**Before the Canadian Radio-television and Telecommunications Commission**

# Review of Certain Aspects of the Regulatory Framework for Over-the-Air Television

**Comments Filed by the Coalition of Canadian Audio-visual Unions in response to Broadcasting Notice of Public Hearing CRTC 2006-5, June 12, 2006**

**September 27, 2006**

**Review of Certain Aspects of the Regulatory Framework for Over-the-Air Television**

**Comments Filed by the Coalition of Canadian Audio-visual Unions**

Table of Contents

**Review of Certain Aspects of the
Regulatory Framework for
Over-the-Air Television**

**Comments Filed by the
Coalition of Canadian Audio-visual Unions**

## 1. Introduction

1. These comments have been prepared by the Coalition of Canadian Audio-visual Unions (CCAU) in response to Broadcasting Notice of Public Hearing CRTC 2006-5, June 12, 2006.

2. The CCAU is a coalition of ten Canadian audio-visual unions and is comprised of the following organizations: the Alliance of Canadian Cinema Television and Radio Artists ("ACTRA"), the Directors Guild of Canada ("DGC"), the National Association of Broadcast Employees and Technicians Local 700-CEP ("NABET"), the Writers Guild of Canada ("WGC"), the American Federation of Musicians – Canada ("AFM-Canada"), Union des artistes ("UdA"), the Communications, Energy and Paperworkers Union of Canada ("CEP"), Association des réalisateurs et réalisatrices du Québec ("ARRQ"), Association Québécoise des techniciens de l'image et du son ("AQTIS"), and Société des auteurs de radio, télévision et cinéma ("SARTeC").

3. These comments are being made on behalf of ACTRA, DGC, NABET/CEP and WGC. Each of these organizations has filed separate submissions with the CRTC referring to and incorporating this submission. Each of the organizations on their own behalf, and as part of the CCAU, requests to appear at the CRTC public hearing commencing on November 27, 2006, in order to expand on this submission and to speak to their own submissions.

4. In preparing its submission, the CCAU commissioned Nordicity Group Ltd. ("Nordicity") to validate projections for the advertising revenue likely to be generated by CBC and the private broadcasting sector in the period up to 2010. In that regard, Nordicity relied on estimates and forecasts developed by PricewaterhouseCoopers LLP (PwC) in its publication, *Global Entertainment & Media Outlook: 2006-2010*.

5. This submission focuses only on English-language over-the-air (OTA) television and English-language drama and comedy. We do not comment here on issues relating to French-language drama and the French-language OTA TV licensees, other than to note that the environment for French-language drama in Canada is entirely different and calls for different approaches. In particular, French-language programs are less vulnerable to direct competition with U.S. programs. By contrast, English-language Canadian drama competes directly with U.S. programs that are effectively dumped into Canada at a fraction of their production cost.

6. Accordingly, references to “Canadian drama” in this submission relate only to English-language Canadian dramatic programs (including both drama and comedy) unless otherwise specified. Similarly, references to over-the-air television relate only to English-language television unless otherwise specified.

## 2. Executive Summary

7. This CRTC proceeding is very important because it provides an overdue opportunity to correct a major failing of the 1999 Television Policy announced in Public Notice CRTC 1999-97. That policy eliminated any Canadian programming expenditure requirements applicable to Canadian over-the-air TV broadcasters.

8. The deficiencies of that policy immediately became evident. Canadian TV broadcasters lowered their spending on Canadian programming generally, and particularly for the categories of programming costing the most – Canadian drama and comedy.

9. Since the adoption of the 1999 Television Policy, the percentage of advertising revenue the English-language TV broadcasters spent on eligible Canadian programming has dropped from 27% to 25% – but spending on American programming rose from 27% of revenue to an all-time high of 35%.

10. The story in regard to Canadian drama is particularly problematic. Spending on Canadian drama by the private broadcast sector hit seven-year lows in 2004 and 2005, dipping to only about $54 million from a high of $73.0 million in 1998. By 2005, spending by broadcasters on Canadian drama had declined to only 3.2% of ad revenue, <u>the lowest percentage in eight years</u>. And that number would have been even lower but for the benefits arising from CRTC approvals of ownership transfers or new licences.

11. Canadian drama is critically important to the future of Canadian television. Drama is not only the most popular genre of TV programming – Canadian dramatic programs allow us to celebrate our experiences, share our stories and identify with other Canadians. The production of Canadian drama is central to our cultural sovereignty.

12. Drama is expensive to produce, and support from the public and private broadcast sectors is essential for its survival. Therefore the CCAU retained Nordicity Group Ltd. to validate projections for the advertising revenue likely to be generated by the private broadcast sector. Working with estimates from PricewaterhouseCoopers LLP, Nordicity has concluded that ad revenue for the private conventional TV station groups is likely to increase over the next four years to between $1.85 and $1.91 billion in 2009 – an increase of over $234 million from 2004.

13. In other words, conventional television will continue to be a lucrative business, despite the broadcasters' fears that audience fragmentation caused by pay and specialty services or by unregulated platforms like the Internet may hurt revenues. Although fragmentation did erode audience share over the 1990s, the audience share of the conventional TV broadcasters in Canada has stabilized at about 38% over the last five years. And instead of declining, the broadcasters' ad revenue rose over 15% in that time.

14. But despite increasing revenues, the broadcasters have spent less -- not more -- on Canadian drama. The track record of Canadian broadcasters has amply shown that unless there is a regulatory requirement -- or the imminent threat of one – broadcasters will do what is in their best financial interest. That means broadcasting the cheapest form of priority programming they can produce or acquire in order to meet their priority program scheduling requirement.

15. Once renewal licences are issued, and the transfer and new licence benefits come to an end, the fate of Canadian drama will hang in the balance. Therefore, we believe that it is crucial that the CRTC put a long-term regulatory "safety net" in place to ensure that Canadian drama levels do not fall below an acceptable level in English Canada. <u>A key component of the safety net would be a requirement that all private conventional TV station groups expend at least a certain percentage of their gross advertising revenue on Canadian drama</u>.

16. Based on our research, the CCAU believes that this requirement should be at least 7%, and that this should be a minimum level, complemented by incentives that will reward broadcasters that meet or exceed that level. This 7% minimum level of support would finally ensure that Canada's private conventional broadcasters play a role in curtailing the current drama decline. Spending on Canadian drama would increase from $54.5 million in 2005 to $130-134 million in 2009.

17. The use of a simple percentage of revenue requirement to support Canadian drama has many advantages. Using a ratio automatically adjusts to new revenue levels, benefiting producers if ad revenue goes up but reducing the amount required to be spent by broadcasters if revenue goes down. A common ratio also puts all broadcasters on a level playing field. By setting a simple expenditure quota for drama, broadcasters are also given more flexibility to focus on fewer high-cost productions or more lower-cost productions, since in the end the "cost" to them will be the same. An expenditures quota also allows broadcasters the flexibility to decide whether they want to focus on series drama, children's drama, miniseries, theatrical movies, made-for-TV movies, animation, comedy, or other forms of scripted drama. A dollar spent would count towards the quota no matter which genre of drama is supported.

18. The CCAU believes that the expenditure quota should be applied on an annual basis, but with the same 5% flexibility as applies to pay and specialty licensees. The expenditure quota should be subject to the accounting rules in Public Notice CRTC 1993-93. It is also critically important that the "licence fee top up" rule should not apply to such an expenditure quota. Within the drama quota, the CCAU considers that TV station groups should be subject to an expectation that a reasonable proportion of their Canadian drama budget be allocated for (a) script and concept development, and (b) the licensing of Canadian feature films.

19. The CCAU strongly believes that conventional television – CBC and the private TV station groups in English Canada -- must continue to be the principal mainstay for high-ticket popular Canadian drama. The OTA TV broadcasters must

remain the economic drivers for quality, popular Canadian drama. We feel this requirement is realistic given the fact that the advertising revenues of conventional broadcasters are forecast to increase over the next five years.

20. In regard to the “benefits policy,” the CCAU recommends no change to the requirement that 10% of the value of the transactions resulting in changes of control be expended over seven years. However, the bulk of such benefits should be earmarked to incremental expenditures on Canadian priority programming, and not on infrastructure or capital costs.

21. The CCAU also submits that the benefits policy contains a loophole that must be closed. The current policy effectively opens the door to a multi-staged approach to the transfer of ownership and control of broadcasting undertakings, as well as major ownership restructurings, that allow parties to avoid payment of substantial benefits as intended by the policy. Specifically, parties could divide a transaction into stages and only at the final transaction, when a new controlling shareholder appears, would benefits be payable. The benefits payable on that final stage would, of course, be only a small percentage of the benefits which would have been payable if the entire ownership transfer transaction had taken place in a single step. The Commission should act now to close this loophole.

22. The CCAU also considers that the Commission could limit the ambit of the regulation restricting advertising on OTA television to traditional commercial messages, provided the increased revenues to conventional broadcasters are put to good use for benefits to the Canadian broadcasting system.

23. The Commission has already liberalized the amount of TV advertising permitted, by allowing broadcasters that implement the drama incentive plan to exceed the 12 minute cap by up to two minutes. The drama incentive plan is complex to apply and to administer, and gives rise to a number of operational concerns. However, it could serve a useful role as a supplement to the 7% drama expenditure requirement recommended above. Broadcasters meeting such an expenditure rule would automatically have met the expenditure targets set in the incentive plan and would be entitled to the 25% bonus. And if they achieved increased ratings for Canadian drama as a result, the second 25% bonus would also apply. Thus a drama expenditure rule would make the incentive plan easier to achieve.

24. In regard to fee for carriage of OTA signals, this is a question on which CCAU would prefer to have the benefit of the submissions made by parties more directly affected. If the Commission did feel that OTA signals should attract a new subscriber fee, the CCAU would argue that significantly increased expenditures should be made on Canadian drama. However, the requirement that OTA licensees expend money on Canadian drama is absolutely fundamental and should not be dependent on such subscriber fees.

## 3. Canadian Drama Productions: The Continuing Crisis

### (a) Why Canadian drama is important

25. Canadian dramatic programs – including both drama and comedy programs -- are the cornerstone of our broadcasting system. For decades, these Canadian programs have brought a wide range of ideas, historical events and voices to life. Canadian dramatic programs have allowed us to celebrate our experiences, share our stories, and identify with other Canadians. Drama continues to be the most popular genre of TV programming, and the production of Canadian drama is central to our cultural sovereignty.

26. As stated by the Chair of the CRTC, Charles Dalfen, during his address at the Canadian Association of Broadcasters' Annual Conference in October 2002, "Drama is storytelling – and storytelling is close to the heart of human culture." To this, the Chair added: "I believe we need to tell our stories, in all their diversity, through strong Canadian dramatic series." The CCAU strongly agrees with these statements by Mr. Dalfen.

27. Dramatic programs are indeed the manner in which Canadians tell and share their stories with one another. (In these comments, as noted earlier, we use the term "drama" to include both drama and comedy.) In *Degrassi: The Next Generation*, winner of the 2005 Shaw Rocket Prize, we learn about the ups and down of teenage life in multicultural Toronto. In *Corner Gas,* CTV's top-rated Canadian drama program, we enjoy the gentle humour of rural Saskatchewan. And there are many other Canadian drama programs worthy of mention – *Slings & Arrows, Robson Arms, Whistler, Alice I Think*, *Falcon Beach*, and *One Dead Indian* are recent examples.

28. These dramatic programs – particularly original "10-point drama," which involves the fullest Canadian creative contribution – serve to strengthen and enrich our broadcasting system. They allow our outstanding screenwriters, directors, performers and other talent to bring Canadian stories to the screen, where they can be shared with viewers from coast to coast. Canadian dramas also provide the production community with an opportunity to share their vision of our experiences, and to archive our Canadian stories for the future. Additionally, Canadian dramas provide Canadians with the pleasure of seeing themselves on TV, an experience that countries the world-over enjoy and go to great lengths to achieve. As Trina McQueen stated at the CTV licence renewal hearings in 2000:

> "[M]ost of the viewing to television is in the dramatic genre. That is what people love to see on television. I'm talking overall, not necessarily Canadian or American, but in general folks love a good story, they love an imaginary story and that is what they want from television."

29. In addition to helping define our Canadian identity, indigenous 10-point drama also helps bind new Canadians to our culture. Shows like *Godivas* and *Metropia,* with diverse leads, and *This is Wonderland*, showing the immigrant experience, help

to advance Canada's multicultural objectives, as does *renegadepress.com,* with its aboriginal focus.

30. The CCAU is of the view that both drama series and miniseries or movies-of-the-week (MOWs) are important to our broadcasting system. Both of these genres of dramatic programs should be given priority in the television schedules of private broadcasters. Dramatic series bring the continued, familiar and powerful storylines and characters that Canadians love to watch. Movies of the week and miniseries allow Canadian television viewers to explore a broad range of programming genres, ideas, and concepts.

31. The Commission has consistently affirmed the importance of Canadian dramatic productions as a crucial component of our broadcasting landscape. Notably, in Public Notice CRTC 2003-54, the Commission stated that:

> "Canadian drama should be a cornerstone of the Canadian broadcasting system. Drama can, and should, reflect Canadians of every background and culture to each other…The Commission considers that a healthy and successful Canadian broadcasting system must include popular drama programs that reflect Canadian society and project Canada's stories onto the world stage."

32. In Public Notice CRTC 2004-32, the Commission added the following observations:

> "14. As noted in Public Notice CRTC 2003-54, drama is the most popular programming on television. English-language drama programs receive more than twice the number of viewing hours received by any other type of programming. As noted in Public Notice 2003-54, drama is the most popular programming on television. English-language drama programs receive more than twice the number of viewing hours received by any other type of programming. According to Fall 2002 data collected by the Bureau of Broadcast Measurement (BBM), prime time viewing of drama on private, conventional, English-language television stations represented 70% of all viewing. This disproportionate amount of viewing to drama relative to programming in other categories has been recorded consistently since measurement of this type was introduced.
>
> 15. The production of high quality drama programs requires more creative, technical and financial resources than any other genre of television programming. Drama production trains, develops and employs Canadian writers, actors, directors, editors, technicians and other key creative individuals. In 2003, the total value of Canadian drama production exceeded one billion dollars.
>
> 16. As has been frequently noted, however, viewing to Canadian drama, as a percentage of all drama viewing on English-language services, has been very low. It stands at only 5% of all viewing to drama on Canadian English-language private conventional television stations, according to Fall 2002 BBM data...
>
> 18. It is the Commission's preliminary view that effective measures to increase the availability of, and viewing to, Canadian drama programs are needed at this time and that such measures would further the objectives of the *Broadcasting Act* (the Act)."

33. Additionally, the importance of drama within our broadcasting system was reiterated by most interveners who responded to Public Notice CRTC 2003-54. At

paragraph 6 of Public Notice CRTC 2004-32, the Commission stated that it "received a total of 301 submissions in response to Public Notice 2003-54. A large majority of these were in agreement with the importance the Commission places on Canadian drama…"

34. The 2003 Report by the Standing Committee on Canadian Heritage (the Lincoln Report), emphasized the importance of Canadian dramatic programming. It determined that the "goal [for English-language drama] must be to create more opportunities and more spaces, to strive for programs that are not only made-in-Canada but also made-for-Canada." (p.8). The Standing Committee on Canadian Heritage also expressed its concern with particular elements of television policy, and recommended that the CRTC be directed to review its 1999 policy for the exhibition of priority programming in prime time.

35. The Department of Canadian Heritage has also recognized the importance of Canadian programs, including dramatic programs, within our broadcasting system. In this regard, it stated the following in its summary of its second response to the Lincoln Report, issued in March 2005:

> "Canadians are best served by a broadcasting system that offers an ample supply of high quality, distinctively Canadian content that enlightens, entertains and informs citizens. To achieve this, the Government will actively encourage the development of compelling programming – particularly drama, children's and cultural programming and documentaries – that reflects that Canadian experience and reaches out to large numbers of Canadians."

36. The Heritage response also included the following statement:

> "In an environment where funding the economic model for broadcasting is under stress, the Government will…put more emphasis on high-quality Canadian content that reaches wide audiences in the Francophone or Anglophone markets, and that tells Canadian stories and reflects Canada in all its diversity. It is this type of programming that brings us together through common experiences."

37. In the Throne Speech delivered on April 4, 2006, Governor General Michaëlle Jean underlined the importance of creative expression with the following statement:

> "Canadian artists from all disciplines have confirmed to me just how important creative expression is to the health of a democratic society."

38. More recently, the Chair of the Commission, Charles Dalfen, noted the importance of Canadian drama in his speech to the Banff World Television Festival on June 12, 2006:

> "On the social and cultural side, successful Canadian drama production helps to achieve so many of the objectives of Canadian broadcasting policy enshrined by Parliament in the *Broadcasting Act* . In particular, drama goes to the heart of the objectives that are most closely tied to ensuring that our broadcasting system is a place where Canadians will not only see the world on TV, but will also see themselves.

