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**Submission of Astral Media Inc. to the  
Telecommunications Policy Review Panel**

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**August 15, 2005**

## **I. Introduction**

Astral Media Inc. (“Astral”) is pleased to provide these comments to the Telecommunications Policy Review Panel in response to certain issues raised in the June 6, 2005 Consultation Paper.

Astral is one of Canada’s leading media companies, active in specialty, pay and pay-per-view television, radio, outdoor and e-business. Astral entered the broadcasting sector in 1982, as a pioneer in the launch of a national general interest pay television service. Nearly twenty years later, Astral has become one of Canada’s largest operators of French and English-language specialty, pay and pay-per-view television services. Astral also has a major presence in the French-language radio sector in all urban areas of Quebec. We also own and operate English-language radio stations in New Brunswick and Nova Scotia.

## **II. Scope of Astral’s Submission**

Astral acknowledges that the mandate of the Policy Review Panel is not focused on the broadcasting industry. Nevertheless, many of the issues that the Review Panel will be considering in fact resonate with companies such as Astral and other broadcasters who now operate in a communications environment that is characterized by increasing vertical integration (i.e., the merger of content and distribution) and a more significant level of “media product convergence” (i.e., the offering of telecommunications and broadcasting services by a single provider). In this new environment, changes or developments in the telecommunications regulatory framework could have a significant impact on the environment in which broadcasting undertakings operate.

## **III. The New IP World**

As the Consultation Paper points out, Internet Protocol (IP) networks have been a fundamental driver of innovation and demand for connectivity, permitting many types of applications to be distributed efficiently over a single network and capable of handling every kind of application including voice, data, audio and video. The evolution towards IP delivery of “intelligence” (whether data, text/information, audio-visual entertainment and information or other content) raises issues with respect to the existing regulatory

and legislative framework governing the provision of telecommunications and broadcasting services.

This “IP convergence” raises concerns with respect to the role of “broadcasting distribution undertakings” (BDUs) in the Canadian broadcasting system. BDUs operate undertakings for the reception of broadcasting programs and the retransmission of such programs to various individuals and homes (or to other BDUs through a relay function). However, BDUs are increasingly employing their distribution platforms for IP-based telecommunications services (for example, VOIP products). Moreover, cable operators are using their cable platforms to provide IP broadband connectivity to subscribers. From a marketing standpoint, broadcasting, Internet and telecom (telephony) services are now being bundled as a single product offering.

In this new environment, there has been an increasing focus on BDUs as telecommunications common carriers,<sup>1</sup> which has had the effect of understating or even downplaying the key role that BDUs have traditionally played and will continue to play in meeting the cultural objectives set out in the *Broadcasting Act* and as developed by the CRTC under its regulatory framework.

#### **IV. Understanding the role of BDUs in achieving cultural/broadcasting policy objectives**

As noted above, BDUs and telecommunication common carriers engage in the distribution of “intelligence”<sup>2</sup>. However, in contrast to a common carrier, which is prohibited under the *Telecommunications Act* from controlling the content or influencing the meaning or purpose of telecommunications carried by it to the public<sup>3</sup>, one of the central roles of a BDU is precisely to control the content and “influence the meaning” of the services distributed to the public (BDU subscribers). Not only do BDUs make purely “programming decisions”, they are required by specific rules and regulations to carry content in a specific priority. Among the BDU’s obligations are:

- carriage of all local conventional stations
- each educational television service operated by a provincially-designated authority

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<sup>1</sup> A role recognized by the Commission beginning in Telecom Decision CRTC 96-1.

<sup>2</sup> *Telecommunications Act*, S.C. 1993, s.2.

<sup>3</sup> *Telecommunications Act*, section 36.

- carriage of each CRTC-licensed specialty, pay and digital category 1 services in the language of the market in which the BDU operates<sup>4</sup>
- carriage of at least one licensed “general interest” ppv service
- carriage of other off-air stations, vod or other digital programming services
- compliance with distribution and linkage rules (i.e., preponderance, basic/discretionary status, dual status, linkage);
- a minimum of 5% of their gross annual revenues derived from broadcasting activities to support Canadian programming;

The scope of BDU obligations in meeting broadcasting objectives is illustrated in detail in the table included as Appendix “A” to this submission.

