Governor in Council or equivalent. As in Canada, this means the power essentially vests in the Prime Minister (or equivalent/designate).

Some countries have somewhat limited that power by creating panels that recommend candidates to the GIC.

Australia has a statutorily entrenched Nominations Panel that advertises and conducts a director selection process, assesses candidates based on established and any additional criteria, and provides a report and recommendations. While the Prime Minister (or Minister) may choose to ignore the Nominations Panel's recommendations, they must do so publicly and with reasons.⁴⁸

For judicial appointments, Canada has long used independent judicial advisory committees to vet lawyers who apply, and to provide the Minister of Justice with a list of approved candidates, from whom appointments are made.⁴⁹

More recently, the Governor in Council established an Independent Advisory Board for Senate Appointments (Senate Appointment Advisory Board) — which included two members each from the federal government, Ontario, Quebec and Manitoba — as part of its stated plan to make the Senate more independent and less partisan.⁵⁰ In its first iteration (culminating in seven vacancies being filled in March 2016), the process saw the Board receive 284 nominations and provide a short list of 25 individuals.⁵¹ In “identifying exceptional candidates”, the Senate Appointment Advisory Board:

“... undertook significant engagement and outreach with more than 400 national, provincial and local organizations, both rural and urban, which represented Indigenous peoples, women and LGBTQ groups, linguistic, minority and ethnic communities, service groups, educational and academic organizations, as well as groups representing labour and business interests ...

“These consultations were undertaken to ensure that a diverse slate of individuals, with a variety of backgrounds, skills, knowledge and experience that could contribute to a well-functioning Senate, were nominated for the consideration of the Advisory Board.”

⁴⁸ *Australian Broadcasting Corporation Act 1983*, as amended, Section 24A&B.

⁴⁹ <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html#Appointments>

⁵⁰ [Order in Council PC 2016-0011](#), January 19, 2016. The Advisory Board consists of three permanent federal members, one of which is to be appointed as Chairperson, and two *ad hoc* members chosen from each of the provinces where a vacancy is to be filled.

⁵¹ [Report of the Independent Advisory Board for Senate Appointments](#), March 31, 2016. The Terms of Reference for the Advisory Board require, under the transitional process and following each subsequent appointment process, that the Advisory Board must provide a report, within three months after submitting the names of qualified candidates to the Prime Minister. The Report is required to contain information on the process, including on the execution of the terms of reference, the costs relating to the Advisory Board's activities and statistics relating to the applications received.

<http://www.democraticinstitutions.gc.ca/eng/content/transitional-process-report>

We believe some kind of analogous process for CBC appointments, reporting to the Minister of Canadian Heritage, and potentially ultimately serving other communications and culture agencies such as the CRTC,⁵² NAC, NFB, Telefilm, may well be appropriate.

The key elements would be the solicitation and vetting of candidates by an independent body, and the requirement (or at least expectation) that appointments be made from candidates deemed qualified by that body.

Later sections of this opinion will speak to how such new requirements could best be established, and whether this should involve new legislation.

Issue Five – Other Governance Issues Central to an Independent CBC

The director appointment process is not the only governance issue that is central to a well-functioning independent CBC.

Other important governance issues include:

- The term and nature of a director's appointment;
- The number of directors;
- The relationship between the President-CEO and the rest of the Board, including the Board's ability to hire and fire its President; and
- Definition of role of President vs. Chairperson and Board.

Term and Nature of Directors' Appointments

We have noted that, unlike some other GIC appointees, CBC directors are appointed "during good behaviour" rather than "at pleasure". This type of appointment creates an important safeguard in favour of independence, and one that is even more appropriate if the appointment process itself is more sound.

A CBC director would, under a new process, have gone through a significant vetting of his or her qualifications prior to appointment. Once appointed, that director would have sufficiently earned the public trust to be able to maintain that appointment for a full term, except in extreme cases of 'cause'.

