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Strengthening Canadian Television Content: Creation, Discovery and Export in a Digital World

The future of television is up in the air as more viewers switch to streaming from channel surfing and revenues shrink. How can regulators ensure that Canadian voices will be heard?

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and Peter Miller

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The Study In Brief

In April 2016, the Canadian government announced a consultation on how to best create Canadian content in a digital world. On September 28, 2017, the government released its Creative Canada Policy Framework, a high-level overview of cultural policy direction that summarized initiatives to date and announced some new directions and next steps. Among the next steps is a review of the *Broadcasting* and *Telecommunications Acts*, preceded by a Canadian Radio-television and Telecommunications Commission (CRTC) review of new and traditional distribution models and their capacity to support Canadian programming. This examination and modernization of cultural policy is timely.

The world of Canadian content regulation was developed in an earlier analog environment. Broadcasting was largely a closed system. This meant that all parts of the broadcasting system could be regulated and most were. In addition, there is a system of subsidies designed to help create more domestic content.

But the broadcasting system is no longer closed. High-quality television programming is available from the Internet and Canadians are avid consumers. When TV is delivered over the Internet, none of the Canadian regulations apply.

This state of affairs creates two related problems. First, if Internet-delivered TV continues to increase in popularity, this could lead to a significant decline in the amount of available Canadian television content, at least in the regulated system. Second, if Canadian broadcasters and cable companies are regulated, and Internet-delivered competitors like Netflix are not, it will be difficult for Canadian providers to compete or even to survive, especially if foreign competitors face no Canadian tax.

We recommend several changes to regulatory rules to address the challenges ahead.

The Canada Media Fund, an important source of subsidies particularly for drama, effectively requires the recipients of those subsidies to have Canadians in all important on-screen and production roles. Changing those rules and rewarding export success, will allow more of those products to be exported.

Canadian broadcasters are excluded from fully exploiting the fiction programming they commission as they are required to rely on independent producers in ways that limit the retention of ancillary rights and up-side to this content. By relaxing these rules, and giving the broadcasters more "skin in the game," the quality of the programming may increase.

As revenues decline in the broadcasting system, the subsidy mechanisms, such as the Canada Media Fund, will need to be topped up with additional funding. One idea is requiring a subsidy from Internet service providers while reducing the subsidy broadcasters pay. However, such a tax would be overly broad, as only a portion of the Internet is used for media purposes. We think a better idea is to use the proceeds from the auction of wireless spectrum. In the US, the majority of the auction proceeds were paid directly back to broadcasters from the government, which is not happening in Canada.

Finally, the government should conduct a periodic review, perhaps every five years, by a group outside of the CRTC that could determine the health and necessary reforms of the broadcasting system and its ability to support Canadian content.

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The Internet has blurred the lines between creator and consumer, introduced new players and intermediaries, created a more interconnected and open world and altered consumers' expectations and opportunities.

The Canadian-content regulatory system was designed in an earlier era when the broadcasting system was largely closed. Because the system was closed, the Canadian Radio-television and Telecommunications Commission (CRTC) could regulate all parts of it, and generally did. Foreign channels were excluded if they competed with Canadian channels. Canadian channels were generally required to spend a proportion (about 30 percent)[1] of their revenues on Canadian content and to air Canadian content (about half the time). Broadcast distributors (cable companies) were required to contribute 5 percent of their revenues to the creation of Canadian content, and their video-on-demand (VOD) services were required to contribute an additional 5 percent, primarily through the Canada Media Fund (CMF) and other funds.

All of these regulatory requirements led to the creation of more Canadian content than the marketplace would otherwise create. But the Internet has threatened those regulatory rules. The system is no longer closed. High-quality television programs can be obtained online from anywhere in the world. Internet television providers pay no money into funds for Canadian content, and they have no rules about how much Canadian content they must provide. They are not kept out of Canada even when their programming competes with that of Canadians.

This state of affairs creates two obvious problems. First, if online television replaces the current regulated broadcasting system, less Canadian content will be produced. Second, if online television providers are not regulated but the rest of the Canadian system is, will the then-unlevel playing field hasten the demise of providers of Canadian content?

Aside from the regulatory system, are Canadians changing the way they watch TV? Are they "cutting the cord" and switching from cable television to online television? If so, can the Canadian regulatory

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1 For example, in 2012, Canadian Programming Expenditure (CPE) requirements on discretionary services averaged 35 percent, while CPE on conventional services averaged 32 percent (CRTC Statistical Summaries 2012-2016).

system be saved in any event? Or will the switch from cable television to online viewing take so long that we can largely leave the regulated system in place, perhaps by adding a few more subsidies?

In the long term, the impact of the Internet could render the regulated Canadian broadcasting system obsolete. But that might take another 10 or 20 years. In the meantime, the current system of quotas and expenditure requirements could be made to work, but the changes brought on by the Internet will require adjusting and, over time, reducing the current system. Canadian content needs to become better in order to compete with online providers and to be exported successfully. Finally, as global and online content providers reduce the competitiveness of regulated Canadian players, the regulatory system must not impose an excessive burden.

Why Regulate Canadian Content?

It is taken as given that the objective of Canadian-content policy is to strengthen the creation of such content and to ensure Canadians have access to it. Why, however, does Canada have this objective in the first place?

Rejected Rationales

When deciding whether to apply a regulatory instrument, policymakers should, and traditionally do, consider if the market in question satisfies one or more of the criteria of "market failure." Only then are corrective regulatory measures considered appropriate. Importantly, the size of a market is not itself a sign of market failure. For instance, if the economy of a small island nation is too small to support a steel plant, that is not a market failure requiring a government-subsidized steel plant. Rather, the free market solution – no steel plant – will be best for that economy. Unless there is some reason the small island requires its own steel plant, its economy will be better off without a subsidy to build one.

In the case of Canadian programming, many reasonably argue that the production of modern "hit-based" TV shows and movies involves such high risk and such large economies of scale that Canada cannot compete with Hollywood.[2] As true as that might be, it does not constitute a market failure in the true economic sense of the term – it is simply a result of market size. Thus, if Canada cannot efficiently create content products and find a market for them, the government cannot justify intervention on market-failure criteria. The analysis then would need to establish if Canada requires more Canadian-made audiovisual products than the market will deliver naturally. Such evidence, however, is usually missing from considerations of Canadian-content regulation. It is generally assumed that having more Canadian content is a suitable goal. To the extent that supporters of content regulation provide a rationale, they typically appeal to social or cultural reasons. The federal government indeed has argued that the creative sector fosters a sense of national and community pride and brings Canadians together (see Canada 2016).

Canadian-content regulation is sometimes described as industrial policy, rather than as a solution to a market failure. Industrial policies involve picking industries that can create more jobs and growth, and providing them with funding or

2 The Alliance for Canadian Cinema, Television and Radio Artists (ACTRA), has stated for example, that "[d]rama is uniquely vulnerable as a result of our geographic proximity to the biggest producer of English-language audiovisual materials in the world and the beneficial economies of scale enjoyed by U.S. producers" (ACTRA 2009, 5); see also Globerman (2016, 24–5).

other incentives. In recent years, industrial policies have fallen out of favour because they amount to taxing successful industries and distributing the money to unsuccessful ones. Such policies therefore are unlikely to be beneficial because of their inefficient use of the economy's resources (Stanbury 1998, 25–6). As a result, industrial policies are often cast as "infant industry" policies – in which investing in a budding industry allows it to increase in scale, so that supports can later be removed. But is funding Canadian content akin to supporting an infant industry? Canadian TV has been regulated for 60 years; it is hardly an infant, but well into its prime. (It could be argued, however, that public policy instruments have succeeded in creating excellent production infrastructure – that the infant has now grown up and the supports can be lessened.)

For these reasons, the presence of large economies of scale in a foreign market does not constitute a market failure in the domestic market. If US producers do benefit from economies of scale relative to Canadian producers, perhaps the latter should be making products for the export market – a topic to which we will return later. Put another way, if larger US demand leads to lower per unit cost of production there than in Canada, this is not a market failure but an opportunity for Canadians to sell to that larger market.

Market Failures

What market failures, then, might apply to the Canadian broadcasting space? Classic examples are market power, externalities, high information costs and public goods.

Market Power

Market power can often justify regulatory action. If there is a natural monopoly, as there was in the first century of telephony, regulation can ensure that the supplier does not charge too much and restrict supply. Many audiovisual producers exist – and economies of scale are not so large as to stymie a competitive market. In fact, digital technologies might be reducing the cost of producing movies and television.[3] It is unlikely, then, that market power could be a rationale for increasing the amount of Canadian content above free market levels. It is true that, in recent years, the Canadian broadcasting industry has seen significant vertical integration, so that many Canadian broadcasters are owned by broadcast distributors. This can create competition problems, which the CRTC has addressed. We do not discount the significance of these issues. We merely posit that market power considerations cannot be the reason for creating more Canadian content.

Externalities

Externalities happen when a cost or benefit is imposed on members of society other than the buyer and the seller. These costs and benefits are therefore "external" to the transaction between buyer and seller. A classic example is network effects: if I start sending and receiving email, it becomes easier for others to reach me (but for a more cautious view, see Liebowitz and Margolis 1995). As Church, Gandal, and Krause (2008, 337) note, "benefits depend positively on the total number of consumers who purchase compatible products." The desire to

3 Globerman (2016, 5) states: "Production of all sorts of programming has been affected by the growing capacity of producers to use computers and even tablets and smartphones to create content. In particular, the costs of producing video programming have declined substantially with the increasing capabilities and lower costs of computer-based technologies."

promote this positive externality might explain the push, by many governments, to subsidize broadband for rural and remote areas and for low-income consumers.[4] It is possible that positive externalities can explain the need to increase the amount of Canadian content above free market levels. The argument is that Canadians would enjoy Canadian-made television more if they knew that other Canadians were watching it.

High Information Costs

Costly information can impair the functioning of a market. For example, in the market for used cars, the seller knows more than the buyer does about the quality of a car. This can prevent an efficient level of used car purchases; because of this imbalance in knowledge, purchasers worry they will get duped and buy a "lemon." As a result, they are cautious in purchasing.

Recently, the CRTC has embarked on a program to ensure that Canadian television content is "discoverable."[5] This focus on discoverability suggests that the Commission believes it is too difficult for Canadian viewers to learn about Canadian content, presumably because of high information costs. We are unable to understand, however, why Canadian consumers would find it more difficult to discover Canadian rather than foreign content. True, foreign marketing budgets for feature films far outweigh those for Canadian fare, but we do not believe that, when it comes to television, there is an information deficit that requires regulatory intervention or the dedication of scarce resources to it.