Our submission will address the “tension” that has arisen between the above-noted distinct role played by BDUs within the Canadian broadcasting system and the increasing use by BDUs of their platform to offer new services, many of which are telecom based and offered under distinct regulatory and policy underpinnings. These are addressed below.

(i) **Three key elements of the current broadcasting environment**

(a) **vertical integration**

Astral is not integrated with any BDUs such as cable companies, satellite providers or any other type of entities engaged in broadcasting distribution. However, the broadcasting environment in which Astral now operates is characterized by a significant level of integration. Large integrated media companies are now involved in all levels of broadcasting, ranging from content creation (production), through exhibition and ultimately to distribution or delivery to the end customer (viewer).

The significant level of vertical integration among BDUs (BCE, Quebecor, Shaw/Corus, Rogers, Cogeco) with broadcasting programming services spanning radio, conventional television, pay and specialty services creates a natural incentive on the part of BDUs to favour affiliated programming services on their platform over unaffiliated services. The table below illustrates the varying level of integration among major media players in Canada.

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<sup>4</sup> Subject to available channel capacity.

|                           | Activities of major media players on Canada |          |                |        |        |                   |      |      |        |
|---------------------------|---|----------|----------------|--------|--------|-------------------|------|------|--------|
|                           | BCE   | Quebecor | Shaw/<br>Corus | Rogers | Cogeco | CanWest<br>Global | AACI | CHUM | Astral |
| Radio                     |   |          | ✓              | ✓      | ✓      | ✓                 |      | ✓    | ✓      |
| Television                | ✓   | ✓        | ✓              | ✓      | ✓      | ✓                 | ✓    | ✓    | ✓      |
| Broadcast<br>Distribution | ✓   | ✓        | ✓              | ✓      | ✓      |                   |      |      |        |
| Production<br>Companies   | ✓   | ✓        | ✓              |        |        |                   | ✓    |      |        |
| Newspapers                | ✓   | ✓        |                |        |        | ✓                 |      |      |        |
| Magazines                 |   | ✓        |                | ✓      |        | ✓                 |      |      |        |
| Internet                  | ✓   | ✓        | ✓              | ✓      | ✓      |                   |      |      |        |
| Telephony,<br>networking  | ✓   | ✓        | ✓              | ✓      | ✓      |                   |      |      |        |
| Wireless                  | ✓   |          |                | ✓      |        |                   |      |      |        |

The above market structure creates a similar dynamic to that found in the telecommunications sector with respect to competitive access to bottleneck facilities controlled by integrated players. In that regard, we note that the CRTC imported the principle of “no undue preference” from telecommunication legislation which now forms a core principle with respect to section 9 of the *Broadcasting Distribution Regulations*.

However, as we move increasingly to a single “IP pipeline” environment, the issue of access to the platform for non-integrated broadcasters becomes more important. These developments, along with the greater level of consolidation among BDUs, have made the issue of access and fair treatment between affiliated and unaffiliated players of paramount concern in the new environment.

**(b) An increasingly bundled world**

Broadcasting programming services are now only one of several products offered by BDUs as a part of an overall “bundled” product offering. Using their multiple roles as a BDU, a telecommunications common carrier (telephony) and a telecommunications service provider (broadband ISP), some distributors are now offering an increasing array of new services. One of the consequences of this development is that

broadcasting programming services are now only one of several services offered on the BDU platform. This in turn raises a new set of concerns. For example, the traditional preoccupation in the telecommunications sector that dominant telecommunications common carriers do not cross-subsidize their competitive offerings from revenues earned from monopoly or bottleneck activities has now become a significant issue for broadcasting regulators: integrated companies can use retail revenues from their broadcasting distribution activities to support other bundled products.

This suggests that governments and regulators should be vigilant to ensure that BDU revenues earned from the carriage of broadcasting services such as pay and specialty services should not be used by BDU “telecommunications service providers” to subsidize new competitive ventures such as high speed Internet access or other non-broadcasting services. Any revenues earned by BDUs in respect of their role in providing broadcasting services to the public should be preserved within the broadcasting system.