Moreover, as it stands, that director could serve a maximum term of five years, and would be eligible for reappointment for a second term.⁵³

We note that some countries have a three-year term for their public broadcaster board. We do not recommend this. We believe that the Canadian standard of a five-year GIC term makes boards less prone to political interference as, among other things, the term exceeds that of any government before facing the electorate. We also believe that a three-year term would lead to a perpetually inexperienced Board, with the average member at any time potentially having only a year and a half of service.

We conclude therefore that CBC director appointments should remain during 'good behaviour' and for up to two five-year terms, if reappointed at the GIC's discretion.

⁵² We note that CRTC appointments would require a process involving both Canadian Heritage and Innovation, Science and Economic Development (ISED).

⁵³ *Broadcasting Act*, section 36(4).

Number of Directors

With 12 directors, including the Chairperson and the President-CEO, the CBC Board of Directors is similar in size to that of most other public broadcasters elsewhere in the world, and not dissimilar to that of many other Canadian federal boards and agencies.

An outlier and interesting precedent here is Australia's ABC, which has a Board with a maximum of nine and a minimum of seven directors, including two staff and a Chair.

Also relevant is an apparent trend towards smaller boards and commissions, sometimes by merely leaving positions vacant. For example, the CRTC can have up to 13 full-time members, typically comprised of a Chair, two Vice Chairs, six regional members and up to four national members.⁵⁴ It has been the practice of governments over the past decade not to appoint national members.⁵⁵ Until 1991, the CRTC had up to six part-time members, but only nine full-time members⁵⁶. The 2003 Lincoln Committee Report recommended that the CRTC be reduced in size from 13 to nine commissioners.⁵⁷

The difference between nine and 12 board members may not seem material, but we believe that reducing the CBC Board to nine members, along the lines of the CRTC in practice and Australia's ABC, could be positive.

We also note that, at present, "if a director is not appointed to take office on the expiration of the term of office of an incumbent director, the incumbent director continues in office until a successor is appointed".⁵⁸ This legacy provision is apparently designed to ensure quorum, but seems out of step with current appointment processes, and might usefully be reconsidered.

Board Ability to Hire and Fire President-CEO

Pursuant to reforms implemented in the 1991 *Broadcasting Act*, the Board of Directors has a circumscribed power to appoint the President-CEO, subject to approval of the GIC.

The power of the Board to appoint a President is limited to a situation of vacancy in the office, from an officer of the Corporation, and for no more than sixty days, without GIC approval.⁵⁹ The Board has no express power to dismiss the President.

⁵⁴ [Canadian Radio-television and Telecommunications Commission Act](#), (*CRTC Act*) section 3. There is no set number of national versus regional Commissioners in the *CRTC Act*. Under section 10(1.1) the Governor in Council may direct the Commission to establish a regional office, and pursuant to section 10.1(2), designate a Commissioner for that region.

⁵⁵ At the present time, the Vice Chair Broadcasting and Ontario regional Commissioner positions are vacant. No national Commissioner positions are currently filled.

⁵⁶ Per Bill C-40 in 1991

⁵⁷ June 2003, p. 568

⁵⁸ *Broadcasting Act*, section 36(5), corresponding to section 24 of the previous *Broadcasting Act*, as amended in 1985

⁵⁹ *Broadcasting Act*, section 42(3), reads as follows:

(3) If the President is absent or incapacitated or if the office of President is vacant, the Board may authorize an officer of the Corporation to act as President, but no person so authorized by the Board has authority to act as President for a period exceeding sixty days without the approval of the Governor in Council.

These 1991 *Broadcasting Act* changes flowed from, but fell short of, a prior recommendation to government from the House of Commons Standing Committee on Communications and Culture of 1987 that the President be appointed by and be responsible to the Board⁶⁰, and indeed were reduced from what was originally proposed in 1988 legislation.⁶¹

At least two reports issued since have called for the CBC Board to have real and effective authority over the President.