> "Think about it for a moment. Without home-grown drama productions, where would we be in relation to the *Broadcasting Act* 's objective of a broadcasting system that maintains our cultural sovereignty, while enriching and strengthening our social fabric?
>
> "Where would we be in relation to the objectives of reflecting Canadian artistic creativity, displaying Canadian talent and mirroring the circumstances and aspirations of Canadian men, women and children?
>
> "Where would we be in terms of maximizing the use of Canadian writing, acting and other creative resources; providing windows for Canadian independent producers; and creating a range of employment opportunities in broadcasting for Canadians?"

39. Needless to say, the CCAU strongly endorses these statements.

### (b) Why drama is hard to do

40. It may be appropriate to begin with an important observation. Producing popular television drama, particularly series drama, is not easy! Drama is far more difficult than any other form of television to master. It is a truly collaborative form of art, combining the art of story-telling with sophisticated production skills in screenwriting, composing, performing, directing, and editing, as well as many other talents.

41. Many look with envy at the success of U.S. television drama. Of course, that drama typically costs well over $3 million (Can.) an hour to produce, three or more times the cost of a Canadian drama per hour. Costs rise even higher for U.S. dramatic series that succeed and are renewed.

42. But what many forget is that most U.S. television drama series do not succeed. Most drama series in the U.S. fail in terms of hoped-for ratings and are not renewed. And this is so even though millions of dollars are spent in the U.S. in the selection of ideas, commissioning of scripts, filming of pilots, and the use of focus groups. Despite all this effort, the bottom line is that the success or failure of television drama is inherently unpredictable. However, the U.S. networks employ two strategies to minimize risk.

43. The first strategy is to pour money into script and concept development – where screenwriters write a range of scripts, the most promising of which are made into pilots, which are then tested to see which appeals to audiences. This is one of the most important factors in creating a successful drama. This process makes a huge difference to whether a script will work as a production, and is standard practice in Hollywood. As a rule of thumb, Hollywood develops about ten scripts for each show that is produced. Most studios do even twice that to increase the likelihood of making a hit.

44. In the U.S., a pilot program is usually developed to gauge audience interest before investing millions of dollars to make a full episode run of a series. These pilots are expensive, but studios know the chance of making one monster hit will

help cover the development costs of all the other pilots combined. For example, studios are willing to spend as much as $12 million on a pilot, as they did with the two-hour pilot episode of *Lost*. On average, however, a one-hour drama pilot costs $4 million (U.S.), while a half-hour comedy costs about $2 million (U.S.).

45. The L.A. based Entertainment Industry Development Corporation (EIDC) recently reported that some 131 TV pilots were produced in Hollywood and New York for the 2005 production season, generating about 90 hours of programming and costing $364 million (U.S.) to make.

46. No wonder Canadians like to watch American programs – these programs have been thoroughly tested before they ever reach the airwaves.

47. The second strategy of the U.S. networks to minimize risk is to focus on the volume of original production. Every year they commission dozens of new drama programs, in the full knowledge that most of them will not succeed, but with the hope that at least a few will prove to be winners. The economics of the business are such that a winning U.S. drama series can be extraordinarily lucrative for everyone concerned.

48. In competing with the U.S. juggernaut in television drama, Canada has a few advantages. First, we have an extraordinary talent pool, developed over the last several decades, with a notable track record of past successes. Our talent pool includes

- screenwriters and showrunners like Chris Haddock (*DaVinci's Inquest*), Peter Mitchell (*Cold Squad*), Wayne Grigsby (*Trudeau, Snakes & Ladders*), James Hurst (*Degrassi, Instant Star*), Mark Farrell (*Made in Canada, Corner Gas, This Hour Has 22 Minutes*), Brad Wright (*Stargate)*, Brent Butt (*Corner Gas)* and Susin Nielsen *(Robson Arms)*;

- directors like Marni Banack (*Naturally Sadie*), Graeme Campbell (*Instant Star)*, Mike Clattenburg (*Trailer Park Boys)*, Bill Corcoran (*Falcon Beach, Mutant X, Cold Squad*), Gail Harvey (*Eleven Cameras*), John L'Ecuyer (*ReGenesis*), Bruce McDonald (*ReGenesis, Instant Star*), and David Storey (*Corner Gas*); and

- performers like Sarah Polley (*Slings & Arrows, Road to Avonlea*), Sonja Smits (*The Eleventh Hour*), Gabrielle Miller (*Corner Gas*), Tom Jackson (*North of 60*), Nicholas Campbell (*DaVinci's City Hall),* Ian Tracey (*Intelligence*), RH Thomson (*Human Cargo*), and Paul Gross (*Slings & Arrows*).

49. Second, our costs for drama are less than a third of those in the U.S. And third, we also have the benefit of a major subsidy program from the Canadian Television Fund, triggered by commitment letters from broadcasters.

50. However, Canadian drama also faces some extraordinary challenges in order to grow its audience. Here are the main ones.

51. First, as noted above, our limited budgets mean that we cannot begin to match the U.S. networks in terms of script and concept development, focus group testing and the like. Canada does not have the luxury of shooting a number of pilots which are then never aired. To carry out a process of winnowing at the front end, like the U.S. networks, would require far more investment than has been the case in the past. In our much smaller Canadian English-language market, development costs are seen as too expensive. While the adage that “nobody knows anything” still holds true in terms of the unpredictability of audience reaction, a greater focus on development can lower the risk. Program quality suffers if there is no room to commission extra scripts and then select the best to be produced. There is also less time for writers to work out the series arc and character development for the series “bible.”

52. In some cases screenwriters fund a large portion, if not all, of the development process themselves, or work without pay to develop part of the project. An example of this is *Blue Murder*, which began as *Major Crime*, a CBC miniseries aired in 1997. Based on the miniseries success, the screenwriter who created it invested his own money to develop it into a drama series. The developed script and concept went to two production companies before it was finally greenlit by CanWest Global in 1999 and aired two years later in 2001. *This is Wonderland* is another example. The creators of that series negotiated a six-script development deal, but also had to personally fund 18 months of research to develop the project.

53. Currently only $6 million is allocated to the CTF English-language Broadcast Development Envelopes for the 2006-07 fiscal year. This amounts to 3.4% of the CTF English-language Program Commitment Budget. This is a paltry sum if it is intended to trigger over 2,000 hours of CTF-funded production per year. At an average development budget of $50,000, only about 120 projects (or phases of development) could be supported in each year.

54. This is not good for Canadian television. Only with well-financed development can writers, and producers, have the resources to create rich, detailed and audience-pleasing entertainment. Given that audience success is a factor in Broadcaster Performance Enveloper allocation, it is logical to provide broadcasters and producers with sufficient resources to allow them to develop concepts, bibles and scripts which are likely to be successful with audiences. Writers need to be engaged early and kept at work until that goal has been reached.

55. A second challenge facing Canadian drama is that we cannot match the huge promotional machine that washes over Canadian households from the U.S. media. Whether it is on *Entertainment Tonight*, Viacom’s nightly entertainment magazine show, on *People Magazine*, Time Warner’s monthly celebrity magazine, on the *Tonight Show with Jay Leno*, NBC’s late-night talk show, or on many other U.S. outlets, the stars of U.S. television drama are constantly being promoted, cross-promoted, and talked about. The resulting “blowback” to Canada uniquely benefits acquired U.S. shows.

56. Canada has begun to respond, with programs like *Star TV* on CHUM, *etalkDAILY* on CTV, and *Inside Entertainment* on Global. But these provide only a fraction of the "star system" support that comes with the relentless and omnipresent U.S promotional juggernaut. Moreover, most of these programs have been criticized for focusing mostly on non-Canadian celebrities, not on Canadian entertainment stories. And even when Canadians are featured, all too often they are non-resident Canadians, which adds to the difficulty of building up a resident Canadian star system. So far, the contribution of these programs has been disappointing.

57. The third problem faced by Canadian drama is a problem of our own making. The prime-time schedule of the English-language private broadcasters continues to be built around the maximization of simulcast opportunities with U.S. network programs. As a result, much of the prime-time schedule for CTV, Global and CHUM is determined in L.A., not in Toronto. By virtue of this practice, Canadian private broadcasters are severely limited in where they can place Canadian drama series. Since they tend to schedule Canadian drama sporadically around the U.S. simulcast shows, time slots often change. The lack of a predictable time slot greatly decreases any program's chance of building an audience. For example, the time slot for *Falcon Beach* was moved constantly in its first season, contributing to its disappointing ratings.

58. A fourth factor affecting the ratings of Canadian drama is the tendency by Canadian private broadcasters to schedule that drama in shoulder periods (7-8 p.m., 10-11 p.m.), on lower viewing nights (Friday and Saturday), in weeks other than BBM sweep weeks, and in the summer period. Canadian dramas are virtually shut out of the best 9 or 10 p.m. slots on Monday or Tuesday nights. The number of persons watching television is significantly lower in shoulder periods. On Friday and Saturday evenings, households tuned to TV declines by 10-15% compared with the audience on Sunday through Thursday evenings. The common practice of scheduling Canadian drama on Friday and Saturday evenings -- when fewer people are watching -- contributes to the lower ratings achieved.

59. The same phenomenon occurs when Canadian programs are scheduled in the summer months. The number of persons watching TV declines significantly in the summer. Yet that is when a heavier than average number of Canadian shows are often scheduled. Again, with fewer households tuned to television, ratings for Canadian shows are inevitably lower. The problem is compounded when series with snow-related themes like *Whistler* or *Northern Town* are scheduled in the summer.

60. A fifth problem for Canadian drama is that Canadian broadcasters do not order up enough episodes to build audience loyalty each season. U.S. networks typically order 22 episodes of a new series. In Canada, unless the series is an industrial drama pre-sold to a U.S. network, the Canadian stations only order up 13 episodes per season, and some Canadian series -- like *Northern Town* and *Hatching, Matching and Dispatching* -- have only six episodes. (The CTV benefits package has allowed a number of series like *Degrassi* and *The Associates* to be

"topped up" to 22 episodes.) With only six to 13 new episodes in the can each year, it is much harder to develop and maintain a loyal audience week after week.

61. A sixth problem relates to the nature of the Canadian drama. With some exceptions, ratings in Canada have been generally better for distinctive Canadian drama – typically qualifying as 10-point Canadian drama under CRTC rules -- than for so-called industrial drama, i.e. drama pre-sold to a U.S. specialty service without any obvious Canadian markers, and usually qualifying as only 6-point Canadian drama. The recent ratings success of series like *Corner Gas* and *Degrassi: The Next Generation* provide eloquent testimony to this. Yet Canadian broadcasters have an economic incentive to purchase 6-point Canadian industrials instead of 10-point Canadian distinctive drama, since the licence fees can be much cheaper if some of the costs are borne by a U.S. programming service.

62. A final problem relates to the number of repeats. Here we are not talking about the normal repeats that occur in the first cycle of a Canadian drama's conventional window. Rather, we are talking about the practice of filling part of the requisite 8-hours of priority programming with repeats of past years' episodes of Canadian drama, episodes that have been made in earlier years and that have already run at least two or three times on Canadian free-to-air television. Examples of programs that were subject to this practice include *Mutant X*, *Andromeda* and *Train 48*.

63. If we want to increase the ratings for Canadian drama, our first task must be to constantly prime the pump with new original episodes. Viewers want new, original programs rather than repeats. If we run repeat after repeat, we are simply living off capital and not investing in the future.

64. Drama continues to be the most popular genre on television, outlasting and now far surpassing reality programming. U.S. dramas like *Grey's Anatomy, 24, Lost* and *CSI* currently dominate the top 20 lists. The appetite for drama is there. Recent experience has shown that if a sufficient volume of adequately financed Canadian drama is produced and given pride of place in the schedule, Canadian viewers will respond positively. But we need more choice of Canadian drama in the schedule. It is essential to Canadian cultural sovereignty that we have a significant representation of Canadian drama on our airwaves.

### (c) The Evolution of CRTC Policies to Support Canadian Drama

65. As noted above, Canadian dramatic productions are the life-blood of the Canadian broadcasting system, and the Canadian independent production sector. However, due to the size and the economic realities of the Canadian marketplace, the Canadian market cannot be relied upon to sustain this sector. There are two economic realities to be confronted here:

- The Canadian television market, already small in comparison with the U.S. market, is further subdivided into English and French-language markets.

- U.S. programs are sold to Canadian broadcasters at prices that are a fraction of their U.S. production cost, a practice that is the equivalent of dumping.

66. Therefore, in order to develop, thrive and to be successful, the Canadian dramatic production sector requires government support and regulatory measures.

67. The history of CRTC regulation to support Canadian drama is long and complex. A summary of this history is provided in Schedule 1 of this submission.

68. Prior to 1999, the two largest private broadcasters in English Canada were the CTV Network and Global Ontario. In the period immediately up to 1999, both licensees were subject to licence conditions that required them to broadcast a certain number of hours of original Canadian drama each week, and to expend a certain dollar amount on "entertainment programming," defined to mean drama, music and dance. The hours and amounts are set out in Schedule 1.

69. However, these rules were all supplanted by the Commission's TV Policy in 1999, which eliminated the expenditures rules for conventional television, and changed the scheduling requirement to focus on a minimum number of so-called "priority programs," a category that was expanded to include documentaries and regional non-news programs. The 1999 TV Policy is described in detail in Schedule 1 and its shortcomings are noted further below.[1]

### (d) The crisis in Canadian drama

70. As reiterated throughout this submission, it is evident that in order for Canadian drama to have a future in Canada and to find a strong place in the schedules of Canadian broadcasters, increased funding from broadcasters is essential. In general, that funding should take the form of higher broadcast licence fees as a proportion of the budget.

71. Throughout the mid-1990s, Canadian independent television production in the English-language was on a constant rise, peaking in 1998-99 at $1.5 billion, according to CFTPA's *Profile 2006.* A major contributor to this was the production of Canadian dramatic series and feature films.

72. Over the last eight years, however, there has been a steady decline in independent television production generally, and drama programming specifically. Chart 1 below shows the steady downward trend in overall independent production since 1998-99. The production expenditures shown in Chart 1 include all independent television productions in the English-language, not just drama, and include productions for pay and specialty services as well as conventional television.

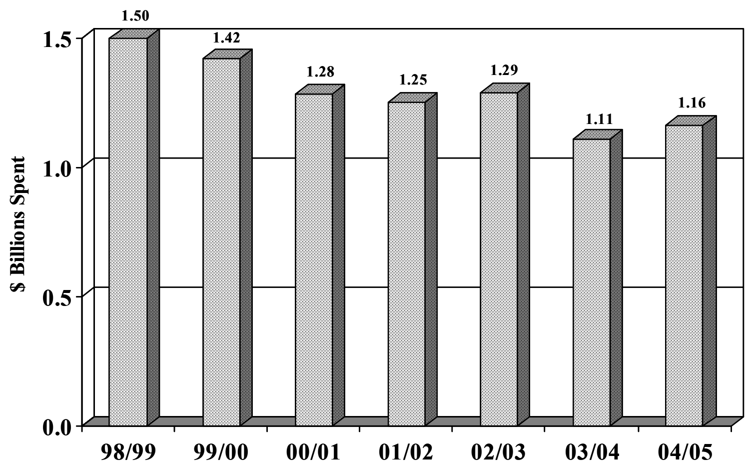
73. As will be seen from Chart 1, English-language television production expenditures (not including broadcaster in-house production) have steadily declined

[1] See below at paragraphs 89-94.

since 1998-99, dropping from a high of $1.50 billion in that year to only $1.16 billion in 2004-05.

**Chart 1**
**Canadian Independent English-Language Television Production**

**1999 - 2005**

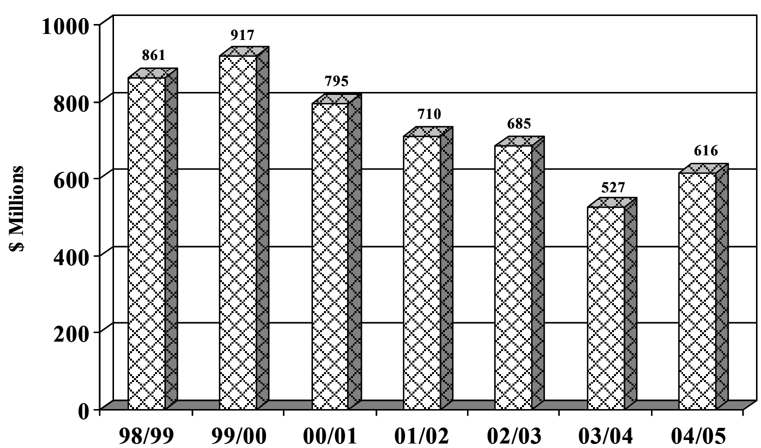



Source: CFTPA, Profile 2006, p. 26

74. Within these statistics, CCAU asked Nordicity to break out the numbers for English-language drama production. (Again, these include drama productions for pay and specialty services as well as conventional television.) The results are shown in Chart 1A below.