Currently, programming services, including Astral’s pay and specialty services, are facing increasing pressure from BDUs to reduce costs, which has put pressure on the revenues received from BDUs in the form of wholesale fees for carriage of our services. In that regard, Astral notes that in the case of our broadcasting programming services, the level of these wholesale fees has effectively been subject to a price ceiling for many years and, more recently, has even fallen. Under this environment, the prospect of revenues from the carriage of broadcasting services being “leaked” to other non-broadcast ventures is particularly egregious: the result will be even further pressure on the revenues earned from carriage by BDUs. To the extent that BDUs can cross-subsidize non-broadcast services without any restrictions or limitations, they are effectively forcing programming services to bear some of the costs of these new ventures.

In view of the foregoing, the Panel will need to be sensitive to the ramifications of wholesale liberalization or forbearance on the telecommunications sector, to the extent that such actions inadvertently make it easier to engage in this form of “cross-subsidy”. While such decisions and recommendations may be completely supportable from a telecom standpoint, it will be important to recognize the “duality” inherent in these issues as we move to an increasingly IP/convergence environment.

(c) **Development of “parallel” broadcasting services**

As noted in the consultation paper, as networks evolve, the distinctions between computing, telecommunications, “new media” and broadcasting continue to fade. Proliferation of packet technologies will generally challenge the usefulness of the distinction between voice, data, text, video and audio services. This in turn has created a “middle ground” where broadcasting and telecommunications services are beginning to incorporate similar interactive and content elements (e.g. interactive TV, on-demand video and music over the Internet, mobile phones and handsets).

A recent example of this convergence is the offering by telecom companies of broadcasting-type services, which has been driven almost exclusively by the move to an IP network configuration. In a very short period of time, “telco” offerings now extend to services such as:

- Internet audio/video streaming;
- broadcasting to mobile phones;
- podcasting; and
- VOD/SVOD.

Applications using IP-based facilities have enabled the distribution of new products such as “broadcasting to mobile phones” and wireless TV. These developments raise the potential to ultimately circumvent the role of BDUs as we move from a traditional “point-to-multi point” distribution architecture typically employed by a BDU to a more “point-to-point” IP-based content distribution architecture.

The IP world has effectively introduced a parallel layer of unregulated broadcasting-like services which compete with more conventional and traditional broadcasting services. Many of these products are offered outside of the scope of traditional CRTC broadcasting regulation, as they fall under the scope of the CRTC’s 1999 *New Media Exemption Order*. Arguably, the *Exemption Order* has introduced significant uncertainty, leaving it difficult to know where conventional regulation stops and the “wild west” of the Internet begins.

It is unlikely that the CRTC specifically contemplated the multitude of technological developments that have been offered in the five years since the *New Media Exemption Order* was issued. What is clear, however, is that the scope and breadth of these

“unregulated” products have effectively placed more traditional broadcasters in a potentially non-level playing field, with a different and more onerous set of obligations and other rules.

An example of these unregulated products can be seen in the recent announcements by Rogers Wireless, Bell Mobility and LOOK Communications Inc. to offer “mobile broadcasting services”. Canadian cell phone providers plan to use *MobiTV*, a software platform which is already being used to provide U.S. cell phone users with live feeds of television and on-demand content to their cell phones.<sup>5</sup> Some of these services will offer as many as eight channels of full broadcasting content.

Following concerns raised by the Canadian Association of Broadcasters with respect to the impact of these new “mobile broadcasting services” on current broadcasting policy and the CRTC regulatory framework, the CRTC has now called for comments to consider the impact on broadcasting policy of some of the foregoing applications.<sup>6</sup>

The development of mobile broadcasting services is just one example of how the role played by BDUs in the broadcasting sector has begun to evolve. To the extent that telecom-based services have the ability to offer full “true broadcasting” services, the role of BDUs as a “cultural choke point” may gradually diminish. This, however, raises a second set of concerns, namely whether policy makers will continue to have the ability to realize broadcasting goals on the “distribution” side.