The 1996 Mandate Review Committee recommended that the President be chosen by the Board and not the GIC, or alternatively, by the GIC on the recommendation of the Board.⁶²

The 2003 Lincoln Committee Report recommended that “nominations to the CBC Board should be made by a number of sources, and the CBC President should be hired by and be responsible to the Board”.⁶³

We are unclear as to exactly why previous governments have for over two decades resisted calls to grant the CBC Board real, rather than merely notional power, to hire and fire the President-CEO.

The words of then Assistant Deputy Minister of Canadian Heritage, Michael Wernick, to the Lincoln Committee provide as good an indication as any:

It’s the government in any case that chooses the board of directors of the CBC, who are there for some kind of public oversight; that chooses the CEO of the CBC and all the members of the CRTC. So ultimately these are people who the government has chosen to supervise the system.⁶⁴

Government may be loath to give up effective authority to make the key appointment of President of the CBC, because as a statutorily entrenched position in a critical cultural agency, to do so would be to maintain apparent responsibility while losing control.

This is perhaps not an unreasonable perspective, and yet, notably, it is not one held by the government in respect of the National Arts Centre, which does, in fact, pursuant to statute, hire and can fire its President without any recourse to the GIC.⁶⁵

⁶⁰ *Fourth Report*, February 12, 1987, recommendation 2.

⁶¹ Per footnote 8 *supra*, Bill C-136 included a specific clause on the Board’s ability to hire and fire its President. The power was still subject to GIC approval, but would have allowed the Board to effectively lead the process, and propose a non-Board member as President. It also would have more clearly made the appointment a non-GIC appointment.

⁶² *Report on CBC, NFB, Telefilm* issued January 31, 1996, recommendation 28 (Department of Canadian Heritage, 1996).

⁶³ June 2003, p. 567, and generally Chapters 18 and 19.

⁶⁴ Meeting of the Standing Committee on Canadian Heritage, 20 November 2001, as cited in the Lincoln Committee Report, at p. 555.

⁶⁵ Some federal cultural agencies and boards have ‘at pleasure’ appointments; some give more or less power to the Board over the most senior staff appointment. This evidently has to do with the type of agency, its perceived national importance, the degree of control believed to be required, and presumably, the leanings of the Government of the day. For example:

- Pursuant to section 6(1) of the *National Arts Centre Act*, the President is “appointed by the Board to hold office for a term not exceeding five years”. The power of the Governor in Council over the President is limited to fixing his or her salary, pursuant to section 6(3).
- Section 5(1) of the *Canada Council for the Arts Act* states “There shall be a Director of the Council to be appointed by the Governor in Council to hold office during pleasure.”

The solution for the CBC, in our view, lies in the GIC having confidence in the director appointment process, and, therefore, having the level of comfort necessary to give the new merit-based, independent and arm's-length Board greater autonomy to select its President.

We accordingly favour a three-phase appointment process for the President, in which:

1. Nominations are first vetted by a third party appointments committee, that then provides a list of qualified candidates to both the GIC and the CBC Board;
2. The Board provides a short list of a minimum of three eligible candidates, with recommendations, to the GIC;
3. The GIC selects a President from the short list, who is then appointed by the Board.⁶⁶

In respect of dismissal of the President, as long as the President was actually appointed by the Board, this becomes a matter of contract and employment law. Essentially, the Board could either dismiss 'for cause', and refuse to pay a severance package, or dismiss 'without cause' and pay appropriate severance.⁶⁷

If the President remained a GIC appointment, the power to dismiss could not be delegated to the Board.⁶⁸ The most the Board could wield in terms of power in this instance would be a statutory right to a recommendation and triggering of a review.

For this reason, it is only if the President were a true and unequivocal appointee of the Board that the Board would possess effective hiring and firing power.