If it is easier to discover Hollywood content than Canadian content, the reason could be that Hollywood producers benefit from economies of scale and are able to use their advantageous cost structure to spend more on advertising to help viewers find their shows. If so, the discoverability problem is really a manifestation of the economies-of-scale issue, which, to repeat, is not a market failure. It should be noted that, for some time, the CRTC has required Canadian TV distributors or "broadcast distribution undertakings" (BDUs) to allocate a certain number of "ad avails" – ads on popular US cable channels such as CNN – to Canadian shows. Perhaps providing very low cost ads to promote Canadian content could overcome any discoverability problem. Similarly, Peter Grant has argued that the information cost of predicting which audiovisual products will succeed is so high that the market underproduces these products unless the government steps in (see Grant and Wood 2004). Since no one can predict which cultural products will be "hits,"[6] there is "market failure," but this is unlikely to be a true market failure. Other industries, such as pharmaceuticals, spend vast amounts of money on drugs and do not know which will be "hits"; they nonetheless invent a lot of drugs without government assistance (see Armstrong 2005). Grant acknowledges that large markets such as Hollywood can overcome these information costs and produce a sufficient quantity of audiovisual products. The problem of predicting

4 See the federal government website, "Digital Canada 150," online at https://www.ic.gc.ca/eic/site/028.nsf/eng/50010.html; and United States (2017).

5 See CRTC, "Discoverability Summit to be held May 10–11, 2016," News release, December 3, 2015; available online at http://news.gc.ca/web/article-en.do?nid=1023429.

6 There is no singular measure that defines a "hit." I use the euphemism "hits" to describe popular programming that attracts audiences. In drama, that might mean attracting an audience of a million viewers or more.

winners is thus not a true market failure, but an example of economies of scale. Why are audiovisual products so special that they require increased production in an economy that is too small to produce them efficiently?

Public Goods

A public good is a good whose consumption by some does not reduce the amount consumed by others. Additionally, it is not possible to prevent consumers from having access to a public good. A classic example is the army: if some Canadians pay to have an army to defend the country, all Canadians – whether they pay or not – reap the benefit.

Advocates of the market failure theory, as it pertains to Canadian content, have argued that Canadian content is a public good because it increases Canadian pride and civic engagement (see Shedd, Wilman, and Burch 1990, 63). The idea is that countries should engage in "nation building." This is why governments invest in monuments, statues and sporting events such as the Olympics. Canadians feel better if their athletes do well at the Olympics, even if they do not watch the events. Spending on the Olympics is therefore a public good, with some funding coming from government coffers. This suggests that the social/cultural rationale discussed above and the economic can align: we need to tell Canadian stories to have a Canadian identity. The availability of Canadian movie and television content helps to create feelings of pride and togetherness, much like success at the Olympics.[7]

How to Incentivize the Creation of More Canadian Content

In considering how to regulate and subsidize Canadian content, a threshold question is whether the policy should be a cultural or an industrial policy (see Hunter 2016). If the former, presumably the objective will be to tell more Canadian stories; if the latter, presumably the objective will be to hire more Canadians and create export revenue. The federal government has advocated (Canada 2016) strengthening Canadian content both as a way to create jobs and as a force for national unity. We argue, however, that the only proper objective is cultural: to tell Canadian stories in order to strengthen the Canadian identity. But what is a "Canadian" story? Presumably, encouraged and subsidized content would be about Canada and Canadians, but would it matter if the actors, directors and camera crew are not Canadians?

According to current regulations, for a television program to be certified Canadian,

- the producer must be Canadian;
- key creative functions must be performed by Canadians;
- at least one of either the director or screenwriter positions and at least one of the two lead performers must be Canadian; and
- a minimum of 75 percent of program expenses and 75 percent of post-production expenses must be paid for services provided by Canadians or Canadian companies.[8]

But if Canadian creative resources are being used to create programs that are not about Canadians or Canadian places, how does that support Canadian

7 Globerman (2016) also argues that nation building translates into better citizenship and is an externality, not a public good. Both rationales are possible, although we believe the public good formulation is better: "Better citizenship might take the form of more informed voting behaviour, increased participation in community activities, greater honesty in filing and paying taxes and so forth."

8 See the CRTC website at http://www.crtc.gc.ca/eng/cancon/c_cdn.htm.

identity and nation building? Imagine, say, an all-Canadian crew filming a series about an American family in California. Would this make Canadians feel good about Canada? Indeed, this would seem much more like industrial policy[9] whose objective is to hire Canadians and spend money in Canada. But why create jobs by subsidizing Canadian film and television production? How do we know that subsidizing another cultural product, such as video games, would not create more jobs? What about non-cultural products, such as self-driving cars? What about reducing taxes? Some might argue that what is in place amounts to a carelessly constructed industrial policy for creating Canadian content, which often fails in its stated goal of fostering Canadian identity. As a result, it could be argued, we should shut it down.

Another possibility is that, although this is an industrial policy, it is based on the infant-industry argument: that the necessary commercial infrastructure should be put in place to allow Canadian creative industries to survive on their own. It could be argued that, in subsidizing this content for 60 years, Canada has by now succeeded. Indeed, in fiscal year 2015/16, the value of film and television production in Canada was $6.83 billion, while Canadian-content film and television production was valued at $4.12 billion (CMPA and AQPM 2016, 5).

We suggest yet another way of thinking about Canada's current cultural policy toolkit: Canada has a cultural policy, but it resembles an industrial policy because the primary focus is on stimulating the use of Canadian resources. There are reasons it could be a mistake for the federal government to subsidize or regulate only Canadian-themed programming.[10] First, it effectively makes the government a censor or regulator of programming content – never a good idea in a democracy. If the CRTC or other government agency approves some content as eligible for a subsidy but rejects other content, it is encouraging some content and discouraging other content. The censorship might be soft, but it still amounts to some content that is government-approved and other content that is not. In *Canadian Content: Culture and the Quest for Nationhood,* Ryan Edwardson (2008) states that "aiding production without a requirement that the content contain national identifiers helped the state to avoid the issue of censorship." Second, is it true that only content featuring Canadians and Canadian places can foster a Canadian national identity? Content might be about another country or a non-Canadian and still bring a perspective that Canadians find uniquely interesting – in other words, Canadian perspectives might be as important as Canadian locations. Finally, a regulatory focus on Canadian characters and places could be ineffective. If content received a subsidy whenever it was distinctively Canadian, this could lead to regulatory gaming where a production could be subsidized by injecting a Canadian character or location into it.[11] It might then be that, even if the objective is to enhance national identity, the best way to foster

9 The Canadian government has been inconsistent on this point. It sometimes describes Canadian-content policies as industrial policies, sometimes as cultural policies and sometimes as both. On its website, the CRTC seems to argue for a cultural policy: "Broadcasting plays a critical role in helping build and support our Canadian identity. In recognition of this, Canada's *Broadcasting Act* sets out objectives to ensure that Canadian broadcasting content meets the needs and interests of Canadians." See "Content that Meets the Needs and Interests of Canadians," http://www.crtc.gc.ca/eng/cancon/mandate.htm.

10 Interestingly the famous "Great White North" series of sketches on SCTV (featuring Rick Moranis and Dave Thomas) were created because of a request by the CBC that two minutes of each show should be identifiably Canadian content.

11 We have seen this in Canadian specialty television, where channels were licensed to satisfy a particular genre, but some shows on these channels are consistent with the genre only through creative interpretations.

a greater sense of that identity would be to adopt regulatory mechanisms that look like industrial policy. In other words, use policies that subsidize or favour Canadian producers and Canadian creative resources and let them produce the content they want. The resulting cultural products will reflect, at least in part, Canadian perspectives and ideas and thereby foster Canadian identity since, almost inevitably, many of the products will also feature Canadians and Canadian locations.

We believe this analysis explains and justifies current Canadian-content regulatory mechanisms: the objective is to support and foster Canadian identity, which is a public good, but the free market alone will not produce enough Canadian content to contribute to this sense of identity. In promoting this objective, however, our regulatory mechanisms do not single out Canadian stories for special treatment; rather, they promote productions that use predominantly Canadian resources. This is done so the content producers will create television and movies that have Canadian themes and that tell stories from a Canadian perspective. If this analysis is sound, it means that the basic structure of the existing regulatory system is appropriate and needs only to be adjusted to make it more effective.

The Television Policy Toolkit

The television-content regulatory system is based on subsidies[12] and structural measures, including quotas. The subsidies come from the CMF, independent production funds and tax credits. The quotas come from regulations that require Canadian channels to spend a percentage of their revenues on Canadian programming (or Canadian programming expenditures, CPE) and to show a percentage of hours of Canadian programming (exhibition requirements). Other structural measures include:

- rules that keep out foreign channels that compete with Canadian channels;
- regulations that require cable companies and other BDUs to give "priority carriage" to Canadian over-the-air (OTA) television stations, to distribute designated high public-interest channels on the basic service and to offer a majority of Canadian channels;
- simultaneous substitution, which requires BDUs to replace a program on a US TV station with any identical version of the program on a local Canadian TV station; and
- advertising tax non-deductibility, which precludes the claiming of tax expenses incurred for advertising on foreign broadcast stations directed to a Canadian audience.

All the elements of the toolkit arose from the desire of the government and the regulator to see the creation of more Canadian content and the realization that, left to their own devices, domestic broadcasters and broadcast distributors (at least in English Canada) would favour US product over domestic. A typically Canadian compromise emerged: broadcasters and broadcast distributors would be allowed to carry some Hollywood entertainment and would use the profits from that programming to subsidize Canadian content. The regulations that require 30 percent of revenues to be used to produce Canadian content and require 50 percent of the prime-time schedule to be devoted to Canadian content are tools to ensure that the profits from US programming are indeed spent on Canadian content.

Keeping foreign channels out of Canada often led to US channels partnering with a Canadian service. As a result, a channel with a given genre

12 We include in our definition of subsidies those that come from the system itself, such as the mandatory 5 percent contribution BDUs make to Canadian programming. I note that the industry's preferred term today for "subsidy" is "investments." Certainly, many subsidies do act as investments, and that might be particularly so with tax credits.

of programming would have majority Canadian owners and produce some Canadian content. Again, the intent was to use the profits from US content to produce Canadian content.

Is It Working?

Many of the contributors to the 2016-17 Government Digital Canadian Content Review[13] believe the system is working very well. The objective for these interveners is therefore to continue the support mechanisms that have worked so well and to modify them to make them more sustainable.

A contrary view is that the Canadian-content systems for film and TV have not worked very well.[14] The TV system creates a demand from broadcasters for a large amount of television. The TV producers get subsidized for supplying that content. But the system provides inadequate incentive for excellence. Of course, "excellence" means different things to different people. For some, "excellence" should be defined purely in terms of audience and revenues, including exports. It should be about creating more "hits" – something viewed as lacking on Canadian English-language TV. This would suggest that the system needs to be modified to produce better Canadian TV, including greater economic returns and a greater number of hits.