**Chart 1A**
**Canadian English-Language Television Drama Production**

**1999 - 2005**




Source: Nordicity. Totals exclude children's productions and feature film productions.

75. As shown in Chart 1A, English-language drama production in Canada dropped from a high of $917 million in 1999-2000 to a low of $527 million in 2003-04. In 2004-05, English-language TV drama production recovered to a degree, rising to $616 million. However, this level was still significantly below the levels that were being commissioned when the 1999 Television Policy was released.

76. The decline from 1999 to 2004 created what has widely been acknowledged as a crisis in Canadian dramatic production. The crisis has also been referred to as a "perfect storm" since it coincided with a decline in foreign service production in Canada.

77. Two factors combined to increase the financial pressures faced by Canadian drama in that period. The first factor was the state of the export market for Canadian drama. That market has experienced a precipitous decline in the last few years, caused in part by the reduction in foreign sales of North American drama on European television. This was largely caused by the surge in the popularity of local television drama in markets like Germany, Italy and Spain.

78. The second factor causing the decline in foreign sales was a reduction in the pre-sales of 6-point industrial Canadian drama to U.S. specialty services like the *Sci Fi Network, USA Network*, and so forth. These networks have reduced their purchase of 6-point industrials and have focused on a fewer number of higher quality "signature" program strands. The result of this is to add significantly to the difficulty in financing 6-point Canadian drama.

79. By contrast, 10-point Canadian drama, which is to be preferred in terms of its contribution to the broadcasting system, relies on higher broadcast licence fees and a significant CTF subsidy. But that too is under pressure, as we note further below.

80. Dramatic productions, and in particular 10-point productions, continue to be the most expensive type of programs to produce. According to CFTPA's *Profile 2006*, CAVCO numbers indicate that the average production budget per hour of a Canadian fiction television production in the English language in 2004-05 was $1.3 million.

81. With costs at this level, it is very difficult to have these types of productions made without adequate support mechanisms in place. Since the adoption of the 1999 Television Policy, which eliminated broadcaster expenditure and exhibition requirements for Canadian drama, except for transfer and new licence benefits, there has been a decline in the amount of English-language drama productions that are being made.

82. With weak foreign pre-sales, Canadian producers have focused more on 10-point Canadian drama. However, this results in greater pressure being placed on the public subsidy dollars. Public funding of CAVCO-certified fiction productions, which includes all drama, not just 10-point drama, now amounts to 32% of the

productions' financing.[2] Thus, the limited pool of public funds is able to support increasingly fewer productions.

83. In response to the drama crisis, the CCAU has stated its concerns to the CRTC in a number of submissions. Specifically, the CCAU filed a comprehensive brief with Ms. Trina McQueen in late 2002 within the context of her review of the state of English-language drama in Canada for the CRTC and Telefilm Canada. An updated version of that brief was made public in March 2003. The CCAU also filed a detailed submission with the CRTC on November 28, 2003 in response to the Commission's call for comments on mechanisms to support Canadian dramatic productions set out in Public Notice CRTC 2003-54. Finally, on June 21, 2004, the CCAU filed a submission with the CRTC regarding the CRTC's proposed incentive plan for drama, proposed in Public Notice CRTC 2004-32.

84. In her report to the Commission of March 2003, Ms. McQueen discussed the challenges that exist with respect to the availability of financing for Canadian dramatic productions. More specifically, she stated that "the achievements in drama have occurred against all odds; and they conceal the central problem, which is financing."

85. The realization that lack of funding is a key obstacle for Canadian drama was acknowledged by the CRTC at paragraph 24 of Public Notice CRTC 2003-54, which states that:

> "… the Commission agrees that <u>the lack of funding is a key contributor to the difficulties facing Canadian drama.</u> Drama is generally expensive to produce and English-language Canadian drama programs have not, as yet, attracted audiences in the numbers that U.S. drama attracts." [Emphasis added]

86. One of the principal factors contributing to the lack of funding is the low level of Canadian broadcaster licence fees as a proportion of production cost. The ratio of licence fees paid by English-language Canadian broadcasters to production cost is quite low compared with the equivalent ratios in other countries. In the case of CTF-supported drama, broadcast licence fees have risen to 30% of the production cost because of CTF's own rules. However, non-CTF 6-point drama productions typically get much lower licence fees as a proportion of production cost. Based on CAVCO numbers, Canadian drama productions received only 23% of their financing from broadcaster licence fees in 2004-05.[3] This contrasts with licence fees in the U.K. and the U.S. that are closer to 70% or 80% of the production budget.

---

[2] Nordicity Group Ltd., *Profile 2006: An Economic Report on the Canadian Film and Television Production Industry,* (Ottawa: CFTPA, 2006), at p.29. The 32% number is made up of 10% from the federal tax credit, 11% from provincial tax credits, and 11% from CTF, Telefilm Canada and other government support.

[3] *Ibid.,* at p.29. Of this amount, 13% was from private broadcaster licence fees and 10% from public broadcaster licence fees.

87. Thus, it is evident that in order for Canadian drama to have a future in Canada and to find a strong place in the schedules of Canadian broadcasters, increased funding from broadcasters is essential. In general, that funding should take the form of higher broadcast licence fees as a proportion of the budget. Given the benefits given to broadcasters in terms of regulatory protection, as outlined further below, this should be an essential *quid pro quo*.

88. It is also important to note that broadcasters should not rely on CTF support for all their Canadian drama. Given that this is a regulatory obligation, they should be commissioning appropriate amounts of Canadian drama whether or not each project gets CTF support.

### (e) Problems with the 1999 Television Policy

89. When the Commission adopted its new Television Policy, it stated that its intention was to provide support to Canadian programming, the Canadian television broadcasting industry, and to improve the regulatory framework for television broadcasting. Indeed the Commission's goals were summarized at page 2 of the Television Policy as follows:

> - <u>Ensure quality Canadian programs at times when Canadians are watching</u>.
> - Reflect the diversity of Canada's regions and peoples.
> - Support an economically successful broadcasting industry.
> - Require regulation only where the goals of the Act cannot be met by other means.
> - Ensure that regulations are clear, efficient and easy to administer. [emphasis added]

90. However, when broadcasters implemented the requirements of the 1999 Television Policy, it is entirely understandable that they sought ways in which to meet the requirements of the Policy, while at the same time minimizing the costs of implementation. Given the way in which the 1999 Television Policy is drafted, there are many ways in which broadcasters could elect to minimize their contributions to the Canadian broadcasting system. The following lists some of the perverse incentives created by a number of components of the Television Policy which have undercut the achievement of its purpose.

91. First, as discussed above, because of the broad definition of "priority programming", the 8-hour priority programming policy does not require broadcasters to air a specific amount of dramatic programming throughout the broadcast year. As dramatic programs are the most expensive to produce or acquire, this gives

broadcasters an incentive to air less costly programs such as documentaries and magazine programs.

92. Second, there is no obligation on television broadcasters to air *original* Canadian dramatic programming. In order to lower their cost, there is therefore an incentive for broadcasters to fill the 8-hour requirement with repeats of old Canadian programs. This results in fewer new and original Canadian stories being developed, produced and aired.

93. Third, the 1999 Television Policy is silent on when broadcasters are required to broadcast Canadian priority programming throughout the broadcast week, and throughout the broadcast year, except for the requirement that priority programs be aired between 7:00 p.m. and 11:00 p.m. There is nothing to prevent broadcasters from scheduling Canadian priority programs in time slots within the 7-11 p.m. period that attract fewer viewers, i.e. the shoulder time slots of 7-8 p.m. and 10-11 p.m., and in periods of the year that do not generally attract a large audience such as the summer.

94. Fourth, there are no expenditure obligations on Canadian conventional broadcasters to contribute funds to the creation of high quality Canadian dramatic programs, apart from obligations that may arise from the award of new licences or the 10% “benefits” arising from ownership transfers. (And in the latter cases, since the choice of what benefits to propose is up to the applicant, the benefits may not necessarily include any drama expenditure obligations.) As will be seen, this has resulted in a decline in the funding to Canadian dramatic programs in the system, and a decline in production itself.

### (f) Why the new drama incentive program is not enough

95. On November 29, 2004, in Broadcasting Public Notice CRTC 2004-93, the CRTC released details of its new incentive program to increase the amount of original English-language Canadian television drama broadcast on Canadian television and to encourage larger audiences to this type of programming.

96. Broadcasters who take advantage of this incentive program were required to apply for conditions of licence that would allow them to broadcast additional minutes of advertising per hour if they met the Commission’s criteria. All three of the English conventional TV private broadcast groups – CTV, CanWest Global and CHUM -- have applied to take advantage of the plan.

97. Under the plan, broadcasters can earn the right to broadcast between 30 seconds and eight minutes of additional advertising for each hour of original Canadian drama they broadcast. The exact amount of additional advertising is dependent upon such factors as the level of Canadian participation in the production, the budget required to produce the drama, the time of broadcast, and the source of the funding.

98. If broadcasters increase their audience share for Canadian drama by a pre-determined amount, they are entitled to increase the total additional amount of advertising they broadcast by 25%. And if broadcasters increase their spending on Canadian drama by a pre-determined amount, they are able to increase the additional amount of advertising they broadcast by another 25%.

99. While there is no limit to the number of additional advertising minutes that may be earned under the incentive program, broadcasters may not air more than 14 minutes of advertising in any given hour.

100. For the largest English-language broadcasters, the incentives apply only to qualifying drama in excess of 26 hours per year, except for drama programs that do not receive funding from the Canadian Television Fund. Those programs also enjoy the greatest additional advertising minutes. This was intended to encourage broadcasters to invest directly in the creation of new independently-produced drama projects.

101. In evaluating the proposed incentive plan, the CCAU inquired of ad buyers and station rep houses as to the effect of adding this kind of new inventory to the Canadian broadcast market. We were told the following: (1) the main beneficiaries will be the conventional broadcasters of the top 20 programs, i.e. primarily CTV and, to a lesser extent, CanWest Global; (2) the additional minutes will be sold mostly to existing advertisers, not new advertisers; (3) the additional minutes will largely be diverted from existing ad budgets, and will not represent "new money"; (4) some of this diversion may be at the expense of Canadian broadcast services that do not have top 20 shows, i.e. CBC, CHUM and the specialty services; and (5) some diversion will be at the expense of alternative non-broadcast media, including print and billboards.

102. The incentive plan is complex and its impact will depend on a number of factors that are difficult to predict. Based on our analysis to date, however, a number of concerns do arise.

103. First, it is clear that the real incentive to a broadcaster does not arise unless it is able to trigger one or both of the "bonuses". (Absent the bonus minutes, almost all of the money from the additional minutes has to be funneled to the production itself.) Achieving the bonuses would presumably not be difficult for CanWest Global, given its low performance levels to date. But CTV is a different story, given the unexpected ratings success of *Corner Gas* in the base year.

104. For this and other reasons, it does not appear likely that CTV will trigger the incentive program to a significant degree. Yet CTV has the lion's share of the top 20 TV shows, from which the incentive minutes can de derived. Moreover, CTV continues to have some unsold minutes in some of these shows, which lessens the benefit of having added inventory. It also has a significant inventory of Canadian drama in development derived from its benefits expenditures, lessening the pressure on it to increase this number.

105. As for CanWest Global, the CCAU estimates that the financial benefit to CanWest Global of commissioning a 13 part non-CTF one-hour Canadian drama series could exceed $4 million. However, this assumes that both bonuses are triggered, which adds an element of risk. It is also unclear whether CanWest Global will utilize the program extensively, given the fact that it has far fewer top 20 shows in which to sell extra minutes. Instead, it may simply elect to pick off some low-hanging fruit by selling extra ad minutes on a limited number of shows, and decline to do much more. The situation for CHUM and the CBC has even less potential, since neither broadcaster has a number of high-rated shows where additional inventory could be readily sold.

106. OTA licensees are currently starting the third full year of the incentive program and the jury is still out on whether the incentive plan will work. It is particularly hard to measure the impact of such incentives when broadcasters are also facing renewal hearings in the next two years and have an artificial inducement to show an improved performance in Canadian drama in anticipation of those hearings. In addition, as we show later in this submission, transfer and new licence benefits alone will require increased drama levels in the next two years.

107. But the troubling fact is that the transfer and new licence benefits largely disappear after 2008. In the absence of the requirements imposed because of these benefits, what is to prevent private broadcasters from reducing their drama expenditures yet again, as they have in the past?

108. In light of their performance to date, we have grave concern about the longer term support by the private broadcasters for Canadian drama. The incentive plan, while well-meaning, is very complex to apply and to administer and gives rise to anomalous results. Given this circumstance, it is clear that incentives will not be enough. Regulatory requirements will also be needed.

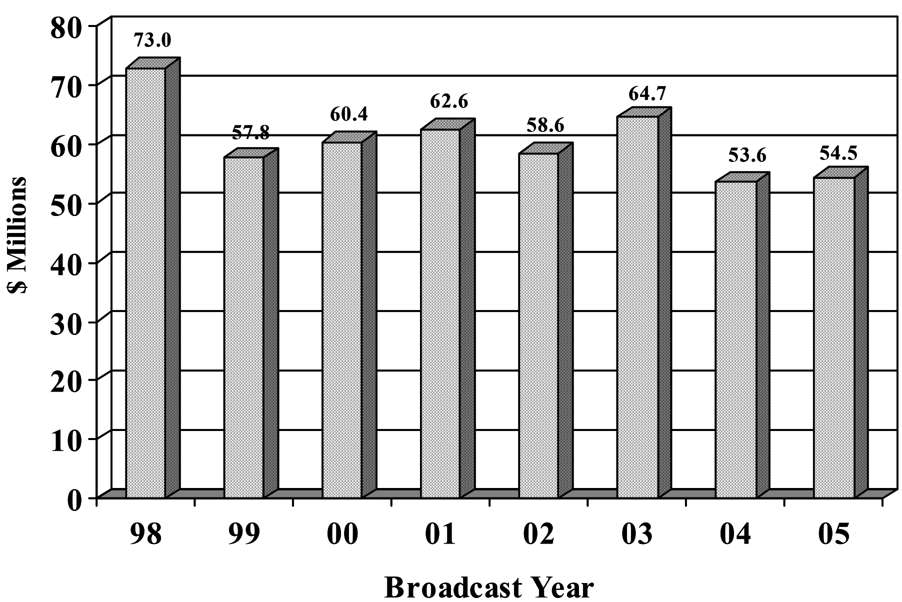
## 4. Over-the-Air TV Broadcasters and Canadian Drama

### (a) The Current State of Play for Private Broadcasters

109. In 1998, just before the CRTC hearings on the new TV policy, the private English-language conventional TV broadcasters spent $73 million on Canadian drama, a new high. But their Canadian drama spending has declined ever since. In the period from 1999 to 2003, their aggregate financial support for Canadian drama stayed in the $58-$65 million range. But in 2004 and 2005, their support suddenly declined to only about $54 million. <u>This is the lowest level it has been for eight years</u>.

110. This low spending level included Canadian drama spending required by virtue of transfer and new licence benefits. In other words, the decline occurred notwithstanding the fact that the financial support from CTV for drama significantly increased because of its BCE "benefits" requirements. Spending by the private stations on Canadian drama also declined even though spending over the same period significantly increased on U.S. programs.

**Chart 2**
**Expenditures by Private English TV Broadcasters on Canadian Drama 1998 - 2005**

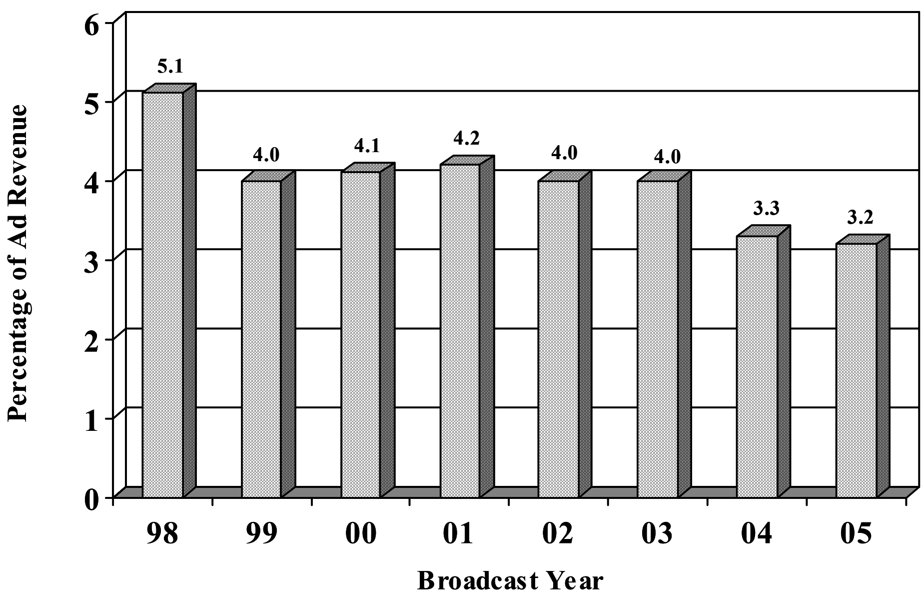



Source: CRTC Statistics

111. Chart 2 above sets out the aggregate expenditures by the private English TV broadcasters on Canadian drama from 1998 to 2005. As shown in Chart 2, there has been a 25% decline in Canadian drama spending from 1998 to 2005. The expenditures on Canadian drama by these stations has also declined as a

percentage of advertising revenues. As shown in Chart 3 below, by 2005, Canadian drama expenditures had declined to only 3.2% of revenues, again the lowest level in seven years. In fact, this ratio represents a drop of 37% since 1998.