Consideration might also be given to whether some variation on such a process could be followed in the appointment of the Chairperson.⁶⁹

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- Section 23(1) of the *Museums Act* requires that there be a "Director of each museum who shall be appointed, with the approval of the Governor in Council, by the museum's Board to hold office during pleasure for a term of not more than five years."
 - Section 12(1) of the *Telefilm Act* provides that "The Governor in Council may, on the recommendation of the Corporation, appoint an executive director of the Corporation, who shall hold office during pleasure and shall be paid such salary as is fixed by the Governor in Council."
 - Section 16(1) of the *National Film Act* stipulates: "There shall be a Government Film Commissioner who shall be appointed by the Governor in Council on the recommendation of the Board and paid such salary as the Governor in Council may determine." Under section 16(2), the Commissioner may be removed from office for cause by the Governor in Council on the recommendation of the Board.

⁶⁶ This is a simplified description of a recommended process that would be akin to judicial councils and the new Senate appointment process. Variations on the theme could include permitting the GIC to decline to appoint from first round options, subject to providing reasons and consulting with the Board, who would then provide a final list (which could include, but would not be exclusive to, the first round nominees). A variation on Australia's approach would retain in the GIC the right to choose to appoint a different candidate than that provided by the CBC Board, as long as it provides reasons and consults with the Board. While unsuccessful candidate confidentiality would be maintained, as a further measure of accountability, the GIC would be obliged to reveal its reasons, if it were not to appoint a candidate recommended by the Board.

⁶⁷ In all likelihood, severance would exceed statutory minima, as set out in the employment contract. This could, for example, be based on the full compensation owing for the rest of the term, or some formula based on service to date.

⁶⁸ We see no need to change the requirement that the President also be a GIC-appointed director. The President role can be seen as distinct and separate from that role.

Clearer Definition of Role of President vs. Chairperson and Board

The current *Broadcasting Act* is relatively general on the role of the President versus that of the Chairperson and Board, stating that

- a. The “Board is responsible for the management of the businesses, activities and other affairs of the Corporation”; and
- b. The “Chairperson shall preside at meetings of the Board” and the President is the “chief executive officer of the Corporation and has supervision over and direction of the work and staff of the Corporation” and both “may exercise such powers and shall perform such other duties and functions as are assigned to [them] by the by-laws of the Corporation.”⁷⁰

This contrasts with other jurisdictions, which provide more specificity on the roles of senior staff and the Board, such as the UK where the BBC Trust sets the “strategic objectives of the BBC”, and a separate Executive Board (half comprised of BBC staff) is “responsible for the operational delivery of BBC Services and the direction of BBC editorial and creative output”.⁷¹

Previous reports to government have also recommended more clarity.

The *Fourth Report of the Standing Committee on Communications and Culture* in 1987 recommended that the *Broadcasting Act* be amended to provide that the Chairman be responsible for the Corporation’s policies, while the President shall be responsible for policy implementation.

The 1996 Mandate Review Committee recommended that the Board be made explicitly responsible for approving the goals, policies and long range plans of the CBC, as well as evaluating their implementation. The President would be responsible for general management and supervision of staff, and to develop long-term strategies for recommendation to the Board.⁷²

While such divisions may appear relatively obvious, and in some ways suited to by-laws, statutory recognition has the advantage of certainty and public recognition. We therefore recommend it.

Issue Six – Options for Legislative Change

As has been noted, the need for, or advisability of, legislative change has at least two possible bases.

First, if for political, practical or legal reasons, a sufficient changeover of the current CBC Board is deemed not possible under the current legislative framework, there is no other option.

Second, and regardless of any non-legislative initiatives, there is no better way to ensure a truly merit-based, independent and arm’s-length CBC appointment process – that is protected from partisanship, than to enshrine it in legislation.

The power of the Government to change the GIC appointment processes is inherent in the nature of GIC authority. Given that an Order in Council is subordinate legislation, it can by definition be superseded by a later order. In particular, as Parliament has the constitutional jurisdiction and ability to enact,

⁶⁹ We do, however, believe the Board’s ability to hire and fire its own President to be a more important matter for the Board and the independence of the CBC.