Others argue that "excellence" must include some notion of quality, originality and Canadian distinctiveness, if not Canadian "values." Such a notion of quality is not without basis: the *Broadcasting Act* itself calls for programming to "be of high standard."[15] In any event, by the standard of overall viewing, Canadian TV fares relatively well. Canadians overwhelmingly watch Canadian TV channels, with viewing of foreign channels on the dial declining to a low of 12.1 percent in 2015, and bouncing back only slightly to 13.1 percent in 2016 (CRTC 2017a, table 4.2.12). On those Canadian TV channels, news viewing is almost all Canadian, sports and information programming is majority Canadian content, and about a third of the content of categories such as reality and music shows is Canadian (CRTC 2017a, table 4.2.14). Drama, as always, is the main exception: although drama accounts for just under 40 percent of all TV viewing in both English and French Canada, less than 20 percent of that is Canadian in English Canada and just under 30 percent in French Canada. Few of the top dramas on Canadian TV are Canadian;[16] in the United States all of the top 10 are American, in the United Kingdom most are British[17] and in Australia about half are Australian.[18] Although facing similar economic challenges, dramas in French Canada more routinely take top spots and achieve greater audiences (CMPA and AQPM 2016, 107). English Canada's affinity for US drama

13 See the federal government's website on the consultation "Canadian Content in a Digital World," and submissions by the Canadian Media Producers Association and others, at http://www.canadiancontentconsultations.ca/other-ideas.

14 In "Cultural Policy for the Digital Age," Richard Stursberg states, regarding English-language television: "Despite regulatory requirements to devote half of their prime-time inventory to Canadian programs, the number of Canadian entertainment shows in the top 40 shows watched by Canadians in prime time has averaged three per year. This means that on average 93% of the most watched prime time entertainment television shows are consistently foreign" (2016, 9).

15 Section 3(1)(g) of the *Act* states "the programming originated by broadcasting undertakings should be of high standard."

16 See, for example, "TV top 10: What Canadians watched in 2015." *Bell Media*, December 21, 2015. Available online at http://www.bellmedia.ca/pr/press/tv-top-10-canadians-watched-2015/.

17 See "20 of the most popular shows on British TV in 2016," *Business Insider*, January 24, 2017, available online at http://www.businessinsider.com/most-popular-shows-on-british-tv-in-2016-2017-1.

18 See "Ratings," *TV10 Tonight*, available online at http://www.tvtonight.com.au/category/ratings.

compresses audiences for Canadian drama; in French Canada, it is market size. Of the top 10 television series in Canada in 2016, eight were American and two were French-Canadian. Of the top 10 Canadian-produced series, eight were in French and two were in English. All achieved average-minute audiences – the average number of people exposed to the program for one minute – of at least 1.2 million, with the top French-language Canadian drama achieving a 2.67 million average-minute audience in 2016.

English-language drama lags on per capita viewing relative not only to French-language drama, but also to shows in other major English-speaking countries. In the United States and United Kingdom, a "hit" show might garner over 12 million viewers – in Canada, just over a million.[19] Canada also ranks well behind the United States and United Kingdom in terms of global exports of TV shows (Clark 2016). Canadian drama might be seen as a relative success under the circumstances, but the level of subsidy – and it is significant[20] – required to support it calls into question the sustainability of the current model. More important, drama and other "hit" programming is what viewers watch most on television. In English Canada, of the top 10 shows among the age 18–49 demographic in 2016-17, nine were US dramas and one a US reality show. Of the next 10 shows, there were three US dramas, one US reality show, four Canadian reality shows and two Canadian sports programs.[21] Since dramas are the most popular programs and Canadian dramas are not very popular among Canadians, one could conclude that the Canadian system is underperforming.

The need for hits and for greater sustainability for traditional Canadian TV appears to be behind many of the adjustments to the system the CRTC has introduced over the past decade. These changes include flexibility to spend more on fewer hours and the sharing of content expenditures across the entire broadcast ownership group, which allows broadcasters to place their Canadian-content bets where they have the greatest chance of return.[22]

We think this policy makes sense. Producing fewer dramas that are watched more, would do more to sustain a sense of Canadian identity than producing a lot of dramas that are watched less. With increased viewership, the business model would be more sustainable.

The Impact of the Internet

Changes in Viewing

The impact of technological change on Canadian content is the key issue in the federal government's current review. Even if one were to conclude that the system is working very well, trends suggest it might not be sustainable. The system is in transition: the timing and final outcome might be unclear, but the direction – toward more on-

19 See Screen Australia, "Top-Rating First-Release Australian Dramas Series," available online at https://www.screenaustralia.gov.au/fact-finders/television/australian-content/top-drama-titles/first-release-series.

20 Public funding accounts for over 50 percent of the financing of drama production, a portion that reaches two-thirds for distinctly Canadian production, or "10 out of 10 point" Canadian content, where all the leading creative positions are held by Canadians. See CMPA and AQPM 2016, exhibit 4-18.

21 "2016/2017 Canadian Television Report Card: CTV is Canada's Most-Watched Network for the 16th Year in a Row," CTV news release, June 5, 2017, relying on Numeris data.

22 See, generally, the CRTC's "Let's Talk TV" decision (CRTC 2015a) and its group licensing framework (CRTC 2010a). The most important innovation required Canadian programming expenditures to be shared among channels in the major English-language TV groups (Bell, Corus, Rogers), and allowed it to be spent on any channel in the group, provided that conventional stations retain 75 percent of their required CPE.

demand, Internet-based TV delivery – is clear. What is less clear, although becoming clearer, is the impact of the adoption of, and adaptation to, these new forms of content and content delivery. Three observations are apt.

First, broadband Internet has not (yet) changed the fundamental form or ethic of professional film and TV content.[23] The form of consumption has changed – on-demand viewing, binge watching – but the content itself has not. Although original shows produced for over-the-top TV (OTT) might not be limited to the same typical strictures of length, and might push the boundaries somewhat on storyline, it is still the case that a TV show on Netflix is still recognizable as a TV show.[24]

Second, and on the other hand, user-generated content, brought on by social media, online news forums, YouTube and so on, has started to change the nature of journalism itself. The attributes that journalism historically stood for – seeing itself as factual, reliable, reasoned, trustworthy – often are not features of online news or, apparently, not those consumers always demand. Personalized journalism – journalism that reflects the views and interests of one's friends but also their biases – is increasingly the order of the day (IPSOS Public affairs 2017). Demand for traditional television news remains relatively strong, but the advertising revenues that support it are migrating to online platforms.[25] Suddenly, news programming, historically seen as a relatively profitable genre of Canadian content for broadcasters, is at serious risk.[26]

Third, contrary to early optimistic views of the "long tail," hits are even more important and harder to achieve.[27] Given a choice – the choice provided by on-demand – most viewers want to watch hits most of the time. Historically, Cancon quotas and expenditure requirements on linear channels have given a "lift" to Canadian shows that otherwise would have received far fewer viewers. Such requirements notwithstanding, on-demand Canadian shows will receive a far smaller "lift." Excellence, higher quality, less quantity – in other words, more hits – is the only answer.

Changes in Subscription

There is considerable concern that more and more Canadians will cancel their cable or other broadcast distributor subscriptions and turn to online viewing instead. Since the current regulatory rules are built around the current BDU model, subscriber migration eventually will lead to the end of that model and the collapse of the associated regulatory system. Indeed, the subsidy in support of Canadian TV production is already declining. Cord cutting, cord shaving – reducing the number of cable TV channels one subscribes to – and "cord nevers" are taking a small but demonstrable toll on the ability of the system to support Canadian production

23 This having been enunciated by Marshall McLuhan as "the content of the new medium is the old medium."

24 Not needing to account for a schedule or commercial breaks, Netflix Original shows can and do play with length. As cable shows are to network shows, they can push boundaries. While allowing for greater creative flexibility, however, neither of these "innovations" can be considered a fundamental change.

25 For a general diagnosis of what ails news in Canada, see Public Policy Forum (2017).

26 As the CRTC notes in its "Policy Framework for Local and Community Television" (CRTC 2016c, para. 63), "costs associated with the production of local news exceed the revenues derived from this programming, with costs estimated to have risen beyond revenues by as much as 22% from 2012 to 2015."

27 This is not to suggest that some Canadian companies, including DHX and Nelvana, in Canadian children's TV, will not be able to take advantage of the long tail in OTT.

financially – the CMF announced a 5.8 percent program budget decrease for fiscal year 2017/18 due to a reduction in contributions from BDUs.[28]

But while cord cutting has had an impact, subscriber losses from 2012 to 2016 amounted to less than 4 percent, and aggregate BDU revenues actually increased 2 percent from 2012 to 2016, despite a 2.1 percent decline from 2015 to 2016.[29] Since 76 percent of Canadian households subscribe to a BDU service and 44 percent subscribe to Netflix, it is likely that the majority of Netflix's 6.4 million Canadian subscribers[30] will continue to subscribe to BDUs, treating Netflix as another "channel," not as a replacement TV provider. The average Canadian consumes 28 hours of traditional TV a week (CRTC 2017a, Figure 4.2.16);[31] those watching that much TV and more simply might not find the same range, type and amount of quality programming on Netflix.[32] It is possible that traditional regulated TV in Canada ultimately will decline to minimal relevance and less sustainability. It is at least equally likely that, in the right regulatory environment it will decline to a sustainable, but still material level of viewing and relevance among Canadian households. Although it would be a mistake for public policy and regulation not to factor declines in subscriptions and advertising revenue into the regulatory framework, it would equally be a mistake to assume that the demise of the Canadian television system is imminent and to establish policy and regulation accordingly. The need for "changes to the federal cultural policy toolkit," "to modernize how government supports the creation, discovery and export of Canadian content" is an evident theme in the Digital Cancon Review.[33] What is less evident is what such change or modernization should entail.

Why the Current System Might Work for Some Time

There are two reasons to believe that the long-term trend toward broadband delivery of video might not require the elimination of the current regulatory tools. First, demand for legacy broadcasting might persist, especially as BDUs adopt new set-top

28 See "CMF announces 2017-2018 program budget, guidelines and deadlines," News release, March 31, 2017; available online at http://cmf-fmc.ca/en-ca/news-events/news/march-2017/cmf-announces-2017-2018-program-budget,-guidelines.