**Chart 3**
**Ratio of Expenditures on Canadian Drama of Private English TV Broadcasters to Total Advertising Revenue**
**1998 - 2005**




Source: CRTC Statistics

112. An analysis of this spending also shows that the financing of English-language Canadian drama by the private conventional TV stations has become increasingly dependent on the benefit packages imposed by the CRTC as a result of ownership transfers or new TV licences.

113. In the last few years, the CRTC has approved major consolidation in the TV industry in English Canada. These transactions include the BCE takeover of CTV, the CanWest Global takeover of the WIC TV stations, and the CHUM takeover of CKVU Vancouver and the Craig stations in Western Canada. The CRTC has also approved new English-language TV licences in Calgary, Edmonton, Montreal, Vancouver, Victoria and Toronto.

114. In each of these cases, the CRTC has required programming “benefits” to be provided by the licensee, and many of the benefits have focused on dollars to be expended on Canadian drama production. In addition, the CRTC has generally required the licensees to file annual reports indicating how they have spent the money.

115. Despite the licensing of a number of new over-the-air services, the actual number of television reporting units (i.e. stations and their rebroadcasters) in the CRTC's financial statistics has declined from 99 in 1998 to 95 in 2004. These consolidation activities of broadcasters came accompanied by promises of synergies. Consolidation would result in back office savings, the sharing of capital equipment, buying clout and the "laying off" of program costs across more outlets and so on. In theory, all this was to leave more on the table for Canadian programming expenditures.

116. It is interesting to see what has really happened in the last decade as far as Canadian conventional television is concerned. CRTC statistics demonstrate that, while revenues have increased steadily over the last seven years, the areas where broadcasters have chosen to spend those dollars have changed substantially.

117. In 1999, Canadian private English-language conventional television broadcasters spent 27% of their advertising revenues on eligible Canadian programming. They spent about the same amount on non-Canadian programming. Since then, their spending on Canadian programming has stayed in the same range (it was 25% in 2005). However, spending on non-Canadian programming has soared to 35% of ad revenue, a new high.

118. Overall, as a percentage of revenue, since 1999, less has been spent on technical expenses, not only less as a percentage of revenue but fewer absolute dollars than seven years earlier. Less was also spent as a percentage of revenues on both sales and marketing and on general and administration as well.

119. The increase in expenditures on non-Canadian programming propelled that category of expense *from 27% of ad revenues in 1999 to 35% of ad revenues in 2005*. Yet increasing non-Canadian program expenditures were one of the key problems that consolidation was supposed to assist in remedying. It was argued that bigger buying groups (i.e. fewer Canadian bidders) would have more clout in Hollywood and drive down programming costs, thus leaving more on the table for the development of high quality Canadian programming.

120. Regrettably, this is not what has happened. Instead, in the last seven years, Canadian broadcasters' appetite for non-Canadian programming has resulted in an increase of just under $200 million in the expenditures in that category, far outstripping the growth in any other category of expenditure.

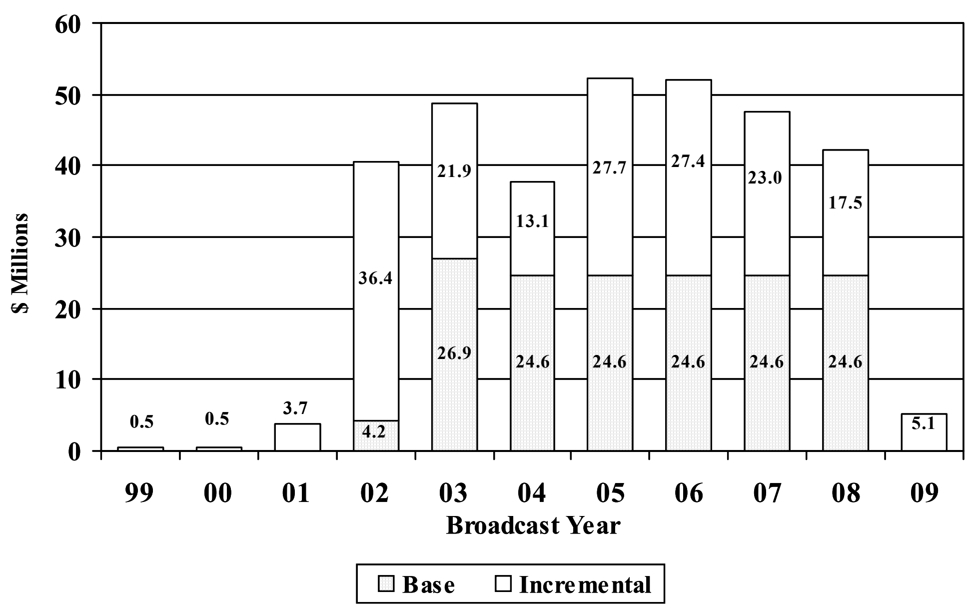
121. In dollar terms, Canadian private English-language conventional television broadcasters were spending $404 million on Canadian programming and $327 million on non-Canadian programming in 1998. By 2005, the Canadian programming spend had increased by less than the amount of the CPI during that period to $428 million. However, non-Canadian programming expenses had increased from $327 million to $563 million. This was not what was supposed to happen in exchange for the Commission's approval of broadcasters' consolidation/acquisition applications.

122. Within these figures, even more disturbing news is found. The $404 million that these broadcasters spent in 1998 on eligible Canadian programming included more than $73 million on Canadian drama and comedy. Eight years later, this total has plummeted to less than $56 million.

123. The CCAU has reviewed the applicable CRTC decisions and licensee reports to determine how much spending on drama is required to be made under the various benefit packages and how much has actually occurred. (The numbers and methodology are set out in Schedule 1.)

124. Based on this review, we have developed Chart 4, which sets out the amounts actually spent (1999-2004) or to be spent (2005-2009) by private broadcasters in English Canada on Canadian drama, by virtue of ownership transfer or new licence benefits. The amounts are the cumulative total of the "base" number (i.e. a number derived from previous year expenditures that the CRTC has set as a minimum benchmark beyond which the benefits apply) and the "incremental"

**Chart 4**
**Spending on Canadian Drama by Private English TV Broadcasters**
**By Virtue of Transfer or New Licence Benefits**
**1999 - 2009**



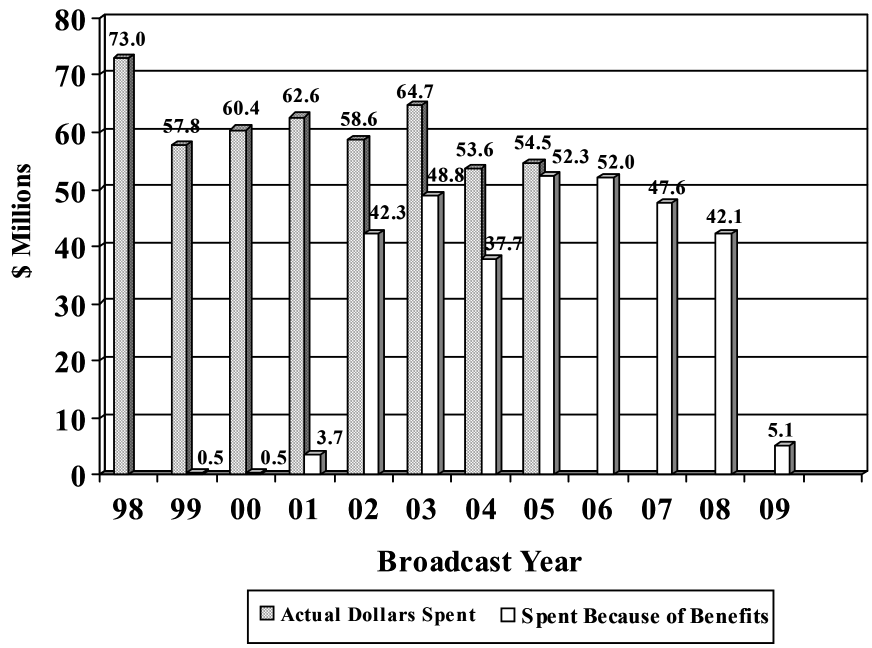

Source: Station Group Reports (99-04); CCAU Estimates (05-09)

number (the actual benefits package spent or required to be spent).

125. As will be seen, the amounts actually required to be spent on Canadian drama are in the $40-50 million range per year from 2004 until 2008. Thereafter, the amount required to be spent on Canadian drama falls dramatically.

126. When one compares Chart 2 with Chart 4, however, it becomes clear that in the past few years, an increasing proportion of the amounts spent on Canadian drama are triggered by requirements imposed as part of transfer benefits. This comparison is presented in Chart 5 below.

**Chart 5**
**Expenditures by Private English TV Broadcasters on Canadian Drama, Compared With Transfer or New Licence Drama Benefits**
**1998 - 2009**




Source: CRTC Statistics, CCAU Estimates

127. As shown in Chart 5, by 2005, the private TV broadcasters in English Canada had reduced their Canadian drama spending to only $54.5 million. This includes spending by virtue of the benefits. However, broadcasters have typically underspent in the early years of benefits, thus increasing the amount they have to spend in the later years. A review of the annual station reports filed with the CRTC shows that, because of this practice, the stations will need to spend at least $52 million on Canadian drama in 2006, just to catch up and comply with CRTC regulatory requirements.

128. The jury is still out on whether the incentive plan will work. It is particularly hard to measure the impact of such incentives when broadcasters are also facing renewal hearings next year and have an artificial inducement to show an improved performance in Canadian drama in anticipation of those hearings.

129. In the longer term, an even more troubling fact is that the existing transfer and new licence benefits largely disappear after 2008. While benefits from new transfers may apply in the future, the extent to which these may affect Canadian drama is not known. The fact that such benefits are unpredictable and affect only certain licensees is also troubling. Drama requirements need to be both reliable and equitable.

### (b) The Current State of Play for the CBC

130. As Canada's national public broadcaster, the CBC has a significant obligation to produce and acquire Canadian dramatic programming and drama series that are attractive to audiences. As a major player in the Canadian drama sector, the CBC can play a key role in addressing the crisis in Canadian drama, and there should be a particular focus on its funding and contribution in this regard. Many of Canada's best-known drama series and most provocative miniseries have emanated from the CBC, such as *The Newsroom*, *This Hour has 22 Minutes*, *Trudeau, Da Vinci's Inquest*, *Rick Mercer's Report, Canada: A People's History, Shattered City, Human Cargo, The Last Chapter,* and *This is Wonderland*. Additionally, over the last few years, CBC has scheduled significantly more priority programs than did CTV and CanWest Global, and more hours of Canadian drama.

131. However, the CBC has shifted its focus in the last few years away from drama towards news and sports. In 1999, according to WGC statistics, the CBC had 66 hours of original one-hour dramas. By 2005, this was down to only 32 hours. When all drama is tabulated (one-hours, half-hours, miniseries, movies-of-the-week), there was a decline from 121 hours in 1999 to only 86 hours in 2005.

132. Recently, the Department of Canadian Heritage recognized the important role that the CBC plays within our broadcasting system in its second response to the Lincoln Report (see page 8):

> "The CBC is a unique and essential instrument in the Canadian broadcasting and cultural landscape, and the Government believes it has a special role to play in reflecting Canadians across its radio, television and new media services and in providing high-impact Canadian programming."

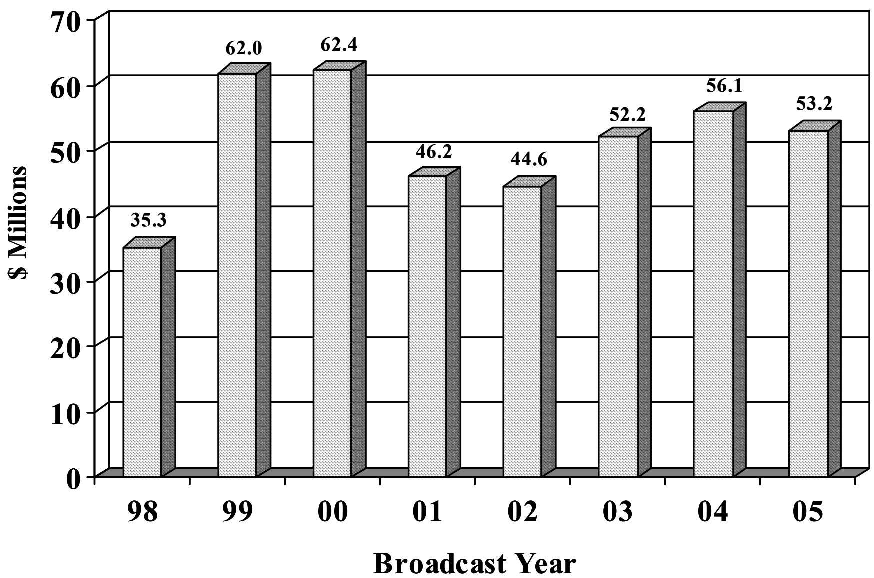
133. The CBC has expressed a strong interest in taking a leadership role in addressing the crisis in Canadian drama. In an address delivered to the Broadcast Executives Society by Richard Stursberg, the newly appointed Executive Vice President, CBC English Television in February 2005, Mr. Stursburg stated:

> "The most important cultural challenge facing English Canada today happens to be the most important challenge facing Canada's public broadcaster. That challenge is drama. It's also a challenge the CBC is uniquely able to address – and one we're determined to address, with vigour, imagination…and success…
>
> "But aside from available real estate, CBC also has the mandate, the skill, the DNA and the vision to significantly increase and sustain the level of English dramatic programming. It is our job…

"To begin to address the drama crisis, the CBC proposes to act as the anchor for a significant expansion and renewal of all aspects of drama…but we will need the support of the federal government." [Emphasis added]

134. Over the past seven years, the CBC's financial support for Canadian drama has generally been about the same as that of the private sector, as shown in Chart 6 below. (For the expenditures by the private sector during the same period, see Chart 2 above at p.21).

**Chart 6**
**Expenditures by Canadian Broadcasting Corporation on English-Language Canadian Drama**
**1998 - 2005**




Source: CRTC Statistics

135. In the spring of 2005, the CBC announced that in addition to its traditional support, it intended to invest an additional $33.5 million on Canadian drama in the next two years, which would have added 100 more hours of dramatic programming to the CBC's schedule in 2006 and 2007. The CBC also stated that its goal was to double over the next number of years the amount of drama and entertainment programming broadcast on its main network. In that regard, CBC officials have indicated that they "would like the CBC Television to be overwhelmingly the place that you go for Canadian entertainment programming."

136. The CCAU agrees that in order for the CBC to take an important role in the area of Canadian dramatic programs, it must be adequately funded. In 2003-2004, the CBC received a parliamentary appropriation of $873 million for operating expenditures, and an additional $60 million non-recurring funding from the Government of Canada. However, this level of funding is clearly insufficient given

the CBC's broad mandate, and its obligation to develop and broadcast high quality dramatic programming on its network.

137. In order to help the CBC meet its Canadian programming objectives, in its second response to the Lincoln Report the Department of Canadian Heritage committed to provide the CBC with an additional $60 million in 2005/2006. This was confirmed in the federal budget presented in the spring of 2005. The Department also created an envelope of 38% of the CTF's English drama allocation for the CBC, based on the CTF's historical average contribution to CBC projects. It did not approve CBC's request for a $20 million increase in the CTF allocation.

138. The CCAU believes that the CBC can and should take the lead in addressing the Canadian drama crisis. However, the open question is whether the government's financial commitments to the CBC will be sufficient given the CBC's mandate and its ambitions with respect to drama. This will need to be a central question in any government review of the CBC's mandate.