**Astral submits that the Panel must be mindful of the impact that these telecom/IP developments will have with respect to the ability of policy makers and regulators to achieve broadcasting objectives.** It is possible that certain measures arrived at using a telecommunications rationale to liberalize or forbear from regulation in an IP world could have the unintended consequence of leaving BDUs less able to meet their obligations for Canadian content and other broadcasting policy objectives. Astral submits that telecommunications policy makers and regulators will need to be cognizant of these potential “second order” impacts on broadcasting objectives.

Astral submits that in an IP/convergence environment, the issue goes beyond merely retaining the current of “parallel regulation” under the current broadcasting and

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<sup>5</sup> MobiTV was developed by Idetic, Inc., a privately held company based in Berkeley, California.

<sup>6</sup> *Call for comments on a regulatory framework for mobile broadcasting services*, Broadcasting Public Notice CRTC 2005-82, August 11, 2005.

telecommunications regulatory frameworks. Rather, the challenge before regulators will be whether such parallel systems can be reconciled in a convergence world.

In summary, a paradox has arisen: in the long run, the role of the BDU as a “gatekeeper” may be diminishing as we move to a more “disaggregated” point-to-point distribution environment, as evidenced by services such as *MobiTV*. However, at the same time, it will become increasingly difficult for regulators to ensure that a more diffuse distribution architecture can effectively deliver on the current obligations extracted from BDUs under the existing regulatory framework. As we move to the IP world, the challenges raised for policy makers is to address both the telecom and the broadcasting policy issues raised by these new developments.

## **V. Foreign Investment Rules Governing Telecommunications and Other ICT Companies**

### **(a) Application of liberalized rules to BDUs**

Astral submits that the Panel should pay close attention to the relationship between foreign ownership rules and/or cultural goals in the broadcasting sector. We note that the issue of the appropriate scope of foreign ownership rules governing telecom companies are of interest to broadcasters, given the potential impact that possible liberalization of such rules could have on the activities of BDUs in Canada.

The Canadian ownership and control rules governing broadcasting undertakings have had an important role in shaping a distinct and diverse Canadian broadcasting system. Canadian-ownership and control rules for the broadcasting sector have provided the necessary conditions to enable the creation of Canadian content that reflects and promotes Canadian values, stories and perspectives to our viewers.

The prospect of more relaxed ownership rules for telecommunications companies, raises the question of whether such liberalized rules should be extended to broadcasting distribution undertakings (BDUs). Today, many Canadian media companies have combined ownership and control over telecommunications facilities and BDUs (as well as programming undertakings).

In Astral’s view, the current ownership framework governing BDUs should remain unchanged in order to preserve the key role that BDUs play in our broadcasting system. Ceding control over the BDU platform raises the potential for non-Canadians to exert

undue influence over programming decisions made by licensed Canadian broadcasters including programming undertakings.

BDUs are not the analog of “common carriers”. As noted above in detail, when a BDU offers television programming to its subscribers, unlike a pure common carrier (such as a telephone company), it has an active role in “controlling or influencing” the content that it offers to subscribers: the BDU makes critical decisions about which services to market, promote and offer to its subscribers, as well as the appropriate level of resources that should be devoted to such marketing and promotion. It also negotiates vital wholesale prices and sets program packages, sets retail prices and program promotion channels.

At the time that the foreign ownership rules were initially adopted, there was little or no vertical integration among Canada’s media companies. The ownership patterns until relatively recently generally reflected “silos”, in which distribution and programming were carried out by separate and distinct unaffiliated entities. However, the current environment is marked by far more ownership concentration and vertically integrated ownership structures.

The potential for influence is magnified by the fact that under the current rules, non-Canadian media companies are permitted to take significant minority ownership stakes in Canadian programming services. Once you introduce non-Canadian BDU control alongside existing cross-ownership of programming services, it becomes far more difficult to ensure continued Canadian control over programming decisions, thereby placing the “checks and balances” of our current system at risk.

Therefore, any liberalization of the current rules governing non-Canadian control over BDUs could easily result in an unacceptable level of influence by non-Canadians over the broadcasting system. This could occur, even if the programming ownership rules remain unchanged. It is not simply a matter of a U.S.-owned BDU operating in Canada complying with CRTC requirements.