29 Estimates of BDU subscriber losses vary, but there is consensus as to direction and apparent acceleration. CRTC figures place BDU subscriber numbers at a height of 11,517,000 in 2013, declining to 11,247,000 in 2015, with losses of 112,000 subscribers in 2013-14, 158,000 in 2014-15 and 125,000 in 2015-16 (CRTC 2017a, table 4.3.3). Convergence Research Group estimates that the 2015 calendar year saw a decline of 190,000 TV subscribers, and another 220,000 in 2016, and forecasts a further decline of 247,000 in 2017. The decline in subscribers nevertheless has not been matched by an equivalent decline in revenues. CRTC figures show that BDU per subscriber revenues rose by over 5 percent between 2012 and 2015 (CRTC 2017a, table 4.3.7), and that aggregate revenues continued to climb through 2014 before seeing a 2.1 percent decline through 2016 (table 4.3.1). Convergence Research Group estimates a decline of 1.3 percent in 2016, but declines of only 0.6 percent and 0.8 percent in 2017 and 2018.

30 CRTC 2017 Communications Monitoring Report, tables 4.3.3, 4.3.6 & figure 4.3.7.

31 Canadians age two and older watched 28.2 hours of traditional TV in 2016, down from 28.6 hours in 2015 and 29.8 hours in 2011. This is still almost an order of magnitude higher than average Internet TV usage in 2016 of 3.1 hours.

32 There are many reasons for this, including habit and incumbency, and the lack of sports and news on entertainment-based OTT providers such as Netflix. This could change with new OTT providers, but it could also be buttressed by a competitive response from incumbents, including offerings targeting "millennials."

33 Reflected in the "citizen as creator" theme in the federal government's consultation paper (Canada 2016a).

technology that is more user friendly. Second, TV distributors might continue to supply legacy broadcasting products.

The Demand for the Legacy Broadcasting System Might Persist

It has been said – and it certainly appears true in the communications sector – that "we tend to overestimate the effect of a technology in the short run and underestimate the effect in the long run."[34] Consider an analogy from telecommunications. Starting around 1990, commentators became convinced that fibre optic lines would quickly replace metallic cable. Government committees were formed, trials conducted and regulations changed. The direction of the forecasts was correct, but the timing was off. Fibre optic into US homes was insignificant until 2005, and even by 2011 only about 6 percent of homes were connected (FTTH Council). Currently, 15 percent of US homes are connected by fibre.[35] It is not always the case that digital technologies replace older technologies. e-books never reached more than a 20 percent market share, and today their share is declining.[36]

The imminent death of legacy broadcasting might be greatly exaggerated for several reasons. First, legacy broadcasters still provide good value for many customers. Any who wanted to replicate all the services in their cable package (news, sports, movies, series, reality programming, lifestyle shows) would face formidable costs for the required apps. They might also need a more expensive Internet service with a bigger cap. Second, the value of BDU service might increase as suppliers add new, more user friendly interfaces with conversion to IPTV boxes. Further value might be added if BDUs were to reduce the price of TV service bundled with broadband. Third, even if only older demographic cohorts want legacy television, there are a lot of people in those groups and they will be buying TV for some time. Fourth, as millennials establish homes and earn more income, they might return to the convenience of cable television.[37] In sum, significant demand for legacy television platforms could persist for another 10 or 20 years.

Television Distributors Might Continue to Supply Legacy Broadcasting Products

Moreover, some suppliers will continue to meet whatever demand persists. It might be instructive to consider how wireless providers adapted to the availability of broadband-delivered substitutes. At one time, text messaging was a lucrative source of revenue for wireless providers. They sold packages of text messages along with a subscription to voice service. As data service became cheaper, apps were developed that allowed users to send and receive text messages without subscribing to the text message service. Carriers did not abandon the text service. Instead they began giving unlimited text service for free with a voice subscription. Similarly, mobile voice services can now be obtained from data services using an app. Wireless carriers have once again adjusted pricing. They often sell data

34 Roy Amara, an American researcher, scientist and past president of the Institute for the Future.

35 "Fibre growth remains strong: Now passing 30 million homes in the U.S.," *Medium*, October 27, 2016, available online at https://medium.com/@fiberbroadband/fiber-growth-remains-strong-now-passing-30-million-homes-in-the-u-s-5461eb03216b.

36 "The plot twist: e-book sales slip, and print is far from dead," *New York Times*, September 22, 2015.

37 "This suggests (but certainly doesn't confirm) that as Millennials have kids, they fall into similar patterns as they had when they were living with their parents," "The State of Traditional TV: Updated With Q3 2016 Data," *MarketingCharts.com*, January 11, 2017.

service with free unlimited voice and text. The legacy services have not disappeared. They are simply now provided free along with the service customers really want: broadband. TV distributors, almost all of which provide broadband, might do the same thing. Customers will buy wireline broadband service and receive basic cable (or more) for free, and perhaps pay for premium services – to some extent, this is already happening. By bundling, BDUs will lower the price of cable TV service to remain more competitive.

Canada's broadcasting system today is better equipped to withstand online competition than ever before. Deliberate public policy and corporate strategies of consolidation and vertical integration have ensured that Canada's private broadcasters are better capitalized, better able to innovate and better able to invest than at any previous time.[38] Our public broadcaster and cultural institutions have seen a significant influx of incremental public dollars.[39] Cable companies are enhancing their offerings using digital technologies, improving their user interfaces and integrating online viewing into the customer experience. In some cases, this includes bundling their offerings with Netflix. These enhancements will make cable television more attractive and slow the migration to online viewing.

The delivery of legacy television products might continue for another 10 years. Legacy broadcasting regulation therefore would have a similar life. Of course, just as legacy television platforms are always being upgraded to make them more appealing to customers, so the regulations will need to be adjusted, a subject to which we will turn below. We will likely see ongoing reductions in overall revenues and expenditures to Canadian programming, but not a collapse (see, for example, Miller 2015). That said, mere tweaking is essentially what cultural public policy has been doing for over a decade in response to the broadband Internet. Something more than "tweaking" but less than "radical change" might be required to maintain a Canadian TV system.

Future Proofing the Canadian Television System

The Nature of the Problem

Canada has a television system with a public policy objective to produce Canadian content. The tools used to accomplish this – quotas and subsidies – produce a lot of Canadian content but were not designed to produce hits.

The Internet is affecting the Canadian broadcasting system in four ways. First, online distributors are replacing regulated Canadian distributors and broadcasters. These online distributors have no regulatory obligation to provide Canadian content, as most are global distributors, so they will provide what market forces dictate.

Second, as an advertising medium, the Internet has now eclipsed all traditional media, growing from $560 million a mere decade ago to over $5.5 billion in 2016,[40] or well over a third of all

38 As articulated, for example, in the CRTC's approval of Bell's acquisition of Astral. While finding that the proposed transaction would lead to significant concentration in Canadian broadcasting, the CRTC nevertheless approved the application given the safeguards and benefits attached, including Bell's commitment to the continued operation of all its conventional TV stations (Broadcasting Decision CRTC 2013-310). As strong an independent broadcaster as Astral was, it also seems unlikely that Astral would have been in a position to make the long-term investments necessary to create a national pay-TV platform, launch CraveTV and purchase long-term rights to HBO programming, as Bell has done since its acquisition of Astral.

39 In particular, government investments in the CBC/Radio-Canada, the Canada Council and Telefilm; see Abma (2016).

40 IAB Canada 2016 Canadian Internet Advertising Revenue Survey.

Canadian advertising revenues, and causing declines across the traditional media board.

Third, Canadian viewers are drawn to dramas and other "hit" entertainment. If the Canadian system is not providing it, Canadian viewers will watch it elsewhere.

Fourth, Canadian dramas are heavily dependent on subsidies, including direct subsidies from the CMF and from tax credits, and indirect subsidies in the form of regulatory obligations such as broadcaster "national interest" programming requirements. As cable and broadcaster revenues decline, there are fewer subsidies available and the system is less able to subsidize drama.

All of this makes the production of drama in the Canadian television system less sustainable, and the production of local news potentially unsustainable. The system therefore needs to be adjusted.

A Proposed Solution for Drama and other Hit Entertainment

The current Canadian system does not do a good enough job of producing the dramas and other hit entertainment Canadian viewers want. It requires large subsidies to remain sustainable and might require more.

Because the language, accent and culture are similar, English Canadians are comfortable watching US dramas. Since the United States is a much bigger market, US producers can spend less per viewer and more per program. As a result, they can sell higher-quality programs that are popular around the world, but especially in Canada. To produce higher-quality shows, Canadian producers need to spend more per show. This can be facilitated in part by changing the regulatory structure. The CRTC has already started. For example, it has eliminated the requirement that over-the-air channels air Canadian content outside prime time, which now allows broadcasters to spend more of their Canadian-content dollars on hit programming during prime time.

A related solution is to export programming. The business case for high-budget Canadian drama is obviously better if programming is sold abroad, especially in the United States. (Of course, one problem is that export-oriented programming might not be made from a Canadian perspective, which is the point of the regulated system.)

Finally, the Canadian system is a highly complex arrangement of subsidies, with regulated relationships between broadcasters and independent producers. Simplifying this system would allow market forces to develop more innovative solutions and programming.

We believe the system can deliver good-quality Canadian television programming if changes are made in three areas. First, Canadian broadcasters should be allowed to spend the same amount of money on fewer productions. This will allow the creation of better-quality television programs, and perhaps more hits.

Second, more programming should be produced with the export market in mind. Indeed, the federal government has undertaken a process to inquire how to strengthen production, discoverability and export. Increasing exports presumably would be somewhat easier if less but better programming is produced. Moreover, the Canadian Media Fund's current selection process has created barriers that should be relaxed.

Third, Canadian broadcasters need more "skin in the game." Canadian over-the-air services rely on profitable US hits. The returns on these Hollywood hits have allowed them to break even or lose a bit on their Canadian content and still generate a financial return. Until recently, then, they have been able to view their Canadian drama shows as a cost of doing business. Under the current system, broadcasters have virtually no stake or interest in the export success of Canadian shows, are generally required to use independent producers, and must pay incremental license fees to exploit online and other sources of revenue. As a further consequence, unlike broadcasters in other countries, Canadian broadcasters do not typically own production

studios.[41] Giving Canadian broadcasters more skin in the game could cause them to up their game, potentially producing, and otherwise commissioning better. more exportable, content.

We explore each of these proposals.

Produce Less but Better Programming

The elimination of specific exhibition quotas for drama on over-the-air television stations has given broadcasters a further incentive to take more of a quality than a volume approach. And elimination of genre exclusivity gives broadcasters greater motivation to place their drama bets on channels that are most likely to benefit from them – generally the main networks. We think this policy approach makes sense. There are issues as to the appropriate level of spending on drama and other "national interest" programming, and the appropriate overall prime-time Canadian content quota, which will need to be examined over time. Producing fewer dramas that are watched more, will, in our view, do more to sustain a sense of Canadian identity than producing more dramas that are watched less. With increased viewership, the business model for drama will be more sustainable.