### (c) Protections for Canadian OTA TV Broadcasters

139. In assessing the obligations that should apply to OTA TV broadcasters, it is important to realize that they benefit from a number of protective measures. These include the following:

(a) limits to the licensing of new competing over-the-air TV broadcasters in Canada, including foreign ownership requirements;

(b) must-carry and priority provisions for local Canadian signals on BDUs;

(c) the simultaneous substitution policy benefiting over-the-air TV broadcasters;

(d) Section 19.1 of the *Income Tax Act* (Bill C-58), which disallows advertising expenses placed by Canadian advertisers on U.S. border stations as a business expense;

(e) far higher degrees of consolidation and concentration in the free-to-air markets than are permitted in the United States;

(f) prohibition of competing U.S. pay and specialty services;

(g) prohibition of local advertising by cable systems, either directly on local community channels or through the use of local avails on specialty services, and prohibition of local advertising by almost all specialty services;

(h) common ownership of niche-protected Canadian specialty services and BDU must-carry provisions for those services; and

(i) financial support for priority programming from the Canadian Television Fund, tax incentives and other sources.

140. Based on reports such as the IBM publication entitled "The End of Television," some have suggested that support measures of this kind cannot be sustained if unregulated platforms are permitted to exist that ignore borders. The Internet is presented as the most cogent example of this.

141. However, any such suggestions fall apart upon close scrutiny. It must be remembered that the foregoing measures are largely derived from the 1991 *Broadcasting Act* and are strongly supported by both broadcasters and creators. There is therefore little pressure to change these policies, which have worked to the benefit of the Canadian broadcasting system.

142. At the same time, if we want to have a meaningful Canadian presence in the broadcasting system, it will be crucial for the government to support the existence of a distinctive Canadian rights marketplace, through effective copyright legislation and CRTC policies that maintain that distinctive market and require Canadian broadcasters to include Canadian programming of high quality, including Canadian dramas that Canadians will want to watch.

### (d) Impact of New Platforms

143. A key question raised by the IBM report is whether the new unregulated platforms on the Internet or on mobile devices will cannibalize the viewing of television.

144. The CCAU has commented extensively on this issue in its filing of September 1, 2006, which is attached as Schedule 3. As we note in that filing, TV viewing by Canadians has remained remarkably constant over the past five years, despite significant growth in broadband access to the Internet. While it is true that average weekly viewing hours among 18-49 viewers fell from 26.5 hours in 2001-02 to 25.0 hours in 2004-05, the per capita viewing numbers for the same demographic rose from 21.4 hours to 22.0 hours. Moreover, TV viewing by children and teens, two demographics that might have been expected to drop because of increases in video games and cellphone use, rose in the same period.

145. A Statistics Canada report published in August 2006, based on a detailed review of respondent activities over a 24 hour time period, concluded that the Internet does not affect the way consumers watch television. Comparing heavy, moderate and non-Internet users, StatsCan concluded that all of them watch almost the same amount of traditional TV.[4] Furthermore, the report points out that heavy

[4] Statistics Canada, General Social Survey: "The Internet and the way we spend our time" August 2, 2006. URL http://www.statcan.ca/english/research/56F0004MIE/56F0004MIE2006013.pdf

Internet users are even more motivated than other consumers to use other types of media other than the Internet.

146. At this stage, therefore, it does not appear that the new platforms will cannibalize existing television. As noted above, cross platform projects are increasingly anchored around major television properties, and are used to promote traditional viewing. In addition, to the extent that Canadian content created for traditional media reappears on the new platforms, there may a favourable multiplier effect in terms of the accessibility of Canadian programming. Thus, it is all the more important that the traditional television channels be subject to meaningful Canadian content requirements, given that the content may then appear on multiple platforms.

147. It is also important to note that the new platforms can be regulated if circumstances warrant. We comment on this in our submission of September 1, 2006, attached as Schedule 3.

### (e) Nordicity Projections

148. Taking the foregoing into account, the CCAU retained Nordicity to validate projections for the advertising revenue likely to be generated by CBC and the private broadcasting sector in the period up to 2010. In summary, Nordicity concluded that ad revenue for conventional TV in Canada will increase over the next five years.

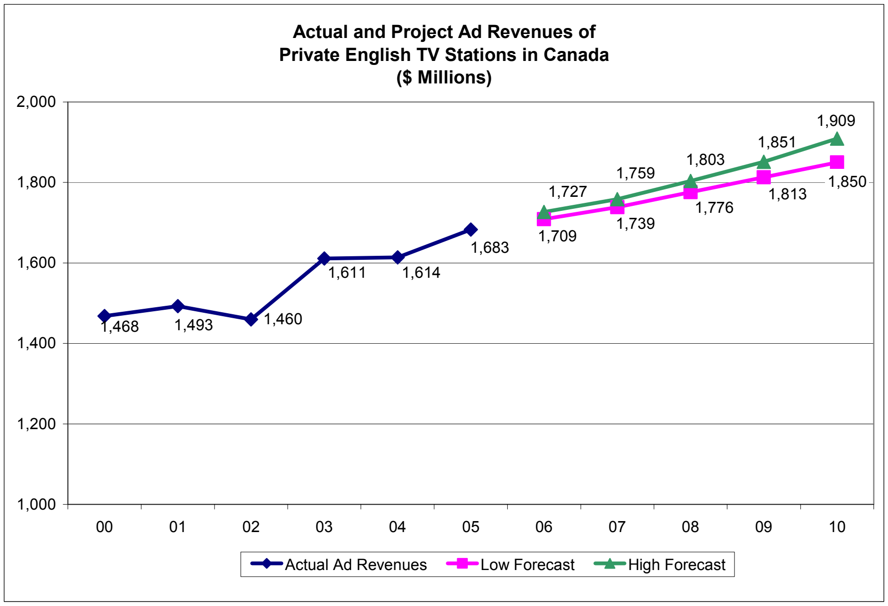
149. Nordicity also validated the revenues (subscriber + advertising) of pay- and specialty-television services. Nordicity confirmed revenue estimates showing continued strong growth in this segment of the Canadian television sector.

150. In reviewing available projections, Nordicity relied on estimates and forecasts developed by PricewaterhouseCoopers LLP (PwC) in its publication, *Global Entertainment & Media Outlook: 2006-2010*. It should be noted that these projections do not reflect the fact that broadcasters are expanding their horizons to generate other advertising avenues, including online and mobile. A recent report from the Interactive Advertising Bureau of Canada showed that Internet-based advertising revenues have gone up 54% and are projected to go up 43% next year. While the absolute numbers are still relatively small compared to the revenues of traditional media, they are growing. Canadian TV broadcasters all have at least one major website with advertising, so they are positioning themselves to benefit from any new streams of revenue that may develop.

151. Chart 7, below, presents a forecast range of ad revenue for English-language conventional television. This forecast range was derived by Nordicity from PwC's projections for Canadian conventional broadcaster ad revenue and additional information published by the Department of Finance and Statistics Canada. Based on its review, Nordicity concluded that the ad revenue for conventional private TV stations in English Canada is forecast to increase over the next five years from $1.68 billion in 2004-05 to approximately $1.85 to $1.91 billion in 2009-10. The

methodology used by Nordicity is set out in Appendix 1 of the report attached as Schedule 3.

## Chart 7




Source: CRTC, Nordicity Group Ltd., PricewaterhouseCoopers, Department of Finance, Statistics Canada

## Table 1

| All amounts in millions of Canadian dollars unless specified otherwise | Historical statistics for English-language conventional television advertising revenue | | | Forecast based on PricewaterhouseCoopers*, English-language conventional advertising revenue | | | |
|---|---|---|---|---|---|---|---|
| | Private broadcasters | CBC | Private + CBC | Private broadcasters | | Private + CBC | |
| | | | | Low | High | Low | High |
| 2000/01 | 1,493 | 214 | 1,707 | -- | -- | -- | -- |
| 2001/02 | 1,458 | 216 | 1,674 | -- | -- | -- | -- |
| 2002/03 | 1,606 | 190 | 1,796 | -- | -- | -- | -- |
| 2003/04 | 1,614 | 209 | 1,820 | -- | -- | -- | -- |
| 2004/05 | 1,683 | 133 | 1,816 | -- | -- | -- | -- |
| 2005/06 f | -- | -- | -- | 1,709 | 1,727 | 1,864 | 1,884 |
| 2006/07 f | -- | -- | -- | 1,739 | 1,759 | 1,897 | 1,918 |
| 2007/08 f | -- | -- | -- | 1,776 | 1,803 | 1,938 | 1,967 |
| 2008/09 f | -- | -- | -- | 1,813 | 1,851 | 1,978 | 2,020 |
| 2009/10 f | -- | -- | -- | 1,850 | 1,909 | 2,018 | 2,083 |

f - forecast
Source: CRTC, Nordicity Group Ltd., PricewaterhouseCoopers, Department of Finance, Statistics Canada
* The forecast series is based on a forecast prepared PricewaterhouseCoopers of the overall advertising revenues of conventional television broadcasters. Please see Appendix 1 for an explanation of how the PricewaterhouseCoopers forecasts were applied to advertising revenues in the English-language conventional television market.

## 5. What the CRTC Should Do About Canadian Drama

### (a) Lessons to Be Learned

152. In developing the analysis set out above, we have borne in mind a number of key principles. The foremost of these is the importance of maintaining a distinct Canadian broadcasting market. The second principle is the importance of including a significant amount of new original 10-point Canadian drama on broadcast schedules. A third principle is the importance of maintaining and enhancing a strong independent production sector.

153. Bearing these principles in mind, what can we do to address the problems faced by Canadian drama? In particular, what lessons can we learn from the foregoing analysis?

154. Certainly, some of the factors that present problems are ones that we can do little to solve. The decline in export sales or in foreign pre-sales is not something that the CRTC can address. Nor can we wish away the U.S. star system, although our own promotion of Canadian dramas can be significantly enhanced.

155. However, there are a number of lessons that can be learned if we want to improve the ratings for Canadian drama.

156. The first is that *we need more original hours of Canadian drama, and fewer repeats*. For networks to argue that Canadian drama cannot deliver ratings when they fill their schedule with endless reruns is just not tenable. Original hours of distinctive Canadian drama that are well-promoted give the best chance at attracting a meaningful audience. At the same time, we must be prepared to recognize that audience response is inherently unpredictable. Thus, to maximize our chances for ratings success, we must have a number of drama series on offer, not just one or two.

157. Second, *we need more distinctive Canadian series, not fewer*. In general, as we have noted, 6-point Canadian drama does not deliver the eyeballs that good 10-point drama telling Canadian stories written, directed and performed by Canadians can deliver.

158. Third, *we need more support for script and concept development*. This is a crucial area that needs attention, in order to maximize the chances of getting higher ratings. Yet as indicated earlier, screenwriters have often had to fund a large portion, if not all, of the development process themselves, or work without pay to develop part of the project, because broadcasters make little or no investment to develop television drama.

159. All of this leads to the fourth lesson, namely, that *more money needs to be invested by the private broadcasters in Canadian drama.* That is a simple corollary

of the first three points, since original Canadian drama costs more to licence than industrial drama, and much more than the cost to licence repeats. The CTF cannot be expected to make up the difference in cost, given the pressures on its funding. Nor can foreign pre-sales or export sales make up the difference. Export sales for North American drama are declining, not increasing.

### (b) Role of Private Broadcasters

160. As noted above, the CCAU believes that more money needs to be invested by the private broadcasters in Canadian drama. There are many reasons why this is essential.

161. First, as we have noted earlier, drama expenditures by Canadian English-language private TV stations as a percentage of their overall program spending are far lower than is true for other countries. In 2005, English Canadian private broadcasters spent only 3.2% of their ad revenues on Canadian drama. As we have noted earlier,[5] Canadian drama productions received only 23% of their financing from broadcaster licence fees in 2004-05. This contrasts with licence fees in the U.K. and the U.S. that are closer to 70% or 80% of the production budget.

162. Some Canadian broadcasters have defended their low licence fees by arguing that they pay no less for Canadian drama than they pay for U.S. acquired programming. But this ignores the fundamental maxim of international television programming sales, namely, *that all broadcasters around the world pay far more for commissioned programs than they pay for acquired programs.*

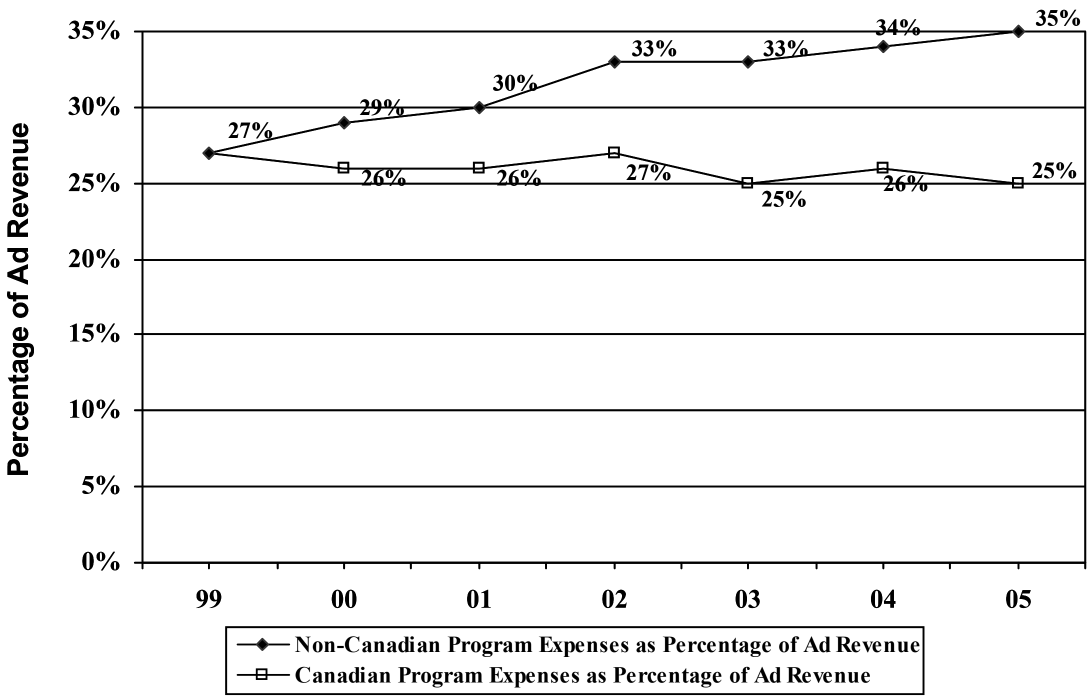
163. The experience around the world is that broadcasters in other countries pay far more for local drama, either in terms of the proportion of their own overall programming budget or in terms of the licence fee as a percentage of the production cost of the program, than is the case in English Canada.

164. As we have noted earlier,[6] since 1999, the Canadian private broadcasters have spent 25-27% of their advertising revenues on eligible Canadian programming (the number was 25% in 2005). However, spending on non-Canadian programming has soared from 27% of advertising revenues in 1999 to 35% of ad revenue in 2005, a new high.

165. This differential between spending patterns is shown graphically in Chart 11 below.

[5] See above, at paragraph 83.
[6] See above, at paragraph 114.

**Chart 11**
**Private English TV Stations in Canada**
**Ratios of Program Expenses to Ad Revenue**




Source: CRTC Statistics

166. It is appropriate to note that Canadian television broadcasters benefit in many ways from the protected environment under the *Broadcasting Act*, compared with their counterparts in the U.S. Some of these benefits have been listed above.[7]

167. Given all these regulatory benefits, any suggestion that a drama expenditure requirement should not be imposed on broadcasters because "Canadian drama is not profitable" needs to be firmly rejected. Not every activity of a broadcaster that operates in the public interest can be expected to be profitable, particularly when those activities are part of the bargain under which licensees receive regulatory protection to enhances their overall profitability.

168. A requirement to support Canadian drama is of fundamental importance. As the Commission stated in Public Notice CRTC 2003-54, "Canadian drama should be a cornerstone of the Canadian broadcasting system." A drama spending requirement should be part of the obligations of all Canadian TV broadcasters who make money from the broadcast of foreign drama and benefit from the protection and assistance measures noted above. Canadian TV broadcasting is a valuable franchise and Canadian drama must be a significant part of the obligations of the holders of that franchise.

[7] See above at paragraph 139.

### (c) Creating a "Virtuous Circle"

169. As it stands today, the transfer and new licence benefits required to be spent on Canadian drama by private broadcasters run out in a few short years. While benefits from new transfers may apply in the future, the extent to which these may affect Canadian drama is not known. The fact that such benefits are unpredictable and affect only certain licensees is also troubling. Drama requirements need to be both reliable and equitable.

170. If no drama expenditure rules are put in place for private conventional TV licensees at the time of the next renewal of their licences, it is entirely likely based on historical experience that aggregate drama spending by the private sector will decline just as it did in 2004 and 2005.