⁷⁰ *Broadcasting Act*, sections 39, 41(1) and 42(1)

⁷¹ As previously noted

⁷² Recommendation 29

repeal or modify any legislation, not only can an Order in Council appointment be rescinded, but the very structure, composition and existence of the CBC's Board can be altered through new legislation.⁷³

Thus, while not necessarily required to implement change to CBC appointments, new legislation is the only route that gives government unquestioned legal and moral authority to implement a full reform of CBC governance structures. It is the only way to start anew with a clean slate.

Even if a complete reconstitution of governance is not required, and even if changes are deemed incremental or evolutionary, the value of introducing such changes in legislation cannot be overstated. In so doing, the government would move them from merely being based on the power and authority of the Cabinet of the day, to being matters of Parliament, with all the Parliamentary debate, public review of and engagement on the issues, inherent to that process. As such, consistent with the arm's-length principle that is deemed essential to governance of public broadcasters in western democracies, legislation is the best guarantee that new CBC governance requirements cannot easily be discarded or changed.

As a matter of principle, we therefore believe that proposed changes to the CBC appointment process should ultimately be manifested in amendments to the *Broadcasting Act*.

We summarize those proposals in the following section, but leave the precise wording of most such amendments to legislative drafters.

In one key area, however, we do feel compelled to propose language. We recommend that section 39 of the *Broadcasting Act* be amended to add the following:

39(2) Every director shall, in the exercise of his or her duties, seek to protect and advance 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.⁷⁴

We believe that the CBC's requirement for journalistic, creative and programming independence, set out in Section 46(5) and section 52(1) of the *Broadcasting Act*, and Section 68.1 of the *Access to Information Act*, is so fundamental that it should also become a direct obligation of directors. We view such a requirement as a key additional check and balance on governance – both internal (after appointment) and external (prior to appointment) to the Corporation.

Part III - Recommendations

Commitments by the Liberal Party, now the government, to move to a merit-based, independent and arm's-length appointment process for the CBC Board of Directors are laudable, and can be achieved in a number of ways.

In making these recommendations we are guided by three principles:

1. Recommending the minimum change necessary to achieve objectives. We believe this to be consistent with both core principles of governance and easier to achieve in practice;
2. Being as consistent as possible with already announced government plans for a new GIC appointment process change; and

⁷³ Recognized by the Lincoln Committee at p. 554.

⁷⁴ While we prefer this option, another option would be to change the oath sworn by directors pursuant to section 37.

3. Providing short-term and transitional mechanisms and proposals that would not require statutory permanent solutions, as well as recommendations for statutory change, which would provide more secure and permanent solutions for the medium and long term.

We acknowledge the inherent tension between the expediency possible through proceeding by way of policy instrument or GIC Order, and the relative permanence possible with the slower route to statutory change.

In this case, however, we believe the choice to be an unnecessary, if not a false one. We believe the answer is both.

Given the need for expediency, we recommend that the government move to revitalize the CBC by introducing a new appointment process as a matter of policy. This process would address vacancies, and encourage existing partisan appointees to step down, and should result in a majority of non-partisan appointments by December 31, 2016.

Given the need for a more secure solution for the longer term, we also recommend that the Government move to re-constitute CBC's governance structure through amendments to the *Broadcasting Act*. We believe that a reasonable target date for the approval of amendments would be December 31, 2017.

Our specific transitional and permanent recommendations are summarized below.

Transitional Recommendations – New Policies and Practices

Recommendation 1: The government should proceed to fill vacancies on the CBC Board employing an expanded version of its new approach to GIC appointments (Recommendations 2 through 7, below). Consistent with the government's new approach to GIC appointments, candidates for director should be encouraged from all regions of Canada, employing recruitment strategies and outreach activities to reach qualified and diverse pools of candidates.