More Exports

More attractive drama programming will have a higher potential for export, which will also improve the business model. We would note that there is already a trend toward more exports of Canadian productions, including drama.[42] Indeed, the same trend toward globalization that threatens the Canadian regulatory system could make it easier for Canadians to export their TV programs. This is where the long tail could work in Canada's favour. Many Canadian producers and program distributors with strong evergreen content libraries (such as DHX and Corus) are already taking full advantage of this. CRTC pilot projects, designed to provide incentives for adaptations of successful Canadian novels and programs with budgets over $2 million, were launched in 2015 (see CRTC 2915). Export success, however, remains limited. Although not an apparent intentional policy outcome, this is certainly a logical consequence of the current regulatory and funding framework.[43]

A number of rules and restrictions inhibit export, particularly of Canadian drama. First, broadcasters have little or no stake in export success, and therefore have no reason to use their leverage – including as acquirers – in the international

41 The major broadcasters have production arms for news and sports. Corus and DHX Media own production entities focused on children's programming.

42 Unlike news, which has no shelf life and whose costs must be amortized in Canada, drama and other genres of independent production have the potential for both export and multiple window revenue. From 2012 to 2016, in English-language TV production, foreign financing grew (largely foreign presales) from 9 percent of the financing picture to 18 percent, making up for losses in private broadcaster licensing fees and other financing sources. At 22 percent, foreign financing is now the largest source of financing for English-language fiction productions (CMPA 2016, exhibits 4-19, 4-21). Audiences for Canadian programming, even in peak viewing periods, have grown slightly from 2010, when Netflix launched in Canada, to 2016 (CMPA 2016, exhibits 11-8, 11-9; CRTC 2017a, table 4.2.14.

43 The Creative Canada vision (Canada 2017b) announced "a new investment of $125 million over five years to support Canada's first Creative Export Strategy" and that a "new Creative Export Fund will be launched in 2018," but provided few details. Although such an initiative might well be useful in promoting exports, underlying structural issues need to be addressed.

marketplace to further exports.[44] Second, broadcasters are deterred from owning foreign rights to Canadian content through rules that limit direct broadcaster-affiliated producer access to funds, requirements to use independent producers and fund expectations that independent producers retain ancillary rights, including foreign rights.[45] Third, CMF-funded productions are required to have Canadians in all key creative positions,[46] thereby all but eliminating the funding of projects with, say, a lead US star or foreign writer.[47] Funding support is bifurcated between the CMF (which supports distinctly Canadian productions) and tax credits (which support all productions) with little in between.

More specifically, there seems to be an opportunity for more exportable Canadian productions that are more than 6/10 "industrial" and less than 10/10 "distinctly Canadian."[48] As it stands, the CMF contributes almost nothing to the former but as much as 35 percent of the budgets of the latter.[49] As an expansion of the CRTC's pilot projects, the CMF should fund more eight- or nine-point projects, but with a lower average contribution by the CMF. Indeed, a review of the three-decades-old point system seems appropriate.

Focusing on the use of Canadian resources, however they are deployed, would appear to make more sense in this environment. Finally, CMF funding criteria should reward export success more systematically by including an international

44 The exception to this is children's programming, where both Corus (Nelvana) and DHX are producer/distributors with genuine, and growing, international success. A big reason is the relatively lower cost and evergreen nature of children's programming. But a material reason is also the fact that their producer arms were grandfathered in terms of their ability to access Canadian production funds, and the broadcasters permitted to air affiliated productions.

45 CMF rules cap broadcaster-affiliated producer access to the performance envelope for drama at 15 percent, and preclude the broadcast licence fee from including foreign broadcast rights, other ancillary rights and equity (CMF Performance Envelope Program Guidelines 2017-18, sections 2.1.1 & 3.2.TV.5 (d)). CRTC rules require that broadcasters spend 75 percent of expenditures on Programs of National Interest (PNI) consisting largely of drama productions, on independent production. In eliminating the requirement for terms of trade agreements, the CRTC has removed one barrier to broadcasters' acquiring rights from independent producers.

46 That is, a 10 out of 10 point (10/10) production, or "distinctly Canadian" show, under the "point system." The CMF identifies 10/10 production as an "essential requirement" of eligibility (CMF Performance Envelope Program Guidelines 2017-18, section 3.2.TV.1), but has made limited exceptions over the years. The point system was first adopted by the CRTC in 1984. Key creative positions for live action productions are assigned points based on the functions performed by Canadians, as follows: director (two points), screenwriter (two points), first and second lead performers (performer or voice) (one point each), production designer (one point), director of photography (one point), music composer (one point), picture editor (one point). A Canadian production must receive a minimum of six points. In addition, the producer must be Canadian and be responsible for monitoring and making decisions pertaining to the program; at least one of either the director or screenwriter positions and at least one of the two lead performers must be Canadian; and a minimum of 75 percent of program expenses and 75 percent of post-production expenses must be paid for services provided by Canadians or Canadian companies.

47 Official co-productions are the exception, but there can be no official co-productions with US companies.

48 In fiscal year 2015/16, 80 percent of Canadian-content television production was 10/10, 10 percent was 8/10 or 9/10 and 10 percent 6/10 or 7/10 (CMPA 2016, exhibit 4-11).

49 On average, the CMF accounts for 22 percent of the budget of CMF-funded productions, including fiction, documentary, children's and variety projects. Drama represented 53 percent of $286 million in CMF TV contributions in fiscal year 2015/16 (CMPA 2016, exhibit 4-15).

success component in funding allocations.[50] This could be accomplished through a separate pool or the rewarding of international success through larger future envelopes. A shift in favour of more exportable Canadian content, however, should be recognized as that: a shift. Virtually all countries produce TV first and foremost for their domestic market, and make the majority of their revenues from that market. Although exports can be a point of pride and a generator of material revenues, the domestic market remains key financially.[51] This is consistent with the view of using what resembles an industrial policy to support and foster Canadian identity, but doing so more efficiently and sustainably.

Skin in the Game

Although public policy has encouraged consolidation in the broadcasting sector, the converse has been the case in the production sector. In its "Let's Talk TV" decision (CRTC 2015a), the CRTC diagnosed the problem as a combination of, first, the absence of long-term monetization of much Canadian programming, because broadcasters lack the incentive and independent producers lack the capacity to support long-term exploitation and export of content; second, the heavy reliance of both parties on government subsidies and investment for sustainability; and, third, an environment that gives independent producers incentives to behave like production contractors operating in a service industry, operating project to project on behalf of licensed broadcasting services, and unable fully to exploit their intellectual property. The Commission concluded: "The production industry must move towards building sustainable, better capitalized production companies capable of monetizing the exploitation of their content over a longer period, in partnership with broadcasting services that have incentives to invest in content promotion." We agree with the Commission's assessment.

Lacking the jurisdiction to implement its vision, the Commission was largely left to make soft recommendations to the government. What it could do directly was limited. With the apparent intention of encouraging consolidation in the independent production sector, the CRTC reversed prior precedent and removed conditions of licence that require broadcasters to enter into terms of trade agreements with producers.[52] The Commission also approved two fiction pilot projects "to encourage governments and partner agencies to consider more flexible and forward-looking approaches." Unfortunately, the pilot projects – a screenplay based on a Canadian novel, and high budget (more than $2 million per hour) – encourage very specific (albeit potentially exportable) activity, rather than introduce more general flexibility. Although a goal of diversity of sources of content, especially given the consolidation in the broadcasting sector, is laudable, Canada does not need three hundred small producers, each believing it has the right to exist because it makes an irreplaceable contribution to Canada's cultural life and identity.

The CRTC's decision to eliminate previous requirements for terms of trade (CRTC 2017) should be allowed to stand and consolidation in the production sector allowed to occur. Ten or twenty larger Canadian producers would be far

50 DHX Media also made this recommendation in the "Canadian Culture in a Digital World" consultations.

51 See, for example, CMF (2016) and de Rosa and Burgess (2017). This has been specifically recognized in the Creative Canada vision.

52 Terms of trade agreements governed the programming licensing relationship between independent producers and producers, setting rules on bundling or linkage of rights, licence terms, and so on. They were first endorsed by the CRTC in 2007 and implemented in the 2011 round of group licensing. See CRTC (2011).

better able to tackle export markets and negotiate fair terms with broadcasters than three hundred producers backed by CRTC-endorsed terms of trade agreements or other regulations. Although most broadcasters will not necessarily want to become producers,[53] they will all be interested in more flexible arrangements with third-party producers, and the ability to negotiate whichever rights they feel appropriate. Other than an obligation that all such acquired rights be exploited, such market-based activity should not be prevented. For example, as an initial step, CMF-funded 8/10 or 9/10 production could be linked with greater flexibility for broadcasters to negotiate equity or ancillary rights as part of their participation. Moreover, broadcasters that are producers and exporters – DHX and Blue Ant, in particular – should not be limited unduly in pursuing synergies in airing their own shows through a blanket 75 percent independent production requirement. The CRTC should continue to exercise its discretion not to require "one size fits all" rules and to seek diversity of programming sources on a system basis, not necessarily an individual licence basis.

Other Views: More Subsidies

Another possible model would be to replace or supplement the current regulatory system with increased subsidies, either direct or in the form of tax credits. As discussed above, we think there is life in the old system yet. If we are wrong, we are not optimistic about the use of tax credits and other direct subsidies. We do not favour an increased focus on tax credits and direct subsidies for two reasons.

First, it is unrealistic to believe that the economic value of the quotas and expenditure requirements could be replicated through direct subsidies. Government directly subsidizes Canadian TV to the tune of approximately $1.5 billion per year, including the CBC's parliamentary appropriation (as allocated by CBC to TV), the CMF and federal tax credits.[54] The "economic value" of quotas and expenditure requirements is harder to determine, but can be reasonably assessed by deducting the subsidy amount from known public and private support for Canadian programming of approximately $4.2 billion annually.[55] The value of quotas and expenditure requirements, by this measure, is approximately $2.7 billion. In other words, $2.7 billion comes from the broadcasting system as enabled by BDUs and broadcasters and enforced through regulation. It is doubtful that $1.5 billion in direct subsidies would be almost tripled in the absence of such structural measures.

53 In fact, it is fair to say that most broadcasters prefer to use independent producers for genres other than news and sports. Even in genres that are not "Programs of National Interest," where the CRTC does not have a 75 percent requirement for the use of independent producers, independent production remains the preferred option. Indeed, broadcaster in-house production fell by 17.3 percent during 2015, compared to a 5.1 percent increase in independent production (CMPA 2016). Broadcasters do not typically possess the core expertise or risk tolerance for high-end production, and benefit from the ability to select from among the many development proposals presented by real and credible producers.