171. The new CRTC incentive plan is intended to provide new money to support Canadian drama. It is also hoped that the plan may free broadcasters from dependence on CTF. However, the plan has a number of defects and raises a number of concerns. Even if it is implemented, the plan is likely to have only a limited impact, and it will be difficult to clearly attribute any such impact to the introduction of the plan. Given these issues, in the view of the CCAU, it would be foolhardy to place complete reliance on the incentive plan.

172. As noted throughout this report, experience has shown that unless private Canadian broadcasters in English Canada are required to spend on Canadian drama they will not do so. CTV and CanWest Global are owned by shareholders who want to enhance shareholder value. Those shareholders will penalize managers who do not maximize profit, and unless the CRTC compels expenditures in areas where there is less profit, those expenditures will go elsewhere.

173. Broadcasters like to suggest that any policy to support drama should be all "carrot" and no "stick." CRTC Chair Charles Dalfen reflected this approach in a speech to the Canadian Association of Broadcasters on November 29, 2004, announcing the new incentive plan:

> "I don't want close out on this subject without noting there were, of course, voices advocating that instead of – or in addition to – using incentives, we should require licensees to broadcast a minimum number of hours of Canadian drama. This approach would certainly have been easier to implement and to monitor. But our view was that regulation will only get us so far. As Trina McQueen said in the study she prepared for us and Telefilm Canada last year, "drama deserves better than to be a forced and resented obligation. It needs the commitment and willing partnership of broadcasters."…
>
> "Hopefully, the incentive program that we've announced today will help to advance the cause, and I hope that many of you will take advantage of it. I would like to be able to show any doubters that this approach, rather than regulatory compulsion, is the best way to get more and better English drama on the air, and have more Canadians choose to watch it."

174. Chairman Dalfen's hope that broadcasters will respond to the incentive program is understandable, and shared by the CCAU.

175. However, as we have indicated above, the incentive program gives rise to some real concerns. For various reasons, it appears that CTV is unlikely to trigger the incentive program to a significant degree. CTV may be reluctant to add inventory in its top-rated shows for fear that it may adversely affect existing pricing levels. It may also feel that its shelf space for Canadian drama is already full given its transfer benefit obligations. For its part, CanWest Global has expressed more interest in selling additional ads, but it has fewer top-rated shows to take advantage of the plan; thus, its participation is also unpredictable. And the situation for CHUM and the CBC has even less potential, since neither broadcaster has a number of high-rated shows where additional inventory could be readily sold. So the first problem with the plan is that it is very uneven in its application and inherently unpredictable. This is not a proper basis for implementing an important public policy.

176. A second problem with the plan is that the station groups have every incentive to increase their commissioning of Canadian drama anyway this year and next in order to stave off a drama expenditure requirement at renewal time. They may argue that the incentive plan is working, when in fact any increase in Canadian drama was simply done in order to present a better picture at renewal time, despite their lacklustre record over the past several years.

177. We hope that TV broadcasters in English Canada will respond positively to the CRTC's incentive plan with significantly increased production levels. But the jury is still out on whether and to what extent the incentive plan will work.

178. Moreover, we have grave concern about the longer-term support by the private broadcasters for Canadian drama. The industry has been through a horrendous period where the support of the private sector conventional broadcasters for Canadian drama significantly declined despite the requirements arising from transfer and new licence benefits. The licences issued to those broadcasters come up for renewal in the next two years, and the existing transfer benefits will come to an end. With the disappearance of these requirements, incentives alone will not be able to ensure that production levels will be adequate.

179. The fundamental problem remains: you can lead a horse to water, but can you make it drink? As shown elsewhere in this report, the track record of Canadian broadcasters has amply shown that unless there is a regulatory requirement -- or the imminent threat of one – broadcasters will do what is in their best financial interest. And from an economic standpoint, it is in their financial interest to broadcast the cheapest form of priority programming they can produce or acquire, in order to meet their priority program scheduling requirement. This will inevitably mean that they will tend to avoid high-cost Canadian drama. Money saved by producing or acquiring cheaper priority programs effectively drops to the bottom line. Shareholders will penalize managers that do not observe this simple logic.

180. By contrast, if it is made a condition of these valuable conventional TV licences that a certain level of expenditures be made on important but mostly unprofitable categories like indigenous drama, then shareholders will not penalize

managers who comply with the conditions. In fact, they will reward managers that commission Canadian drama that garners higher ratings, since that will increase net revenue. Thus a virtuous circle will be created.

### (d) Creating a Regulatory Safety Net

181. Given these circumstances, we believe that it is crucial that the CRTC put a long term regulatory "safety net" in place, to ensure that Canadian drama levels do not fall below an acceptable level in English Canada.

182. A key component of that safety net should be a requirement that private conventional TV broadcasters spend a certain minimum percentage of their gross ad revenue on Canadian drama. The Commission has already indicated that the target for such expenditures over time should be 6%.[8] The CRTC has also stated that this target should not include any credit for CTF licence fee top-ups or transfer or new licence benefits.[9]

183. Based on our research, the CCAU believes that the requirement should be at least 7%, and that this should be a minimum level, to be complemented by incentives that will reward broadcasters that meet or exceed that level.

184. If the CRTC implemented a "safety net" of 7% as a minimum level of support for Canadian drama, the support of Canada's private conventional broadcasters would finally begin to address the crisis of financing we face. In particular, spending on Canadian drama from those broadcasters would increase from only $54.5 million in 2005 to $130-134 million in 2009, based on the Nordicity revenue projections.

185. If a 7% requirement had been in place last year (2005), the private TV broadcasters in English Canada would have spent $117.8 million to support Canadian drama, i.e. over double the amount they actually spent ($54.5 million).

186. To put this in context, that total amount is still far less than $156.8 million -- the amount of just the increase in total spending on U.S. programming that the same stations incurred between 1999 and 2004. (The total amount spent on those stations on U.S. programming in 2004 was $549.9 million.)

187. In addition, the CCAU believes that the regulatory safety net should include a minimum number of hours of new original Canadian drama production to be commissioned by the conventional broadcasters. This should be tailored to their size and circumstances, and the CCAU intends to address this further in the renewal hearings for each of the station groups.

[8] *Viewing and expenditure incentives for English-language Canadian television drama,* Broadcasting Public Notice CRTC 2006-11, January 27, 2006, at paragraph 5.
[9] *Ibid.*, at paragraph 7.

188. In developing this regulatory safety net for Canadian drama, the CCAU does not suggest that the rewards associated with the incentive plan need to be dispensed with.

189. The best scenario is to have a combination of incentives coupled with a regulatory safety net. Both are essential. The incentives reward the stations that deliver higher ratings for Canadian drama. The safety net requirements make it possible for those programmers to resist the pressure from shareholders and stock analysts to low-ball station expenditures and thereby maximize profit by avoiding Canadian drama.

190. The introduction of a regulatory safety net in the form of a simple percentage of revenue requirement to support drama would have many advantages.

191. First, using a ratio automatically adjusts to new revenue levels, benefiting producers if ad revenue goes up but reducing the amount required to be spent by broadcasters if revenue goes down. A common ratio also puts all broadcasters on a level playing field.

192. By setting a simple expenditure quota for drama, broadcasters are also given more flexibility. First, they have the flexibility to determine whether they want to focus on fewer high-cost productions or more lower-cost productions; since in the end the "cost" to them will be the same. Second, an expenditures quota allows broadcasters the flexibility to decide whether they want to focus on series drama, children's drama, miniseries, theatrical movies, made-for TV movies, animation, comedy, or other forms of scripted drama. A dollar spent would count towards the quota no matter which form of drama is supported.

193. Finally, by coupling the expenditure ratio to the incentive plan, it also means that a broadcaster would be enabled (and even encouraged) to move away from CTF-financed productions and focus on non-CTF productions, since there are more bonus minutes and potentially more net revenue with the latter.

194. Before leaving the expenditure requirement for drama, there are two elements that need to be addressed. The first is the need for script and concept development support. In the CCAU's view, station groups should be required to allocate a reasonable proportion of their Canadian drama budget for script and concept development.

195. The second relates to the support by private TV station groups for Canadian feature films. In that connection, we note that the Standing Committee on Canadian Heritage, in its report of November 2005, recommended "that the Government of

Canada direct the CRTC to develop a policy that supports the promotion as well as the viewing of Canadian feature films, long-form documentaries, and drama."[10]

196. An important component of any feature film policy will be to enlist the support of broadcasters in funding and supporting this sector. Many other countries have similar policies.[11] As for Canada, the CCAU considers that OTA TV station groups should be required to allocate a reasonable proportion of their Canadian drama budget to the licensing of Canadian feature films.

197. In summary, while specialty and pay broadcasters can and must take on increasing role in the support of Canadian drama, the support of conventional TV broadcasters in English Canada will continue to be critical, particularly for high-ticket, popular Canadian drama.

[10] *Scripts, Screens and Audiences: A New Feature Film Policy for the 21st Century* (Ottawa: Standing Committee on Canadian Heritage, 2005), at Recommendation 13.
[11] See *Broadcasters' Obligations to Invest in Cinematographic Production*, published by the European Audiovisual Observatory, Strasbourg, February, 2006. As shown in this study, direct investment from broadcasters represents between 20 and 30% of film production budgets in some large European countries. In addition to this direct funding, indirect support is provided through broadcasters' contributions to the budgets of film funding bodies. Across Europe, these amount to around one-third of the budget of such bodies.

## 6. Responses to CRTC Questions Raised in Broadcasting Notice of Public Hearing CRTC 2006-5

*Questions Under Objective A*

### (a) What are the most effective regulatory mechanisms to ensure an appropriate contribution to the production, acquisition and broadcast of Canadian programs?

198. In its 1999 Television Policy, the Commission decided to drop any expenditure requirements for OTA TV broadcasters, apart from transfer or new licence benefits. Instead it focused on scheduling requirements for priority programming to achieve its Canadian programming goals. As we have elaborated above, this omission proved to be disastrous for the cause of Canadian drama, since broadcasters then had every incentive to move away from high-cost, risky programming of this kind and focus on cheaper programming, thereby lessening their costs. Drama expenditures for the OTA private sector plummeted and by 2005 were only 3.2% of ad revenues, the lowest amount in eight years.[12]

199. For all the reasons noted earlier, the CCAU believes that a well-crafted expenditure requirement relating to Canadian drama must be part of the regulatory bargain applicable to OTA broadcasters.

200. Can expenditure requirements be effective? Absolutely! CTV, which was required to make incremental expenditures as part of the BCE benefits package and which elected to focus half of its benefits on Canadian drama, supported two 10-point drama series that turned out to be hits – *Corner Gas* and *Degrassi: The Next Generation*. But even CTV has conceded that it would not have supported either show had it not been required to do so.

201. Similarly, the pay and specialty licensees that have drama in their mandate are all subject to expenditure requirements. Their support for Canadian drama has steadily increased as their revenues have increased and they have had some notable successes in this regard. Recent examples include *Naked Josh* and *Slings & Arrows*. (Their contribution would have been even greater had the CRTC not allowed them to claim double credit for CTF licence fee top ups, a matter which the CCAU will seek to redress in next year's pay and specialty policy proceeding).

202. Certainly, scheduling requirements for the OTA TV licensees have their place and the CCAU is not suggesting that they be dropped. However, the experience of the last eight years has amply demonstrated that scheduling requirements are not enough. They need to be accompanied by expenditure requirements, particularly for the high-cost genres of programming like drama.

[12] See Chart 3, above at paragraph 111.

203. Accordingly, the CCAU considers that the most effective regulatory mechanism to ensure an appropriate contribution to the production, acquisition and broadcast of Canadian programs is a combination of scheduling and expenditure requirements, with the latter requirement focused on the highest cost genre, namely, Canadian drama. These requirements should not be voluntary or dependent on "incentives" or "expectations." They should be part of the fundamental regulatory bargain upon which OTA licences are granted.

### (b) Is the Commission's current approach to independent production appropriate to ensure that the broadcasting system includes "a significant contribution from the Canadian independent production sector," as required by the Act?

204. The CCAU notes that under the current rules, independent TV production in the English language has declined in Canada over the past eight years, particularly in regard to Canadian drama. This is shown in Charts 1 and 1A, above.[13]

205. Given this result, the CCAU considers that more needs to be done to support the independent production community. In that regard, the CCAU looks forward to reviewing the submission of the CFTPA and may have comments to make at the public hearing once it has done so.

206. In that regard, the CCAU agrees with the statement by CRTC Chair Charles Dalfen to the Banff Television Festival on June 12, 2006:

> "As the Commission goes about fulfilling our mandate of nurturing Canadian content in our broadcasting system, it's always mindful of the critical role of independent producers in the realization of that objective. They are an indispensable source of creativity, technical excellence and storytelling."

### (c) Should OTA licensees be subject to an expenditure requirement?

207. As noted above, the CCAU believes that <u>a well-crafted expenditure requirement relating to Canadian drama must be part of the regulatory bargain applicable to OTA broadcasters</u>.

208. Spending on Canadian drama by the English-language private broadcast sector hit seven-year lows in 2004 and 2005, dipping to only about $54 million from a high of $73.0 million in 1998. By 2005, spending by English-language TV broadcasters on Canadian drama had declined to only 3.2% of ad revenue, <u>the lowest percentage in eight years</u>. And that number would have been even lower but for the benefits arising from CRTC approvals of ownership transfers or new licences.

209. Canadian drama is critically important to the future of Canadian television. Drama is not only the most popular genre of TV programming – Canadian dramatic

[13] See above, at paragraphs 73 and 74.

programs allow us to celebrate our experiences, share our stories and identify with other Canadians. The production of Canadian drama is central to our cultural sovereignty.

210. Drama is expensive to produce and support from the public and private broadcast sectors is essential for its survival. Therefore the CCAU retained Nordicity Group Ltd. to validate projections for the advertising revenue likely to be generated by the private broadcast sector. Nordicity has concluded that ad revenue for the private conventional TV station groups is likely to increase over the next four years to between $1.85 and $1.91 billion in 2009 – an increase of over $234 million from 2004.[14]

211. In other words, conventional television will continue to be a lucrative business, despite the broadcasters' fears that audience fragmentation caused by pay and specialty services or by unregulated platforms like the Internet may hurt revenues. Although fragmentation did erode audience share over the 1990s, the audience share of the conventional TV broadcasters in Canada has stabilized at about 38% over the last five years. And instead of declining, the broadcasters' ad revenue rose over 15% in that time.

212. But despite increasing revenues, the broadcasters have spent less -- not more -- on Canadian drama. The track record of Canadian broadcasters has amply shown that unless there is a regulatory requirement -- or the imminent threat of one – broadcasters will do what is in their best financial interest. That means broadcasting the cheapest form of priority programming they can produce or acquire in order to meet their priority program scheduling requirement.

213. Once renewal licences are issued, and the current transfer and new licence benefits come to an end, the fate of Canadian drama will hang in the balance. Therefore, we believe that it is crucial that the CRTC put a long-term regulatory "safety net" in place to ensure that Canadian drama levels do not fall below an acceptable level in English Canada. A key component of the safety net would be a requirement that all private conventional TV station groups expend at least a certain percentage of their gross advertising revenue on Canadian drama.

214. Based on our research, the CCAU believes that this requirement for English-language private OTA TV broadcasters should be at least 7%, and that this should be a minimum level, complemented by incentives that will reward broadcasters that meet or exceed that level. This 7% minimum level of support would finally ensure that Canada's private English-language conventional TV broadcasters play a role in curtailing the current drama decline. Spending on Canadian drama by those broadcasters would increase from $54.5 million in 2005 to $130-134 million in 2009.

215. The CCAU strongly believes that conventional television – CBC and the private TV station groups in English Canada -- must continue to be the principal

[14] For further details on the Nordicity projections, see above at paragraphs 148-151.

mainstay for big-ticket popular Canadian drama. The OTA TV broadcasters must remain the economic drivers for quality, popular Canadian drama. We feel this requirement is realistic given the fact that the advertising revenues of conventional broadcasters are forecast to increase over the next five years.

**(d) Should any spending requirement be based on a percentage of revenues, of total program spending, or some other measure? How might any spending requirement account for year-to-year variations in revenues or program spending? Please be as specific as possible in describing any proposed expenditure formula.**

216. The CCAU recommends the use of a simple percentage of revenue requirement to support Canadian drama. This would have many advantages.

217. First, using a ratio automatically adjusts to new revenue levels, benefiting producers if ad revenue goes up but reducing the amount required to be spent by broadcasters if revenue goes down. A common ratio also puts all broadcasters on a level playing field. By setting a simple expenditure quota for drama, broadcasters are also given more flexibility. First, they have the flexibility to determine whether they want to focus on fewer high-cost productions or more lower-cost productions; since in the end the "cost" to them will be the same. Second, an expenditures quota allows broadcasters the flexibility to decide whether they want to focus on series drama, children's drama, miniseries, theatrical movies, made-for-TV movies, animation, comedy, or other forms of scripted drama. A dollar spent would count towards the quota no matter which genre of drama is supported.