Removing one of these “links” in the chain by permitting a non-Canadian investor to control the distribution platform will greatly increase the potential for non-Canadian influence and control of our broadcasting system. Therefore, in our view, the *ideal* solution is to maintain the existing ownership rules for both broadcasting distribution and programming.

**(b) Structural Separation does not address the concern**

Some have argued that if liberalized ownership rules are extended to BDUs, it would be sufficient for Canadian media companies to simply reconfigure their operations into “structurally separate” affiliates, pursuant to which BDU and programming operations would be completely separate, from a legal form standpoint. Under this approach, it is argued that non-Canadian investors could then acquire control of a BDU without jeopardizing Canadian control of programming undertakings. This simple action to structure operations would ostensibly eliminate any concerns with respect to non-Canadian BDU control and the potential to influence or control Canadian programming services.

However, as noted above, the issue is more complex. There is a unique relationship between broadcasting content companies and broadcasting distributors that goes well beyond solutions of structural accounting separation. The role of a broadcast distribution undertaking in our system is difficult to “surgically remove” from the overall anatomy of our broadcasting system. The issue is more complex than simply permitting media companies to govern themselves under newly liberalized rules through separate and distinct corporate entities for broadcasting programming and broadcasting distribution.<sup>7</sup>

Our concern relates to the issue of cross-ownership, where a non-Canadian who acquires control of a Canadian BDU also acquires (or retains) a minority voting interest in a Canadian programming undertaking. Even a minority interest in a Canadian programming company by the non-Canadian investor that also controls a Canadian BDU would constitute an unacceptable level of influence.

Moreover, the regulator has neither the resources nor the inclination to “micro manage” the BDU-programmer relationship. Nor is it likely that any remedial measure would effectively capture the concern that the structural ownership limitation is aimed to prevent.

**(c) Proposed safeguard in a liberalized ownership environment**

If, ultimately, changes to the BDU ownership rules are recommended, we submit that the following “ownership limitation” should be introduced: *if a non-Canadian acquires control of a Canadian BDU, it would be limited from thereafter acquiring or retaining any*

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<sup>7</sup> Even assuming that there would be separate management and boards of directors, with no interlocking or overlapping management or directors.

*interest in a Canadian programming company.* This minimum safeguard would mitigate the impact of foreign BDU control on our broadcasting operations. This limitation would preclude a non-Canadian investor from holding a voting interest in a programming company once such investor elects to acquire control of a BDU under newly liberalized ownership rules.

In our view, no amount of strengthened conduct rules can be a substitute for the foregoing key structural limitation. In the absence of such an ownership limitation, it will be difficult, if not impossible, in our view, for the CRTC to police the existence of undue influence that could occur in the context of cross-ownership by a non-Canadian who controls the BDU platform. Therefore, the proposed ownership limitation is a critical “structural remedy”, over and above any strengthened “conduct remedies” for the CRTC. A dual approach of strengthened remedial measures coupled with the appropriate structural limitation is needed, in view of the stakes involved.

The foregoing proposed limitation would have no impact on the current ability of a non-Canadian investor to acquire a non-controlling interest in both BDU and programming assets, up to the levels permitted under the current ownership Direction (i.e., 46.7%<sup>8</sup>). The cross-ownership limitation would only apply in the event that a non-Canadian shareholder acquired control over a BDU, in which case it would no longer be able to hold or acquire any ownership interest in a Canadian programming undertaking. Moreover, a non-Canadian investor who acquires control of a BDU could also acquire other ownership interests *in BDUs*. The proposed limitation would only prevent the holding of an ownership interest *in programming services*.

**VI. What is the most appropriate regulatory process to address the challenges of the new IP environment?**

Astral submits that, in view of the above-noted challenges to broadcasting policy in the IP world, the Canadian telecommunications regulatory framework will need to evolve in a manner that takes into account the impact of such evolution on the existing broadcasting regulatory framework. In Astral’s view, a specialized regulator (the CRTC) that is capable of taking into account the underlying distinct policy rationales governing each of the broadcasting and telecommunications sectors will be needed.