54 As at 2015. Included in this amount are federal/provincial tax credits ($712 million), the federal government's contribution to the CMF ($134 million), and support for CBC TV programming expenditures from its parliamentary appropriation ($701 million of $929 million in funding), for a total of $1.54 billion. See CBC/Radio Canada (2016); CMF (2015); CMPA (2016); CRTC (2016a).

55 A slight increase from the $4.1 billion reported in the "Let's Talk TV" decision (CRTC 2015a, para. 28). Almost two-thirds (65.6 percent), or $2.7 billion, of this came directly from the expenditures of Canadian television programming services on Canadian programs. The remaining amounts came from federal and provincial tax credits (15.8 percent), the CMF (9 percent), tangible benefits (4.8 percent), the contributions of BDUs to community programming (3 percent) and various independent production funds (1.5 percent).

Second, the track record for subsidies alone is not good. The feature film industry in Canada is heavily supported with subsidies and tax credits, yet the sector has not performed well. The top five Canadian films took in $11 million in 2016 (Pinto 2017a); the top grossing (US) movie in Canada took in $129 million.[56] In 2015, Canadian films had a 1.9 percent share of Canadian box office receipts (10.7 percent for French; 0.6 percent for English) (Market share of Canadian films, 2001 to 2015[57]). Despite generous government subsidies, the "unregulated" Canadian film industry can be said to produce only French-language hits. In 2010, Telefilm Canada abandoned a 2001 target of 5 percent of Canadian box office receipts as "it became evident that the Canadian films that received critical acclaim and won awards were not necessarily the ones earning big box office numbers in theatres" (Vlessing 2010). Subsidies for TV programming from the CMF and other TV production funds appear to have been more effective. Audiences for English-language prime-time Canadian shows have grown, with many now routinely reaching audiences of one million or more (Pinto 2017b), and English Canadians recognizing and taking pride in Canadian hits such as Trailer Park Boys, Orphan Black and Saving Hope.

Regulatory economists generally believe that subsidies and tax credits work best as incentive mechanisms because they are less distortionary. The efficiency-reducing impact of raising broad-based taxes is fairly low, while subsidies/tax credits can be targeted precisely at the product to be subsidized, which also reduces distortion. This view, however, overlooks the incentives of the producers. Tax credit systems can give producers an incentive simply to obtain the tax credit (Geist 2105); they do not care how good the final product is. By way of contrast, the CMF gives television broadcasters an "envelope" in which to produce shows of a certain type (generally scripted drama). The broadcasters have every incentive to produce the best television programming possible since doing so will earn them higher returns. Furthermore, the CMF rewards broadcasters that have higher audiences with greater future subsidies. So, TV subsidies work better because they are aligned with the incentives of broadcasters. The flexibility of the CRTC's group licensing model and the broadcaster envelopes established under the CMF combine to give broadcasters an incentive to maximize the return from their and the public's "investment" in Canadian television programs. Replace these mechanisms with tax credits and we would be left with a Canadian English-language feature film industry.

The Need for Local News

The plight of local news sources across the country has risen to a level of real and genuine concern.[58] Newspapers have closed; fortunately local TV and radio stations have not. Unfortunately, print media are generally the journalistic foundation of other media (see Public Policy Forum 2017). Although all traditional media have lost revenue to the Internet, print's decline has been almost catastrophic: daily newspaper advertising peaked in Canada at $2.72 billion in 2007 and declined to $1.26 billion in 2016.[59] Private over-the-air television revenue declined from a peak of $2.14 billion in 2011

56 See "Canada Movie Index," *The Numbers: Where Data and the Movie Business Meet*, [2017], available online at http://www.the-numbers.com/Canada/movies#tab=year.

57 Government of Canada, at http://canada.pch.gc.ca/eng/1464190351879.

58 The Creative Canada Policy Framework acknowledges "the importance that news and information hold in a democratic society" (Canada 2017b, 32), but proposes only minimal unspecified financial assistance through the Canada Periodical Fund.

59 News Media Canada, Net Advertising Volume Canada Report 2007-2016.

to $1.67 billion in 2016 (CRTC 2017a). Radio appears to have started its revenue decline.[60] On the issue of local TV news, the CRTC has recognized the problem with the introduction of a new Independent Local News Fund and flexibility for BDUs to divert contributions to their affiliated local news stations from the community channel, effective September 2017 (CRTC 2016c). Unfortunately, the maximum CRTC estimated value of this annual reallocation of BDU contributions to local news is $85 million, or less than the average annual revenue loss of private local stations over the past five years. It seems unrealistic to believe, therefore, that the CRTC has "fixed" the problem of local news. Indeed, the Commission's solution appears at best a stop gap.

Television news remains important to Canadians, and there remains considerable doubt that the business model for it will remain sound. Solutions will have to be found outside the regulatory toolkit. They should be applied appropriately to all news media to avoid distortions in the marketplace so that government support does not inadvertently favour one local medium over another.[61] Options canvassed in other recent reports – see, for example, Public Policy Forum (2017); and Stursberg (2016) – include a new dedicated fund for news, new tax credits for news, and changes to advertising tax deductibility rules to favour Canadian over foreign Internet-based media.

As the challenges facing print media fall outside of the scope of this *Commentary*, we take no formal position on these proposals here. We do, however, make the following two observations.

First, in a democratic society, the importance of supporting news must be balanced against the potential, or even appearance of the potential, for the state's influencing the Fourth Estate. Although the CBC plays an important role in news, few would be comfortable with its becoming the predominant news source for Canadians. Private news sources should continue to play the primary role; thus, any government support must be at arm's length as possible. As a consequence, and contrary to our observations on support for drama, the vital role of news in a democracy would favour automatic tax credits over inherently discretionary funds.

Second, we note that support for Canadian print and broadcast media through advertising tax deductibility rules dates back to the 1970s and earlier.[62] This precedent, the fact that such a move actually would save the federal treasury money (by reducing allowable business expenses), and the fact that it is a matter of Canadian tax policy, rather than cultural policy per se, suggest that it would be the most fruitful area for government to pursue.

Proceeds from the 600 MHz Auction

An opportunity exists to provide additional funding for the Canadian broadcasting system from the proceeds of the 600 MHz auction. The 600 MHz spectrum was for over-the-air television broadcasters in both Canada and the United States. In the US, a "reverse auction" took place to buy the spectrum from the broadcasters before it was auctioned to wireless carriers. The broadcasters received $10 billion for the spectrum, which was

60 Radio revenues declined $72 million, or 4.4 percent, from a peak of $1,623 billion in 2013 to 1.551 billion in 2016, 3.2 percent of that decline in the last year (CRTC 2017a, table 4.1.1).

61 This is a non-trivial concern. Examples in private TV including the CRTC's accepting as "tangible benefits" new local programming initiatives that compete with already-established local programs. Similar concerns have been raised about the CBC's digital services "unfairly" competing with local private broadcasts and newspapers, and the CRTC's support of local TV "unfairly" giving local TV an advantage over local print.

62 Advertising tax deductibility rules prevent Canadian firms from deducting ads in foreign magazines and broadcast media as a business expense.

subsequently sold for $20 billion.[63] Given the usual ten-to-one rule between the two countries, it would be appropriate to set aside $1 billion from the Canadian 600 MHz auction for the benefit of the Canadian broadcasting system.

Some of these funds might be paid to compensate over-the-air broadcasters for the costs of switching to new frequencies. Although we generally oppose increasing subsidies as a means of supporting Canadian content, the existing mechanism in the CMF works better than most subsidies. The amount of money available to the CMF is declining, and an increased subsidy might be needed to prevent further loss. A significant portion of the money from the 600 MHz auction could be used to top up any shortfall in the CMF each year and/or to fund local news.[64]

The Netflix "Tax"

Another view is that, if revenues are leaving the regulated broadcast system and moving to online viewing, the solution is to require contributions from the online providers. In Canada, this solution is often referred to as the "Netflix tax."

To date, the CRTC, the Canadian government and other national governments have been reluctant to impose regulatory measures on Internet-based audiovisual services.[65] Reasons have evolved – from a sense of technological impossibility, to a concern over thwarting innovation, to more recently, concerns over negative consumer reaction. As it stands, CRTC regulations do not keep out foreign Internet audiovisual services or prevent people from subscribing to foreign Internet media, and no Internet media are required to adhere to Canadian-content expenditure or exhibition quotas.

The solution for some is to impose the same regulations on foreign providers. That might well be technically possible,[66] but it would be politically difficult:[67] the federal government does not even charge HST for Netflix purchases.[68] It seems reasonable to assume that the absence of HST of as high as 15 percent on a Netflix purchase is a greater competitive advantage than the absence of a mandatory 5 percent BDU-like contribution

63 See Spectrum Gateway, "600 MHz: Deployment," available online at http://www.spectrumgateway.com/600-mhz-spectrum.

64 The Creative Canada Policy Framework states that the government "will increase the federal contribution in order to maintain the level of funding in the Canada Media Fund starting in 2018" (Canada 2017b, 14). The document does not speak to the reasons for a decline in CMF funding or anticipated shortfalls.

65 France has been the most aggressive in this regard, with the approval in the French parliament in December 2016 of a 2 percent levy, a "YouTube tax," on all streaming video. The measure was implemented following approval by the European Commission in September 2017. See "France Proposes a Tax on Streaming Content," Export.gov, January 13, 2017, available online at https://www.export.gov/article?id=France-Proposes-a-Tax-on-Streaming-Content; and Keslassy (2017).

66 Although smaller Internet-based services might evade effective regulation, there is no technical barrier to subjecting larger mainstream operators such as YouTube, Netflix and Facebook to CRTC regulation. In fact, such operators are already subject to a myriad Canadian laws and regulations from privacy to copyright tariffs. Some Internet users circumvent tools meant to prevent "geoblocking," whereby users access content in unauthorized jurisdictions through IP addresses, but this is not a new problem. The Canadian broadcasting system has always had to deal with a certain level of piracy and "grey markets" such as the early days of direct-to-home satellite broadcasting.

67 We regard Netflix's agreement under the *Investment Canada Act* as an important acceptance by the company of Canadian legal jurisdiction. We see no jurisdictional barriers to Canada's proceeding with some form of "Netflix tax" as long as it was applied on a non-discriminatory basis.

68 To be precise, HST is levied on Netflix, but Netflix is not required to charge the tax and remit it to the federal government. Instead, taxpayers are supposed to remit the tax themselves. Needless to say, few do.

to Canadian programming. There has been much discussion about a "Netflix tax," but relatively little about what it might look like.