218. The CCAU believes that the expenditure quota should be applied on an annual basis, but with the same 5% flexibility as applies to pay and specialty licensees. The expenditure quota should be subject to the accounting rules in Public Notice CRTC 1993-93. Finally, and most important, the "licence fee top up" rule should not apply to such an expenditure quota.

219. Within the drama quota, the CCAU considers that TV station groups should be subject to an expectation that (a) a reasonable proportion of their Canadian drama budget be allocated for script and concept development, and (b) a reasonable proportion of their Canadian drama budget be allocated to the licensing of Canadian feature films. The arguments for doing so are set out elsewhere in this submission.[15]

**(e) What changes, if any, should be made to the Commission's benefits policy?**

220. In the view of the CCAU, no change to the requirement that 10% of the value of the transactions resulting in changes of control be expended over seven years is

[15] See above, at paragraphs 194-196.

warranted at this time. However, the CCAU recommends that the CRTC specify that the bulk of such benefits should be earmarked to incremental expenditures on Canadian priority programming, and not on infrastructure or capital costs.

221. The CCAU also submits that the benefits policy contains a loophole that must be closed. The current policy effectively opens the door to a multi-staged approach to the transfer of ownership and control of broadcasting undertakings, as well as major ownership restructurings, that allow parties to avoid payment of substantial benefits as intended by the policy. Specifically, parties could divide a transaction into stages and only at the final transaction, when a new controlling shareholder appears, would benefits be payable. The benefits payable on that final stage would, of course, be only a small percentage of the benefits which would have been payable if the entire ownership transfer transaction had taken place in a single step. The Commission surely did not intend to create such a loophole in the broadcast regulatory regime when it created its benefits policy, and it should act now to close it.

**(f) In considering the questions set out above, please identify any particular issues or considerations facing French-language OTA broadcasters that may require a different regulatory approach than that adopted for English-language broadcasters.**

222. This submission by the CCAU is limited to factors affecting English-language Canadian OTA broadcasters, as indicated in paragraphs 5 and 6 above.

*Questions under Objective B*

**(a) In light of changes to the form and delivery of advertising messages on television, should the Commission consider amendments to the Regulations respecting advertising? For instance, should the Commission consider restricting its limitation of 12 advertising minutes per hour to traditional commercial messages inserted as breaks in the program schedule (15, 30, 60 seconds etc.)?**

223. The CCAU considers that changes to the Commission's historical approach to the regulation of advertising could have beneficial effects on the Canadian broadcasting system. The changes currently unfolding in the advertising industry make it more and more difficult for the Commission to enforce its regulations regarding advertising. Rink-boards, product mentions, product placements and digital superimposition all challenge the current regulatory model.

224. The popularity of PVRs, TIVO's and other such devices, which allow consumers to record programs and skip through commercials on replay, have encouraged more and more advertisers to find ways of embedding their messages

in the body of programs in a manner that precludes such avoidance. Moreover, the many signals coming in from the United States contain more advertisements than are allowed for Canadian broadcasters.

225. Thus, in the CCAU's view, it may make sense for the Commission to limit the ambit of the regulation to traditional commercial messages, provided the increased revenues to conventional broadcasters are put to good use for benefits to the Canadian broadcasting system. In the CCAU's view, however, the Commission should not consider limiting the ambit of the regulation for OTA broadcasters unless there is a requirement that such broadcasters expend no less than 7% of their revenues on Canadian drama.

226. The funds would have to be incremental. This was the flaw, for example, in the Commission's 1993 decision relating to the creation of what is now the CTF. The funds that the Commission determined were to go from BDUs to the CTF were intended to provide a welcome and much needed shot in the arm for Canadian drama creation. While this occurred in part, the potential contribution it was intended to make was seriously eroded when the Commission determined that broadcasters could use "licence fee top up" monies in satisfying their own requirements for spending on Canadian drama. Thus, the BDU contribution ended up being substituted money, not incremental money, and the broadcasting system did not benefit the way it should have.

227. The Commission has already liberalized the amount of TV advertising permitted, by allowing broadcasters that implement the drama incentive plan to exceed the 12 minute cap by up to two minutes. As noted above, the incentive plan is complex to apply and to administer and gives rise to a number of operational concerns.[16] However, it could serve a useful role as a supplement to the 7% drama expenditure requirement recommended earlier. Broadcasters meeting such an expenditure rule would automatically have met the expenditure targets set in the incentive plan and would be entitled to the 25% bonus. And if they achieved increased ratings for Canadian drama as a result, the second 25% bonus would also apply. Thus a drama expenditure rule would make the incentive plan easier to achieve. A simple expenditure requirement for Canadian drama would also be a far better and more reliable regulatory mechanism to apply.

**(b) What other amendments to the Regulations respecting advertising would be an appropriate response to current and anticipated changes in the way advertising messages are transmitted to television audiences?**

228. Please see response to (a) above. Limiting the ambit of the regulation to traditional ads may make sense, provided the increased revenues to conventional broadcasters are put to good use for benefits to the Canadian broadcasting system. It is a separate question as to whether current restrictions relating to specific types

[16] See above, at paragraphs 95-108.

of advertising should be permitted and the CCAU defers further commentary on this matter until having read the submissions of parties more directly affected.

**(c) Should the Commission consider permitting a subscriber fee for the carriage of certain OTA television signals by broadcasting distribution undertakings (BDUs)? If so, what stations and under what circumstances?**

229. This is a question on which CCAU would prefer to have the benefit of the submissions made by parties more directly affected. Clearly, in keeping with the general thrust of its main submission, if the Commission did feel that OTA signals should attract a new subscriber fee, the CCAU would argue that significantly increased expenditures should be made on Canadian drama. However, the requirement that OTA licensees expend money on Canadian drama is absolutely fundamental and should not be dependent on such subscriber fees.

230. In the United States, fee for carriage is allowed by virtue of the retransmission consent regime introduced in 1992. The 1992 *Cable Act* gave local private TV broadcasters the right to negotiate to be paid for the carriage of their signal, as an alternative to insisting on "must-carry." They could not demand both carriage and payment but they could choose either. The FCC's plan was to give back to broadcasters some of the market power that the FCC felt had been taken by cable operators.

231. While the courts considered the legal issues surrounding must-carry, broadcasters began to bargain with local cable operators for carriage. What happened next was described by an academic commentator in 1998:[17]

> "While visions of dollar signs danced in the heads of network executives, the cable industry, led by some of the larger MSOs, drew an economic line in the sand. They declared they would not pay and would be willing to drop network affiliates if necessary. Network executives desperately wanted the second revenue stream and a tense period of broadcast-cable negotiations ensued. In the end, it was the broadcasters who blinked. Broadcasters failed to negotiate direct payments as a result of the 1992 Act. Instead, they settled for something that may prove more lucrative in the long run-channel space. When they could not get money, they used the law to leverage a guaranteed channel on most cable systems, giving them the opportunity to start their own cable networks…CBS, which had held out for direct payment and refused to bargain with the cable industry for channel space, was left holding an empty bag at the end of the negotiation period."

232. The CCAU understands that since 1998, U.S. stations have begun to receive significant fees for carriage, depending on their bargaining power. However, in Canada, it is hard to imagine the Commission dispensing with "must-carry" rules for local TV signals, given their fundamental role in the Canadian broadcasting system. Thus the two regimes are quite different.

[17]Patrick R. Parsons and Robert M. Frieden, *The Cable and Satellite Television Industries* (Boston: Allyn and Bacon, 1998), at pp.62-63.

233. The CCAU believes that if the Commission intends to establish a fee for carriage regime, then, as with limiting the ambit of the advertising regulations discussed above, any incremental revenues should be put to work for the benefit of the Canadian broadcasting system, and more particularly for the creation of Canadian drama.

**(d) If such a fee were to be considered, should it be restricted to services that offer new or significantly improved services to subscribers – for instance, services that provide a program schedule that is predominantly in HD?**

234. The CCAU does not have a fully informed view on this matter at this time. However, the CCAU would think it tragic if the HD tail were to wag the programming dog. It is a short step from saying that services with an HD-heavy schedule should benefit from fee for carriage to saying that the fee for carriage funds should be directed to HD programming. The shift to HD is a technical shift that all businesses should be making as part of their day to day planning. What is missing is more money for the creation of programming, and in particular Canadian drama, whether in HD or otherwise.

**(e) Are there other criteria that the Commission should use in determining whether a subscription fee for OTA television services is warranted?**

235. The CCAU does not have a further view on this matter at this time other than as articulated above.

**(f) If such a fee were to be considered, on what basis should it be calculated?**

236. The CCAU does not have a view on this matter at this time.

**(g) If a subscription fee were introduced, what changes to the Broadcasting Distribution Regulations (the Distribution Regulations) would be necessary or appropriate?**

237. The CCAU does not have a view on this matter at this time.

**(h) Is the apparent failure to monetize out-of-market tuning a serious problem? If so, what regulatory measures could be introduced to address the problem?**

238. The CCAU would suggest that the current revenues of conventional TV broadcasters do not appear to support regulatory measures to address out-of-market tuning. Revenues are still up, and this invites a close review of how much out-of-market tuning is actually occurring and how much of it is not monetized. As

national network revenues do effectively monetize all viewers nationally, it is the local ads and national selective ads that do not. This is a question on which CCAU would prefer to have the benefit of the submissions made by parties more directly affected.

**(i) In considering the questions set out above, please identify any particular issues or considerations facing French-language OTA broadcasters that may require a different regulatory approach than that adopted for English-language broadcasters.**

239. This submission by the CCAU is limited to factors affecting English-language Canadian OTA broadcasters as indicated in paragraphs 5 and 6 above.

*Questions Under Objective C:*

**(a) Describe the public policy implications of a decision not to require OTA transmission of digital/HD signals, including the implications for the Canadian Broadcasting Corporation/Société Radio-Canada, educational and OTA community television services**

240. In the CCAU's view, the Commission's focus should be on methods of allowing broadcasters to reduce expenses on hardware and on increasing revenues in a manner that allows for more money to be spent on the creation of Canadian programming. A requirement to roll out new digital transmission facilities would perpetuate the disadvantage that conventional broadcasters already face in comparison with their specialty service competitors. The latter already serve the entire country from a single point.

241. Moreover, the percentage of Canadians who receive their television service over-the-air is progressively dropping. The 2005 number was barely 10% of Canadians, continuing this downward trend.

242. But what is even more interesting is that those Canadians who watch conventional television over-the-air watch far less television than those who subscribe to cable and DTH. According to BBM, only 7% of viewing of conventional television occurs other than via DTH or cable. From the perspective of the CCAU, it seems inappropriate to oblige conventional TV broadcasters to invest millions of dollars to reach only 7% of their audiences with digital signals.

243. To put this in perspective, the Commission has already determined that cable operators can discontinue the delivery of analog television services when digital penetration reaches 85%. Thus, reducing the number of digital transmitters to only the number sufficient to reach this percentage of the population may be consistent. The CCAU sees no public policy imperative to force broadcasters to invest in another duplicative distribution infrastructure. Canadians who want digital

television can already receive it by at least three means (cable, DTH and DSL). In order to attract the remaining TV households, it can be anticipated that BDUs would make “digital basic” available at little or no cost to new subscribers.

244. That said, the CCAU reiterates that the reason it would support this type of approach (i.e. not requiring digital transmitters) would be to leave more dollars in the system for purposes of investing in Canadian programming, particularly drama.

**(b) For those Canadians who continue to rely on OTA transmission, what reasonable and cost-effective alternatives could be proposed?**

245. The CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(c) How would licensees make local and regional programming available to the appropriate communities if there were no OTA digital transmission?**

246. The CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(d) What changes to CRTC regulations and/or policies would be required to accommodate a change resulting in no OTA digital transmission?**

247. If over-the-air broadcasters no longer have an over-the-air feed, a number of changes would need to be made. In order to recognize their fundamental importance to the system, there would be a strong argument that the formerly OTA signals would need to be carried on “digital basic” by all BDUs.

248. Once the over-the-air feed disappears, there will be no audience other than cable, DTH and DSL subscribers. In any event, the CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(e) If such an approach were taken, at what point should analog over-the-air services be shut down, or should the Commission specify such a point?**

249. The CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(f) In considering the questions set out above, please identify any particular issues or considerations facing French-language OTA broadcasters that may require a different regulatory approach than that adopted for English-language broadcasters**

250. This submission by the CCAU is limited to factors affecting English-language Canadian OTA broadcasters as indicated in paragraphs 5 and 6 above.

*Questions under Objective D*:

**(a) What has been the impact of out-of-market tuning on stations in small markets?**

251. The CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(b) Are the measures set out in Public Notice 2003-37 to assist independently owned small market broadcasters in maintaining and improving local programming having their desired effect? Should they be continued or altered? If the latter, how?**

252. The CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(c) Should independently owned small market broadcasters be obliged to broadcast a minimum amount of local programming? If so, what amount should that be?**

253. The CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(d) What measures may be appropriate to ensure that small market stations controlled by larger broadcast ownership groups continue to fulfil their local programming obligations?**

254. The CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(e) Should the Commission expect broadcast ownership groups with profitable stations in the largest Canadian markets to subsidize their stations in small markets?**

255. The CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(f) In considering the questions set out above, please identify any particular issues or considerations facing French-language OTA broadcasters that may require a different regulatory approach than that adopted for English-language broadcasters**

256. This submission by CCAU is limited to factors affecting English-language Canadian OTA broadcasters as indicated in paragraphs 5 and 6 above.

*Questions relating to Closed captioning:*

**(a) Please comment on the appropriateness of the Commission adopting a requirement for the captioning of 100% of all television programming by all OTA television broadcasters, including whether exceptions should be granted and on what basis**

257. As a general rule, notwithstanding the obvious sympathy it has for the hard of hearing community, the CCAU feels that requiring a 100% commitment is not realistic. There may well be circumstances where the impact of such a requirement is to deny the airing of programming to the overwhelming percentage of the audience that does not require closed captions. For example, if a broadcaster wanted to do a retrospective on, say, Pearl Harbor and wanted to run the film *Tora, Tora, Tora*, it might be the case that the cost of captioning would exceed the cost of the revenues a broadcaster could expect to earn. The film would then not air as a result of the 100% commitment. The CCAU appreciates that there are certain difficult decisions that the Commission must make requiring achievements that are less than perfect. However, it has made them in the captioning area for many years with an understanding of the costs. The CCAU continues to believe that the system needs more money for programming and in particular Canadian drama. In any event, the CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(b) Please comment on the feasibility of captioning in languages other than English or French and the obligations that should be applied to services that broadcast in third languages**

258. The CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

**(c) The Commission is also seeking concrete and specific proposals to address the ongoing concerns about captioning quality, including the appropriateness of an industry standard "error rate" and the possibility of adopting a self-regulatory approach with a third-party body like the Canadian Broadcast Standards Council to adjudicate complaints about captioning and captioning quality**

259. The CCAU will await the comments of others in the written phase of this proceeding and may have comments to make at the public hearing in this regard.

## Schedule 1

## History of CRTC Regulation of Canadian Drama

This schedule provides a brief outline of the history of regulation of Canadian drama by the CRTC.

### 1. Regulation of Canadian Drama Scheduling from 1961 to 1999

There has been an overall Canadian content quota applicable to private TV broadcasters in Canada since 1961. However, in the period from 1961 to 1979, the broadcast regulator did not regulate the exhibition of Canadian drama at all. The regulations only dealt with overall Canadian content and did not single out drama as such. Private broadcasters could comply with the quota by running news, sports and game shows.

The original quota established in the 1960s required only 40% Canadian content and was very loosely worded. In 1970, shortly after it succeeded the BBG, the newly created CRTC conducted a review of the Canadian content quota. To the large extent, the overall rules created in 1970 still apply today. The basic quota for private television in Canada requires 60% Canadian content during the 18-hour broadcast day, and 50% Canadian content in the evening hours from 6 p.m. to midnight. The quota is higher for the CBC, which is required to maintain a 60% level in both the 18-hour broadcast day and the evening broadcast period from 6 p.m. to midnight. The quota is subject to some case-by-case exemptions.

As noted above, the overall Canadian content quota in the regulations does not distinguish between particular program categories. History quickly demonstrated, however, that where there are no specific mechanisms in place that require private television broadcasters to air dramatic programs, these productions will get very little air-time.

In the 1960s and 1970s, where no express mechanisms were in place relating to the exhibition of Canadian drama, the private television industry, particularly in English Canada, focused on presenting the least expensive categories of Canadian content to produce, i.e. news, sports and game shows. The result was that there was virtually no Canadian drama on private English television. With few exceptions, the only Canadian drama to be seen was on the CBC.