Recommendation 2: Director candidates should be required to possess experience in at least one of three general categories:

- a. broadcasting, media and/or journalism;
- b. financial or technical matters; and
- c. cultural or creative industry experience, including music and film/TV production.⁷⁵

Recommendation 3: An appointments committee chosen from current or former Deputy Ministers, and Associate or Assistant Deputy Ministers of Canadian Heritage, Heads of Cultural agencies, and distinguished Canadians, such as recipients of the Order of Canada, should be formed to vet candidates and provide the Minister with a short list of recommended qualified names. The CBC Appointments

⁷⁵ As previously discussed, given section 38 of the *Broadcasting Act*, this would mean drawing a distinction between potential nominees who have active and material ties to broadcasting or production (and who would not be eligible for appointment) and those with experience and knowledge of these sectors, which could add valuable perspective to the Board.

Committee should be explicitly tasked with recommending a Board comprised of a majority of non-partisan members.

Recommendation 4: As an interim measure, the government should invite current Board members who individually or collectively do not meet the selection criteria to step down.

Recommendation 5: As a further interim measure, the government should consider dismissal of the Chairperson and/or President *in that capacity*. Such dismissal should take precedence over the dismissal of other directors, in the event that the Chairperson, President or Board did not have the confidence of the government in terms of plans for expenditures of an increased CBC parliamentary appropriation.

Recommendation 6: In the event of a vacancy in the position of President, the following three-phase appointment process should be followed:

1. Nominations are first vetted by the third-party Appointments Committee created under Recommendation 3, that then provides a list of qualified candidates to both the GIC and the CBC Board;
2. The Board provides a short list of a minimum of three eligible candidates, with recommendations to the Governor in Council;
3. The Governor in Council selects a President from the short list, who is then appointed by the Board.⁷⁶

Recommendation 7: As a further interim measure, in the event that a sufficient number of Board members do not resign to bring the number of partisan members to less than 50%, the government should consider dismissal of sufficient partisan directors to meet this criterion.

Medium-Term Recommendations: Amendments to the Broadcasting Act

Recommendation 8: Within eighteen months, the government should amend the *Broadcasting Act* to formally establish a new appointment process and overhaul the CBC Board. Recommendations 2, 3 and 6 would form part of the amendments to the Act. We also recommend a rule be added to Recommendation 3 to require that a minimum of two directors possess each area of experience.

Recommendation 9: In furtherance of ensuring experienced directors as set out in Recommendation 8 above, the conflict of interest provisions set out in section 38(1) should be amended to permit a minority of Board members to be engaged in broadcasting, production, or music, or have a pecuniary or proprietary interest therein, but to avoid any direct conflict by requiring disclosure of any such interests prior to appointment and recusal on any decisions that affect those interests.

Recommendation 10: Consideration should be given to providing specific requirements on partisan appointments, such as the following:

- No more than 50% of Board members should have a partisan background.
- For every partisan government member, there should be an equal number of members from other political parties.

⁷⁶ Such a process could only reasonably be initiated in full after a new Board appointment process was in place and the Governor in Council was satisfied that Board members met the new selection criteria.

Recommendation 11: CBC director appointments should remain ‘during good behaviour’ rather than ‘at pleasure’, and remain eligible for a five-year term, renewable at the option of the GIC.⁷⁷

Recommendation 12: Consideration should be given to reducing the size of the CBC Board of Directors from 12 to nine. Consideration should also be given as to whether section 36(5) of the Act (which allows an incumbent director to continue in office until a successor is appointed) should be rescinded.

Recommendation 13: The CBC Board should explicitly be made responsible for approving the goals, policies and long range plans of the CBC, as well as evaluating their implementation. The President should be made explicitly responsible for general management and supervision of staff, and to develop long-term strategies for recommendation to the Board.

Recommendation 14: The CBC’s requirement for journalistic, creative and programming independence, set out in Section 46(5) and section 52(1) of the *Broadcasting Act*, and Section 68.1 of the *Access to Information Act*, should be made a direct obligation of directors.

Yours truly,



Peter H. Miller



Brian MacLeod Rogers

⁷⁷ We note that the Act designates all director positions, except that of the President, as part time. We believe this to be appropriate. We note, however, that especially with a smaller Board, the time commitments of directors would likely expand. Defining those expectation would be an important part of any recruitment and governance processes.