We suggest that, to satisfy the requirement of neutrality, the CRTC impose Canadian-content requirements on Netflix similar to those it imposes on Canadian competitors. It is little known that Canadian distributors that compete directly with Netflix make no contributions to Canadian content; instead, for them, the CRTC created a hybrid video-on-demand (VOD) category in which services must be offered on the Internet to all Canadians without the need for a subscription to a specific broadcasting distribution undertaking, mobile service or retail Internet access service (see CRTC 2015b). Distributors in this hybrid category can offer exclusive content and provide their services without any Canadian programming requirements. Obviously, the CRTC was attempting to let Canadian distributors offer services to compete with Netflix without requiring the Canadian services to incur a more onerous regulatory burden.[69] Therefore, if the objective is to ensure that Canadian and foreign online services are treated symmetrically, then the Canadian-content component of any Netflix tax should be zero. A broader view might be that the CRTC narrowly crafted its order to relieve Canadian distributors with the same business model as Netflix of the requirement to adhere to Canadian-content obligations. Some non-hybrid VOD services that compete with Netflix are still required to have at least 20 percent of their titles be Canadian and to pay 5 percent of their revenues to an independent programming fund to support Canadian content (CRTC 2010b).[70] These same obligations could be imposed on foreign online on-demand services such as Netflix. It presumably would be possible for Netflix to comply with the first condition. Since its titles vary by country, it could arrange to have the extra Canadian titles available to Canadian viewers. The additional payments to obtain the VOD rights to the Canadian titles would benefit the Canadian rights holders and hence the Canadian broadcasting system. With respect to the second condition, assuming Netflix revenues of $600 million annually from Canada, a 5 percent tax would amount to $30 million.[71] This is not an insignificant sum, but unlikely by itself to transform the Canadian broadcasting system. It might, however, offset the reductions in contributions by BDUs to the Canada Media Fund.

Another way of looking at the situation is that Netflix competes with an entire Canadian television system, which includes BDUs and VOD services that pay a 5 percent "tax," and with broadcasters that on average expend 30 percent of their revenues on Canadian programming. Although Canadians

69 Since the order was issued, one of the Canadian services, Shomi, offered by Rogers and Shaw, has ceased operations. Crave, offered by Bell, is still in business.

70 Note that small exempt BDUs can operate VOD services without incurring any Canadian Content obligations (CRTC 2015b). This assumes that the best analogy to Netflix would be a VOD service. If the better analogy was that of a major broadcaster, a CPE level of 30 percent, the benchmark for the major TV groups in Canada, might be more appropriate.

71 Based on 5 million paying subscribers at $10 per month. In a submission to the Digital Cancon Review, Netflix stated: "Netflix is an active investor in movies and TV series made in Canada and our investments are substantial." A number of titles of original and library productions were cited, but no dollar figures given; see Netflix (n.d.). In a subsequent March 2017 blog, Michael Geist suggests that a significant portion of the growth in foreign financing of Canadian production could be accounted for by this Netflix investment; see Geist (2017). With an increase in foreign financing from $201 million in fiscal year 2011/12 to $342 million in 2015/16, it is therefore not inconceivable that Netflix's investments in Canadian programming approach the 5 percent of revenue BDU benchmark. Note, however, that a 5 percent contribution to an independent fund does not equate to a 5 percent investment in programming that an entity chooses and airs.

do not like new "taxes," they also believe in fairness. Imposing reasonable Canadian programming expenditure requirements on Netflix, perhaps on the order of 25 percent, would accomplish both. In any event, regulatory and tax rules should be imposed on online distributors in the same fashion as on Canadian distributors. It does not make sense to require only some competitors to be subject to such requirements. Accordingly, online distributors should be required to pay HST (see Wyonch 2017).

Given the opposition to a Netflix tax and the federal government's September 2017 announcement of a five-year $500 million agreement with Netflix to fund "original productions in Canada,"[72] we are not suggesting that online distributors devote a required level of "shelf space" to Canadian content, pay into funds or make other mandatory Canadian programming contributions at this time. We do, however, recommend that such online video providers be required to substantiate their Canadian programming contributions through filings with the CRTC, to ascertain if that contribution is "equitable" in the circumstances. If the Commission determines this is not the case, or if asymmetry in regulatory treatment causes too much competitive harm to the Canadian system, the approach should be revisited.

An ISP or Broadband Tax

Some analysts have proposed that contributions to broadcasting funds be made by ISPs, because some of the material they transport is broadcast programming. Of course, people use broadband for much more than viewing broadcasting, so if a 5 percent contribution is fair for BDUs, a fair contribution by ISPs would reasonably be lower.[73] Politicians of all stripes have rejected a broadband tax, largely because it would increase the price of broadband service. The CRTC, however, recently imposed a 1 percent levy on broadband service to support such service in rural and remote areas (CRTC 2016b). No concerns about the affordability of broadband have been raised, perhaps because some broadband customers will pay more but rural customers will pay less. (Note that this levy is being paid by all telecommunications carriers, not just ISPs.)

Nonetheless, we view the imposition of a contribution requirement on ISPs as problematic. It would raise the price of Internet services, which could reduce their penetration among low-income Canadians, who already struggle to afford them. If the objective is to future-proof the broadcasting system, the solution might be to raise a new tax and to shift some of the levy from BDUs to broadband. The current 5 percent levy on BDUs could be reduced by a percentage point and a 1 percent levy placed on broadband. Perhaps, over time, the BDU levy could be reduced, say, to 3 percent and the broadband levy increased to 2 percent. Customers who subscribe to both services would face no increase in the amount of levy they pay. Initially, the contributions of carriers that offer both BDU and broadband services would not change much. As BDU revenues declined and ISP revenues increased, however, the change would prevent the erosion of

72 Under the *Investment Canada Act*, and equivalent to an approximate 17 percent contribution on today's annual Netflix Canada revenue. To be clear, the commitment is to "original productions in Canada," which need not be Canadian content; see Canada (2017c).

73 There is an argument that a reasonable level could be close to 5 percent, given that streaming audio and video represent over 70 percent of broadband traffic; See "Sandvine: Over 70% Of North American Traffic Is Now Streaming Video And Audio," *Sandvine*, December 7, 2015, available online at https://www.sandvine.com/pr/2015/12/7/sandvine-over-70-of-north-american-traffic-is-now-streaming-video-and-audio.html.

the CMF budget, although the fund would not initially receive new money.

A Five-Year Review

If the current system does not have to be radically revamped, the CRTC and the Department of Heritage will still need to temper their interest in promoting Canadian content with an appreciation for the changing marketplace. As the shift from legacy television to broadband viewing continues, if only on a decadal scale, the regulatory burden on broadcasters and BDUs might need to be lessened. Levies, although politically unattractive, might have to be imposed on online broadcasters and broadband providers. New tax credits might even be needed, although as explained above, they do not work well on their own.

Without a crystal ball, it is hard to see how long the regulated broadcasting system will remain financially viable. If the system loses a lot of revenue and viewers, its ability to support Canadian programming will be diminished. Interestingly, a recent Statistics Canada report (2017) indicates that the decline in total operating revenues for the Canadian television broadcasting sector rose by 0.9 percent from 2015 to 2016, totalling $7.5 billion. Rather than try to predict the future, we believe there should be a formal process to review the regulated broadcasting system every five years and to make changes to the regulatory burden to ensure it is effective. The initial review could take place in three years and should result in a report referred to the appropriate House of Commons committee. To be determined is whether the review should be handled internally by the government, by the CRTC itself or by an independent panel.

The idea of statutorily mandated reviews is not a new one. During the deregulatory period in the 1980s and 1990s, it was not uncommon for legislation and regulations to have either reviews or sunset clauses incorporated in legislation or policy. When the federal government moved to deregulate the transportation sector in the late 1980s and early 1990s, it incorporated such a provision, initially requiring a complete policy review by an independent panel every five years. A similar policy continues to this day, as set out in section 53 of the *Canada Transportation Act*.[74] Under the provisions of that section, the minister of transport must appoint a panel to conduct a comprehensive review

74 53 (1) The Minister shall, no later than eight years after the day this subsection comes into force, appoint one or more persons to carry out a comprehensive review of the operation of this *Act* and any other *Act* of Parliament for which the Minister is responsible that pertains to the economic regulation of a mode of transportation or to transportation activities under the legislative authority of Parliament.
(2) The person or persons conducting the review shall assess whether the legislation referred to in subsection (1) provides Canadians with a transportation system that is consistent with the national transportation policy set out in section 5 and, if necessary or desirable, may recommend amendments to (a) the national transportation policy; and (b) the legislation referred to in subsection (1).
(3) The review shall be undertaken in consultation with purchasers and suppliers of transportation services and any other persons whom the Minister considers appropriate.
(4) Every person appointed to carry out the review has, for the purposes of the review, the powers of a commissioner under Part I of the *Inquiries Act* and may engage the services of experts, professionals and other staff deemed necessary for making the review at the rates of remuneration that the Treasury Board approves.
(5) The review shall be completed and a report of the review submitted to the Minister within 18 months after the appointment referred to in subsection (1).
(6) The Minister shall have a copy of the report laid before each House of Parliament on any of the first thirty days on which that House is sitting after the Minister receives it.

of the legislation no later than eight years after the law was enacted. There have been a number of reviews of transportation legislation under this or similar provisions in the past 25 years, the most recent chaired by David Emerson and reported in February 2016. Even in the absence of a statutory-based review, governments have not infrequently undertaken comprehensive policy reviews, often using external, independent panels. An example of this approach is the recent panel on the Modernization of the National Energy Board. The federal government announced the review in 2016 and the expert panel released its report on May 15, 2017.

There are a number of advantages to conducting an independent review outside of government. First, it would bring a more objective perspective to the actual operations and policy underpinnings of the regulatory regime. It is often difficult for an agency itself to undertake a comprehensive review because it is, in essence, reviewing its own work. An independent panel also allows the use of "wise persons," who provide their experience and judgment on the policy framework and its operations. An additional benefit is that a report from an independent panel would not be binding on the government; in other words, the government could pick and choose from among the report's recommendations after assessing the policy implications and likely reactions. This might also be a disadvantage, of course, since a report can lay on a government shelf and not be implemented. An independent review could also help the government develop the political support to proceed with recommendations that might be more difficult to undertake internally or in a partisan environment.

Overall, statutorily mandated reviews are a good idea, and they should be conducted by an independent panel of experts. We would recommend a provision similar to that in the *Canada Transportation Act*, but with a review period of no longer than five years, with the first review in three years, given the change and uncertainty with respect to the impact of technology on existing policies and instruments. As part of this review, the third party would:

- assess the current state of the Canadian broadcasting market and determine whether the current regulatory mechanisms are working;
- assess whether the current regulatory burden on BDUs and broadcasters is appropriate given market conditions and whether more or less emphasis should be put on quotas, subsidies and other regulatory mechanisms;
- determine if a levy on online VOD distributors and/or broadband providers should be put in place or adjusted;
- determine if there is sufficient support for local news and information programming and recommend changes to the regime if there is not; and
- determine if the system is creating high-quality Canadian entertainment programming with export opportunities, and recommend changes to the regime if it is not.