At the end of the 1970s, however, a new obligation was implemented with respect to the support of Canadian programming by private English television. In 1979, the CRTC decided to impose a category quota explicitly for Canadian drama as a condition of licence for the CTV Television Network. The quota was 26 hours of new drama per year, rising to 39 hours over the 5-year licence term. That licence condition was appealed to the Supreme Court of Canada on a variety of grounds, but was upheld in 1982.[18]

In 1987, the Commission increased the requirements placed on CTV. In the decision renewing CTV's network licence, the Commission required CTV to broadcast 2 ½ hours per week of a regularly scheduled Canadian drama series, rising to 4 ½ hours per week by the end of the five-year licence term.[19] The proportion of original hours to repeats of regularly scheduled Canadian drama was required to exceed the 70% level. In other words, for each 10 hours of repeats, CTV was required to broadcast at least seven hours of new drama programming. In addition, all but one hour of the requirement was required to be scheduled after eight p.m. The decision also required an additional 24 hours per year of Canadian feature films, miniseries and limited dramatic series to be broadcast by CTV.

In 1994, the CTV licence was renewed subject to a condition that the network schedule three hours per week of Canadian drama programming rising to 3 ½ hours over the term of the licence, with an additional 48 hours per year of Canadian dramatic features, miniseries and limited series.[20] The Commission also stated that it expected CTV to adhere to its commitment that original first-run hours as opposed to repeats remained above 70%.

Global Television was also subject to special Canadian dramatic programming quotas. Under the terms of its 1986 renewal, Global was required to broadcast approximately three hours per week of first-run Canadian drama. This consisted of 1 ½ hours of first-run drama and 1 ½ hours of reruns.[21] In 1992, however, the Commission renewed Global's licence subject to a condition that this amount be increased to 3 ½ hours by the 1994-95 season, all of which was to be broadcast between eight and 11 p.m. In 1996, the Global licence was renewed subject to a requirement that it broadcast four hours of drama per week, at least two of which were committed to be original first-run hours.[22]

As each of the pay and specialty programming service licences were issued over the last 18 years, the CRTC has also imposed Canadian content scheduling requirements for these services. However, they are made applicable through customized conditions of licence, rather than through generally applicable regulations.[23]

---

[18] *CRTC* v. *CTV Television Network Ltd*., [1982] 1 S.C.R. 530.
[19] See Decision CRTC 87-200, March 24, 1987.
[20] See Decision CRTC 94-33, February 9, 1994.
[21] See Decision CRTC 92-220, April 8, 1992.
[22] See Decision CRTC 96-72, February 29, 1996.
[23] For the current conditions of licence applicable to the pay and specialty services, see Peter S. Grant et al, *Regulatory Guide to Canadian Television* (Toronto: McCarthy Tetrault, 3rd edition, 2006).

## 2. Regulation of Canadian Content Expenditures, 1982 to 1999

A Canadian content expenditure quota was first introduced by the CRTC in 1982 for pay television. It was a quota specified as a fixed percentage of subscription revenue. When penetration levels of pay television turned out to be far less than projected in the next few years, the pay television licensees went back to the CRTC and persuaded the Commission in 1987 to establish lower expenditure levels as a proportion of subscriber revenue. (In the most recent renewals of the pay licensees in 2002, the expenditure levels were increased to reflect increased penetration with the introduction of DTH.)

The concept of requiring a certain level of expenditures on Canadian programs was later extended to Global in 1986[24] and CTV in 1987.[25] In 1989, the CRTC applied the concept to all major local television stations, as part of their licence renewal decisions. The level of expenditures was tied to the advertising revenues of the station concerned. As a result, the expenditures on Canadian programs required by the CRTC fluctuated up and down with changes in the ad revenue for the stations.[26] The programming expenditures formula was later modified by allowing some averaging to occur between fiscal years.[27] The expenditure rules were also tightened in 1993 to address a number of concerns about double-counting and other accounting issues.[28]

In 1995, the Commission announced that it would permit local television stations earning more than $10 million in annual advertising revenue the option to choose between the continuation of a condition of licence on Canadian programming expenditures or an alternative condition of licence simply requiring certain minimum hours per week of Canadian entertainment programming in the evening broadcast period. The term "entertainment programming" embraced the genres of drama, music and variety programs, and the required minimum scheduling level rose from 5½ hours a week to seven hours a week over the next seven year period.[29] Local stations across Canada had variously chosen one or the other of these options following their 1995 renewals.[30]

This policy was not extended to two major players, CTV and Global, however, where expenditure conditions applied that were explicitly tied to Canadian entertainment programming, in addition to the scheduling conditions on Canadian drama referred to earlier. For CTV, the expenditure commitment was $18 million per year during its previous licence term; and for Global, the expenditure commitment

[24] See Decision CRTC 86-1086, November 14, 1986.
[25] See Decision CRTC 87-200, March 24, 1987.
[26] *Overview: Local Television for the 1990s*, Public Notice CRTC 1989-27, April 6, 1989.
[27] Public Notice CRTC 1992-28, April 8, 1992.
[28] Decision CRTC 92-229, April 8, 1992.
[29] Public Notice CRTC 1995-48, March 24, 1995.
[30] For a listing, see Appendix to Public Notice CRTC 1995-203, November 30, 1995.

was $9.3 million per year in its previous licence term.[31] Both levels rose with increases in ad revenue.

Finally, reference should be made to the Canadian expenditure rules applicable to the Canadian specialty programming services. In this regard, the Commission has typically required successful licensees to expend the amount proposed in Year 2 in their applications, and thereafter to expend a minimum annual expenditure on Canadian programming derived from averaging the amounts committed in the business plan submitted with the application, and expressing them as a percentage of the services' gross subscription and advertising revenue.

These expenditure requirements continue to apply to Canadian specialty services, but as noted further below, were eliminated for conventional TV stations in 1999.

### 3. The 1999 TV Policy

In 1998, the CRTC initiated a public process to undertake a broad and fundamental review of its policies relating to television broadcasting.[32] This was an important CRTC proceeding, as the Commission had not undertaken a complete review of its television policies for over a decade. After receiving written and oral submissions from interested parties, the Commission released its new Television Policy entitled *Building on Success: A Policy Framework for Canadian Television*[33] (the "Television Policy"). In that new policy document, the Commission's approach to regulating Canadian programming requirements was significantly altered. The following discusses the ways in which the new Television Policy changed the television broadcast regulatory regime.

First, the Television Policy dispensed with requiring Canadian programming expenditure as a condition of licence. Consequently, private conventional television broadcasters are no longer required to expend a percentage of their advertising revenues, or a fixed amount of money, as set out by condition of their broadcast licences.

CTV and Global are, however, required to spend money on Canadian programming as a result of recent ownership transactions. In particular, CTV is required to spend $140 million over seven years on priority programming as a condition of the Commission approving the acquisition of that broadcaster by Bell Globe Media.[34] Of this amount, $75.5 million must be used for the creation of dramatic programming.

[31] Decision CRTC 94-33, February 9, 1994; Decision CRTC 96-72, February 29, 1996.
[32] See Public Notice CRTC 1998-44, May 6, 1998.
[33] See Public Notice CRTC 1999-97, June 11, 1999.
[34] See Decision CRTC 2000-747.

As for Global, it is required to spend $84.2 million over five years in benefits as a result of its acquisition of a number of WIC broadcast assets in 2000.[35] Only $23.9 million of that amount has been earmarked for the creation of Canadian priority programming by independent producers. However, none of the funds have been specifically earmarked for Canadian drama.

The second difference that the new Television Policy brought on is that it does not set any specific requirements with respect to the broadcast of Canadian dramatic programming. Rather, it requires that the larger multi-station groups broadcast an average of eight hours per week of priority programming during the peak viewing periods (7:00 p.m. to 11:00 p.m.) over the course of the broadcast year. The exhibition requirement is set out as follows at paragraph 37 of the 1999 Television Policy:

> "The largest multi-station ownership groups will be required to broadcast, over the broadcast year, on average at least eight hours per week of priority Canadian programs during the 7 p.m. – 11 p.m. viewing period."

Priority programs include dramatic programs. However, they also include a number of other genres of programs. The complete list of Canadian priority programs is as follows:

*Priority Program Categories:*

- Canadian drama programs (Category 7)
- Canadian music and dance, and variety programs (Category 8 & 9)
- Canadian long-form documentary programs
- Canadian regionally produced programs in all categories other than News and information (Categories 1, 2 and 3) and Sports (Category 6)
- Canadian entertainment magazine programs

Thus, the current exhibition requirement sets out no obligation on the television broadcasting industry to exhibit a minimum amount of dramatic programming. Broadcasters may, therefore, meet their priority programming exhibition requirement by broadcasting any of the other program categories included in the definition of priority programming, such as documentaries or entertainment magazine programs. There is also no obligation on broadcasters to air first-run programs.

The Television Policy did not set out any exhibition requirement with respect to the smaller multi-station ownership groups, such as CHUM and Craig. However, when CHUM acquired the Craig stations in 2004, it made commitments to the Commission to meet the eight-hour priority programming requirement established for larger broadcast groups within new licensing proceedings.

[35] See Decision CRTC 2000-221.

A third change bought by the Television Policy is that the Commission has widened the definition of priority programming beyond what were formerly referred to as the "underrepresented categories". The definition added long-form documentaries, regional programs other than news and sports, and entertainment magazine programs.

Finally, the Television Policy altered the manner in which the Commission applies its dramatic programming time credit. Under the regime set out in Public Notice CRTC 1984-94, the Commission granted a 150% time credit to all broadcasters where a program broadcast met all of the requirements set out in Public Notice CRTC 1984-94. In order to qualify, a Canadian program was required to attain at least six out of 10 points set out in that public notice relating to the creative functions of the program.

Under the Television Policy, the 150% time credit rule set out in Public Notice 1984-94 continues to apply to the smaller station groups such as Craig and CHUM. However, for the larger station groups, the 150% time credit rule has significantly changed. Under the new regime, larger station groups may only apply the 150% time credit for priority programs broadcast on the station, where these programs meet 10 out of 10 points relating to the creative functions of the production. Moreover, the larger broadcasters have access to a new 125% time credit for priority Canadian programs that meet six of 10 points relating to the creative function of the production.

### 4. **CTV and Global Renewal Hearings**

In April 2001, the Commission held station group licence renewal hearings for both CTV and Global where it considered the licence renewal applications of most of the CTV and Global television stations. This station group licence renewal approach stemmed from a new policy set out in the Television Policy. In both the written renewal applications and at the renewal hearings, CTV and Global stated repeatedly that they were committed to Canadian dramatic programming.

Despite these words of support to drama, both Global and CTV, the largest media companies in Canada, came in at their licence renewal hearings with no more than a commitment to meeting the minimum requirements of the Television Policy. That is, they committed to broadcast an average of eight hours of priority programming over the course of the broadcast year. Neither Global or CTV committed to airing a specific number of hours of Canadian drama.

### 5. **Transfer and New Licence "Benefits"**

Since 1999, the CRTC has approved major consolidation in the TV industry in English Canada. These transactions include the BCE takeover of CTV, the CanWest Global takeover of the WIC TV stations, and the CHUM takeover of CKVU Vancouver and the Craig stations in Western Canada. The CRTC has also approved new English-language TV licences in Calgary, Edmonton, Vancouver, Victoria, Montreal and Toronto.

In each of these cases, the CRTC has required programming “benefits” to be provided by the licensee, and many of the benefits have focused on dollars to be expended on Canadian drama production. In addition, the CRTC has generally required the licensees to file annual reports indicating how they have spent the money.

An analysis of these benefits is provided in Schedule 2.

6. **The CRTC Incentive Plan for Drama**

On November 29, 2004, in Broadcasting Public Notice CRTC 2004-93, the CRTC released details of its new incentive program to increase the amount of original English-language Canadian television drama broadcast on Canadian television and to encourage larger audiences to this type of programming.

Broadcasters who take advantage of this incentive program were required to apply for conditions of licence that would allow them to broadcast additional minutes of advertising per hour if they met the Commission’s criteria. All three of the English conventional TV private broadcast groups – CTV, CanWest Global and CHUM -- have applied to take advantage of the plan.

Under the plan, broadcasters can earn the right to broadcast between 30 seconds and eight minutes of additional advertising for each hour of original Canadian drama they broadcast. The exact amount of additional advertising is dependant upon such factors as the level of Canadian participation in the production, the budget required to produce the drama, the time of broadcast, and the source of the funding.

If broadcasters increase their audience share for Canadian drama by a pre-determined amount, they will be entitled to increase the total additional amount of advertising they broadcast by 25%. And if broadcasters increase their spending on Canadian drama by a pre-determined amount, they will be able to increase the additional amount of advertising they broadcast by another 25%.

While there is no limit to the number of additional advertising minutes that may be earned under the incentive program, broadcasters may not air more than 14 minutes of advertising in any given hour.

For the largest English-language broadcasters, the incentives apply only to qualifying drama in excess of 26 hours per year, except for drama programs that do not receive funding from the Canadian Television Fund. Those programs will also enjoy the greatest additional advertising minutes, in order to encourage broadcasters to invest directly in the creation of new independently-produced drama projects.

## Schedule 2

## Transfer and New TV Licence Drama Benefits

In the last few years, the CRTC has approved major consolidation in the TV industry in English Canada. These transactions include the BCE takeover of CTV, the CanWest Global takeover of the WIC TV stations, and the CHUM takeover of CKVU Vancouver and the Craig stations in Western Canada. The CRTC has also approved new English-language TV licences in Calgary, Edmonton, Vancouver, Victoria, Montreal and Toronto.

In each of these cases, the CRTC has required programming "benefits" to be provided by the licensee, and many of the benefits have focused on dollars to be expended on Canadian drama production. In addition, the CRTC has generally required the licensees to file annual reports indicating how they have spent the money.

In preparing this report, the CCAU has reviewed the applicable CRTC decisions and licensee reports to determined how much spending on drama is required to be made under the various benefit packages and how much has actually occurred. The results of this review are presented in Table 1 below.

### Table 1

### Spending on Canadian Drama Made by Virtue of Ownership Transfer or New TV Licence Benefits ($ millions)

| *Broadcast Year* | *CTV Base* | *CTV Benefits* | *CanWest Benefits* | *CHUM Base* | *CHUM/Craig Benefits* | *TVA Benefits* | *TOTAL* |
|---|---|---|---|---|---|---|---|
| 1998-99 | - | | - | - | 0.5 | - | 0.5 |
| 1999-00 | - | - | - | - | 0.5 | - | 0.5 |
| 2000-01 | - | 0.3 | 1.7 | - | 1.7 | - | 3.7 |
| 2001-02 | 24.9 | 7.2 | 4.2 | 4.2 | 1.8 | - | 42.3 |
| 2002-03 | 22.7 | 13.1 | 6.9 | 4.2 | 1.9 | - | 48.8 |
| 2003-04 | 22.2 | 5.3 | 2.4 | 4.2 | 3.6 | - | 37.7 |
| 2004-05 | 22.2 | 12.9 | 4.3 | 4.2 | 7.4 | 1.3 | 52.3 |
| 2005-06 | 22.2 | 12.9 | 4.4 | 4.2 | 7.0 | 1.3 | 52.0 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 2006-07 | 22.2 | 12.9 | - | 4.2 | 7.0 | 1.3 | 47.6 |
| 2007-08 | 22.2 | 12.9 | - | 4.2 | 1.5 | 1.3 | 42.1 |
| 2008-09 | - | - | - | - | 3.8 | 1.3 | 5.1 |

Notes:

1. CTV's drama benefits arise from its acquisition by BCE; the base of $24.9 million was based on CTV's actual spending on priority programs in 2000-01. Up to 2004, the numbers shown are the actual expenditures made on drama; later years assume the same proportion of the $24.9 million is spent on drama as was spent in 2004.

2. CTV's drama benefits are based on its reports for 2001, 2002, 2003 and 2004. The remaining amount required to be spent has been allocated equally to each of the remaining years of its 7-year licence.

3. CanWest Global's drama benefits arise from its acquisition of the WIC stations. The amounts for 2000-2004 are based on its spending relating to the Western Independent Producers Fund. The amount for 2005 would have been $8.7 million, but in June 2005, the CRTC granted a request by CanWest Global to make this as a commitment in 2005, but to spread this expenditure evenly over 2005 and 2006.

4. The CHUM base was established in its takeover of CKVU-TV Vancouver in 2001.

5. The CHUM/Craig benefits are the aggregate of the drama benefits for its Victoria station licensed in 2000, its acquisition of CKVU-TV, Vancouver, in 2001, and its acquisition of Craig in 2004.

6. The TVA benefits are the drama benefits arising from its acquisition of Toronto One in 2004.

# Schedule 3

## The Future Environment Facing the Canadian Broadcasting System

**Comments Filed by the Coalition of Canadian Audio-visual Unions**

**September 1, 2006**