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<sup>8</sup> This level can be achieved through a direct 20% ownership interest in a BDU or programming service, coupled with an indirect 33.33% ownership interest taken through a holding company.

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Moreover, this sector-specific approach extends to issues such as competition law. While competition law principles have an obvious role in the regulation of this sector, in our submission these principles are best applied through the lens of the expertise of the sector-specific regulator. Astral's experience in the broadcasting sector suggests that the tests under disparate legislation such as the *Broadcasting Act* and the *Competition Act* need to be consistently applied, suggesting that a specialized regulatory tribunal such as the CRTC is best placed to perform such a balancing exercise.

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Astral is pleased to have the opportunity to participate in this first round of the Telecommunications Policy Review process.

All of which is respectfully submitted, this 15<sup>th</sup> day of August, 2005.

ASTRAL MEDIA INC.



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Sophie Emond  
Vice President  
Regulatory and Government Affairs

**Appendix “A”**

| <b>CATEGORIES OF BROADCASTING UNDERTAKINGS (BROADCASTING DISTRIBUTION UNDERTAKINGS)</b>   |  |
|---|--|
| <b>Role of Broadcasting Distribution Undertakings specified in the Broadcasting Act (section 3(1)(t))</b>   |  |
| <ul style="list-style-type: none"> <li>• should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations;</li> <li>• should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost;</li> <li>• should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services.</li> </ul>  |  |
| <b>Terrestrial (Cable, MDS) – Broadcasting Distribution Regulations</b>   | <b>Direct-to-Home (DTH) Satellite – Broadcasting Distribution Regulations</b>  |
| <p>BDU Regulations:</p> <ul style="list-style-type: none"> <li>-must carry (on basic) all local conventional stations</li> <li>-must carry each CRTC-licensed specialty, pay and digital category 1 services (subject to available channel capacity)</li> <li>-must carry at least one licensed “general interest” ppv service</li> <li>-may carry other off-air stations, vod or other digital programming services (category 2) if “must carry” obligations satisfied</li> </ul>  | <p>BDU Regulations:</p> <ul style="list-style-type: none"> <li>-must carry (on basic) at least one CBC network affiliate and one affiliate of a national private network</li> <li>-must carry each licensed specialty, pay and digital category 1 services (subject to available channel capacity)</li> <li>-must carry at least one licensed “general interest” ppv/vod service</li> <li>-may carry other off-air stations, vod and category 2 (if “must carry” obligations satisfied)</li> </ul>   |
| <p>Distribution and Linkage Rules:</p> <ul style="list-style-type: none"> <li>• preponderance</li> <li>• dual status (basic unless consent to discretionary carriage)</li> <li>• modified dual status (discretionary unless consent to basic)</li> </ul> <p>-Linkage: 1:1 (Canadian and U.S. specialty)</p> <p>-superstations only with at least one pay</p>  | <p>Distribution and Linkage Rules:</p> <ul style="list-style-type: none"> <li>• Preponderance</li> <li>• No dual status</li> <li>• No modified dual status</li> </ul> <p>-Linkage: 1:1 (Canadian and U.S. specialty)</p> <p>-superstations only with at least one pay</p>  |
| <p>BDU Canadian content obligations:</p> <ul style="list-style-type: none"> <li>-large cable operators contribute a minimum of 5% of their gross annual revenues derived from broadcasting activities to support Canadian programming;</li> <li>-contributions to Canadian programming are made through the Canadian Television Fund (CTF) and other independent production funds, as well as through contributions to local expression;</li> <li>-a minimum of 80% of the required contribution be directed to the CTF, with up to 20% directed to one or more independently administered production funds, other than the CTF.</li> </ul> | <p>BDU Canadian content obligations:</p> <ul style="list-style-type: none"> <li>-all DTH distribution undertakings, contribute a minimum of 5% of their gross annual revenues derived from broadcasting activities to support Canadian programming.</li> <li>-contributions to Canadian programming are made through the Canadian Television Fund (CTF) and other independent production funds, as well as through contributions to local expression.</li> <li>-a minimum of 80% of the required contribution be directed to the CTF, with up to 20% directed to one or more independently administered production funds, other than the CTF.</li> </ul> |