Reducing Excessive Regulation

If the Canadian television system faces increasing competition from Internet broadcasters, this seems like a poor time to increase the regulatory burden on that system. Regulation has recently increased, however, in the form of a highly prescriptive, small basic and *à la carte* requirement – that is, a system that lets consumers build their own cable service by selecting individual channels.

We believe consumers and the system would have been better served by relying on a requirement that programming services offer themselves to BDUs on a stand-alone basis, and by mandating an *à la carte* requirement without being so prescriptive as to the nature of the service and the make-up of basic service. We recommend that the CRTC be directed to require less-intrusive regulation where that clearly serves consumers' interests in a manner that does not unduly compromise cultural objectives – similar, for example, to the policy direction under section 8 of the *Telecommunications Act* in 2006.

Amendments to the Broadcasting Act

Current broadcasting regulation might continue for 10 or more years, but since the broadcasting system is undergoing substantial changes, existing legislation eventually will need modifying. Indeed, the federal government has already announced that it will review the *Telecommunications Act* and the *Broadcasting Act* (Canada 2017a, 106). Accordingly, while we do not regard changes to legislation as imperative now, some modifications might be useful. We note, however, that one argument in favour of amending the two acts is that they have become obsolete due to the invention of new technologies. The two pieces of legislation last had a major rewrite before the emergence of the commercial Internet, but they were drafted to be technologically neutral and do not presuppose any particular technology. Accordingly, they do not need to be amended simply because the Internet and other new technologies have emerged.

Amalgamating the Two Acts

Several analysts have proposed amalgamating the *Telecommunications Act* and *Broadcasting Act* to reflect the converged nature of the industry's companies and technologies.[75] In our view, the benefits of merged legislation are outweighed by the costs. It is true that, with the predominance of IP technology, both broadcasting and telecom are, and increasingly will be, bits on a broadband pipe. It is also true that the largest vertically integrated carriers in Canada do broadcasting, broadcasting distribution and telecommunications. However, the two acts have very different purposes. The *Telecommunications Act* was designed to regulate to achieve competitive market outcomes until competition emerges, allowing deregulation. The *Broadcasting Act* was designed so that regulation can ensure a non-market outcome: increased production of Canadian content. Combining the two acts therefore would not yield any obvious benefits. In the United States, the *Communications Act* covers broadcasting and telecommunications, but Title II of the *Act* deals with common carriers, Title III with radio and Title VI with cable communications. It is likely that a single piece of legislation in Canada would deal with telecommunications and broadcasting in separate sections.

Objectives of the Broadcasting Act

In a 2006 report to the government pursuant to section 15 of the *Broadcasting Act*, the CRTC noted strong stakeholder support for the policy objectives in section 3 of the *Act*, but significant differences of opinion as to the weight, priority and effect given to implementing those objectives, as reflected in the crafting or interpretation of the regulatory policy objectives in section 5. In particular, the Commission noted the split between those parties giving priority to cultural objectives and those primarily advancing economic or consumer interests, and suggested that the federal government give greater clarity as to the priority to be accorded such objectives.

We believe such clarification is even more important a decade later.[76] We submit that the

75 See, for example, the comments of former CRTC chair Konrad von Finckenstein, "CRTC chair urges telecom overhaul," *Globe and Mail*, April 14, 2010; see also von Finckenstein (2017).

76 The alternative is the current piecemeal approach that leaves all parties guessing at the government's policy priorities. Contrast the section 15 request that led the Commission in the direction of consumer-oriented pick and pay in the 2014 "Let's Talk TV" hearings (see Canada, Privy Council Office, available online at http://www.pco-bcp.gc.ca/oic-ddc.asp?lang=eng&page=secretariats&dosearch=search+/+list&pg=98&viewattach=28427&blnDisplayFlg=1) and the recent decision on group licensing decisions concerning PNI.

government should issue a policy direction to the CRTC clarifying how the Commission should weigh consumer objectives against cultural objectives. This could also be done through amending section 3 and/or 5.

Information Gathering

Observers of the CRTC will recall the moment, during the "Let's Talk TV" hearings in September 2014, when the chair asked for data and other information from Netflix and Google, which had chosen voluntarily to appear at the hearings, and was refused. Rather than continuing with its request, the Commission backed down and officially removed Netflix's and Goggle's evidence from the proceeding.[77] Commentators variously argued that the Commission lacked the political support – Prime Minister Stephen Harper had already declared as the hearing opened that there would be no Netflix tax (Conservative Party of Canada 2015) – or, potentially, the jurisdiction to proceed. In our view, the technologically neutral nature of the *Broadcasting Act* renders the Commission's jurisdiction over "broadcasting" on the Internet unequivocal, and online video providers are clearly broadcasting. The issues are where, how and to what extent the Commission should exercise this jurisdiction.[78] What remains lacking is information about online broadcasting activities. The Commission has all but backed away from the reporting requirements first adopted in the 2009 digital media exemption order (CRTC 2009). The result is that, in an important matter of concern, we are left with selectively released public information and guesstimates. This is not a basis for effective regulation.

Some online video providers might want to avoid government oversight and information gathering. However, since they do business in Canada and earn significant revenues by charging Canadian customers monthly subscription fees, they should be able to incur the costs of providing information. They might also be concerned (as Netflix was) about the public disclosure of confidential information. But the CRTC has been engaged in weighing the benefits of disclosure against the costs for many years, and is well equipped to conduct this task. The CRTC has the powers of a superior court in respect of hearings, and wide powers to issue mandatory orders, enforceable as an order of Superior or Federal Court to "require any person to do, without delay or within or at any time and in any manner specified by the Commission, any *act* or thing" (*Broadcasting Act*, sections 12(2), 13(1)). In theory, these powers give the Commission wide scope for information and data gathering, but its specific powers of information gathering, including examining financial records and books of account, are limited to regulations concerning licensees (section 10 (1)).[79] In practice, therefore, the lack of an explicit general information-gathering or subpoena power has been a barrier. We accordingly recommend that the CRTC be granted an explicit inquiry information-gathering

77 See letters to Google and Netflix from the secretary general of the CRTC, September 29, 2014, available online at http://www.crtc.gc.ca/eng/archive/2014/lb140929a.htm.

78 We intentionally do not add the word "if" here. Through the act of exemption, including conditions associated with undue preference, the Commission has exercised its jurisdiction.

79 *Broadcasting Act*,: The Commission may, in furtherance of its objects, make regulations
(i) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify;
(j) respecting the audit or examination of the records and books of account of licensees by the Commission or persons acting on behalf of the Commission; and

power akin to section 11 of the *Competition Act* and its predecessors.[80] As in the *Competition Act*, this power should clearly specify that the Commission can require any person (whether a broadcasting undertaking or not) to provide any information relevant to a CRTC inquiry or research under the *Broadcasting Act*. At minimum, it should include the power to issue subpoenas and attend or provide written responses under oath. Eventually, the regulated Canadian broadcasting system will be replaced by online viewing. The CRTC needs to be able to gather information to monitor this substitution and to tailor its policies so that they make sense.

The Presumption of Licensing

The default regulatory scheme under the *Broadcasting Act* is licensing. In essence, all broadcasting (as defined under the *Act*) is prohibited, unless it is expressly permitted through a licence or an exemption from licensing.

Through a succession of Digital Media Exemption Orders, the CRTC – appropriately, in our view – has defined much of the audiovisual content on the Internet as "broadcasting," but has chosen to exempt it from licensing and any Canadian-content requirement (see CRTC 2012). As it stands, however, the Commission's power to exempt broadcasting activity from licensing and regulation is constrained by the need that "the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1)" (section 9(4)). This calls into question the Commission's ability to exempt foreign broadcasting undertakings – given the internal inconsistency of the notion that the Commission can exempt that which it cannot license. A clearer, less constrained power to exempt (with conditions, as necessary) would give the CRTC greater flexibility in its treatment of both foreign and domestic broadcasting activity. Indeed, consideration should be given to changing the presumption of licensing itself. As more and more broadcasting activity becomes exempt from licensing (with or without conditions), that de facto default authorization should become the default authorization under the *Act*.

As for subsidies, although we are not huge fans of their use to create cultural products, the subsidy system administered by the CMF has worked better than tax credits because it relies on the profit motives of broadcasters to produce popular Canadian programming. It is not clear, however, that the *Broadcasting Act* permits the current subsidy system to operate. The CRTC's power to require payments into funds by broadcasting licensees was brought into question by the Supreme Court of Canada, which held that over-the-air broadcasters could not be permitted to withhold their signals to negotiate market-based compensation from BDUs.[81] The appellant BDUs argued that such a regime would conflict with the regime in the *Copyright Act* and the Court agreed. More fundamentally, however, the Court found that such a scheme is contrary to the *Broadcasting Act*.[82]

It should be noted that there is no explicit power in the *Broadcasting Act* to give the Commission the power to order licensees to pay into funds. It might be useful, therefore, while amending the *Act*, to give the CRTC the explicit power to require payments into funds.

80 For a discussion on section 11 of the *Competition Act*, see Canada (2008).
81 In Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168.
82 The Court held that the general powers (section 3) of the *Act* or the "basket" clauses (9(1)(b)(i) and 10(1)(k)) could not give the Commission jurisdiction; instead, that jurisdiction must come from sections 9 or 10 of the *Act*.

Conclusion

The Canadian broadcasting system is being buffeted by winds of change from the Internet. Broadcasting regulations have had as their objective encouraging the players in the system to create and air more Canadian content than would otherwise be the case. They did this by ensuring that a portion of the revenues earned were used to create Canadian content, by requiring a portion of the content aired to be Canadian content and by excluding some foreign channels.

The regulatory system was designed when the broadcasting system was closed – when Canadian viewers could watch only what was on their cable package or available with an antenna. But now, with their broadband connections, they can see high-quality television programming from online providers around the world, who are not subject to regulation.

These changes mean that we cannot take the survival of the system for granted. Already, subscribers and revenues for the regulated system are declining. This does not mean we should abandon regulation. It does mean that we need to be smarter about regulation, and to recognize that the regulatory system will not keep everyone happy; difficult decisions must be made.

In particular, we need to start now to make the system more sustainable. This means creating content that can stand largely on its own and that needs less regulatory support. Part of the answer is to produce less drama programming, but spend more on each production. Part of the answer is to create programming that is more exportable. And part of the answer is to have a more rational supply chain for Canadian content, where broadcasters can have a greater role in the production and exploitation of drama.

With these and other changes outlined in this *Commentary*, the system could work for some time, and it would do a better job than it now does in making Canadians proud of their country and of their shared heritage.

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