CCAU

Coalition of Canadian Audio-visual Unions

Filed via epass

19 October 2007

Mr Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Gatineau, Quebec
K1A 0N2

Dear Mr. Morin:

Re: Broadcasting Notice of Public Hearing 2007-10, 5 July 2007 (the "Notice") - A Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services.

These comments have been prepared by the Coalition of Canadian Audio-visual Unions (CCAU) in response to Broadcasting Public Notice CRTC 2007-10, 5 July 2007. CCAU is pleased to have this opportunity to comment. It also intends to review the comments made by others and to participate in both the second round of comments in November and the Commission's public hearing in February, 2008.

For the purposes of this intervention, CCAU represents the following Canadian audio-visual unions: ACTRA (the Alliance of Canadian Cinema Television and Radio Artists), the Directors Guild of Canada ("DGC"), the National Association of Broadcast Employees and Technicians, Local 700 CEP ("NABET") and the Writers Guild of Canada ("WGC").

Yours truly,

COALITION OF CANADIAN AUDIO-VISUAL UNIONS,

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EXECUTIVE SUMMARY

1. CCAU is concerned about the health of the pay and specialty licensees should all, or a significant number, of the changes discussed in Broadcasting Notice of Public Hearing 2007-10, 5 July 2007 (the "Notice") be implemented. The system is currently in balance, with the profitability and health of the BDU sector aligned with the health of the pay and specialty programming sector.

2. The contributions made by the pay and specialty sector are critical to the success of the Canadian broadcasting system. The key requirements imposed on the pay and specialty services to achieve the objects of the *Broadcasting Act* (the "Act") are (a) scheduling or exhibition requirements for Canadian programming and (b) expenditure requirements for Canadian programming (the "CPE" requirements).

3. Both requirements are rooted in the objects of the Act and have long histories. They have been imposed on the pay and specialty services since 1982 when the first such services were licensed by the CRTC. That is 25 years ago. Over the years, those measures have proven to be very successful in supporting the objects of the Act, and subject to policy changes to make them more transparent and effective, the CCAU considers that it is imperative that they continue.

4. BDUs also contribute to the support of Canadian programming in a number of critical ways. First, they are required by the Act to give priority to Canadian services and to deliver them efficiently at affordable rates. Second, as elements of the broadcasting system, BDUs are required "to contribute in an appropriate manner to the creation and presentation of Canadian programming." This is the basis for the 5% levy set out in sections 29 and 44 of the *Broadcasting Distribution Regulations* (the "Regulations"). While less of this money finds its way to the Canadian Television Fund (CTF) than CCAU would like, it is appropriate that BDUs make such a contribution and, in fact, it should grow given the financial circumstances of the BDU industry.

5. In addressing the issues raised by the Notice, the CCAU is particularly concerned with their impact on the most difficult problem facing English language television in Canada – the troubled state of English-language Canadian drama, including scripted comedy. Canadian drama is the hardest of all program genres to create. When it is successful it can be wonderful and transformative. Yet it would not be produced if the market was left to itself. The experience and data of the past eight years confirm this. It is the quintessential example of programming that depends on regulatory measures to exist.

6. CCAU has attached as Appendix 1 to this submission a complete list of its recommendations with respect to a significant number of the matters raised in the Notice. Of particular note is an innovative proposal (attached as Appendix 2) prepared by Peter S. Grant that proposes the use of CPE "overspending" by pay and specialty services toward the satisfaction of spending requirements that CCAU recommends be placed on OTA broadcasters in next year's licence renewal proceedings. CCAU looks forward to reviewing the proposals of others.

A) INTRODUCTION

1. This proceeding represents an important watershed for the Commission. In reviewing its regulatory approach to broadcasting distribution undertakings (BDUs), and the pay and specialty services that depend on them for distribution, the Commission will need to assess the extent to which these sectors are meeting the objects of the *Broadcasting Act* (Act), and, if not, what measures need to be taken to improve their performance in this regard.

2. That said, CCAU is concerned about the health of the pay and specialty licensees should all, or a significant number, of the changes discussed in Broadcasting Notice of Public Hearing 2007-10, 5 July 2007 (the "Notice") be implemented. The system is currently in balance, with the profitability and health of the BDU sector aligned with the health of the pay and specialty programming sector.

3. Moreover, the Notice does not appear to be backed up by any evidence that would suggest a degree of urgency that would cause the Commission to court the risks that the major reforms outlined in the Notice would entail. In CCAU's view, for the Commission to gamble with the health of the Canadian pay and specialty sector at this juncture in our regulatory history is the wrong approach. There is already too much in play and the evidence as to a successful outcome is non-existent.

4. The proposed "reforms" seem remarkably one-sided and "BDU friendly". While the proposals ought to keep the owners of pay and specialty services awake at night, BDUs have little to fear. There is virtually nothing in the Notice that would not allow them to put significant pressure on services in negotiations, thereby improving their bottom lines and putting nothing additional back into the Canadian broadcasting system.

5. On the other hand, the contributions made by the pay and specialty sector are critical to the system's success. The key requirements imposed on the pay and specialty services to achieve the objects of the Act are (a) scheduling or exhibition requirements for Canadian programming and (b) expenditure requirements for Canadian programming (the "CPE" requirements). Both requirements are rooted in the objects of the Act and have long histories. They have been imposed on the pay and specialty services since 1982 when the first such services were licensed by the CRTC. That is 25 years ago. Over the years, those measures have proven to be very successful in supporting the objects of the Act, and subject to policy changes to make them more transparent and effective, the CCAU considers that it is imperative that they continue.

6. BDUs also contribute to the support of Canadian programming in a number of critical ways. First, they are required by the Act to give priority to Canadian services and to deliver them efficiently at affordable rates. Second, as elements of the broadcasting system, BDUs are required "to contribute in an appropriate manner to the creation and presentation of Canadian programming." This is the basis for the 5% levy set out in sections 29 and 44 of the *Broadcasting Distribution Regulations* (Regulations). While less of this money finds its way to the Canadian Television Fund (CTF) than CCAU would like, it is appropriate that BDUs make such a contribution and, in fact, it should grow given the financial circumstances of the BDU industry.

7. All these support measures are absolutely vital to achieve the objects of the Act. While the Notice refers to the "market" and to "consumers," the Act makes it clear that the overarching concern of the CRTC must be to ensure that these statutory objects are achieved.

8. In addressing the issues raised by the Notice, the CCAU is particularly concerned with their impact on the most difficult problem facing English language television in Canada – the troubled state of English-language Canadian drama, including scripted comedy. Canadian drama is the hardest of all program genres to create. When it is successful it can be wonderful and transformative. Yet it would not be produced if the market was left to itself. The experience and data of the past eight years confirm this. It is the quintessential example of programming that depends on regulatory measures to exist. Accordingly, we place a particular focus on the Canadian drama crisis in our comments below.

9. CCAU has attached as Appendix 1 to this submission a complete list of its recommendations.

B) MARKET FORCES AND REGULATION

10. Paragraph 11 of the Notice says the following:

> 11. In the coming years, distribution and discretionary service licensees will find themselves increasingly obliged to adapt to significant changes within the communications environment, as the full potential of digital technology is reached within a truly converged environment. In this environment, industry players will be increasingly called upon to focus on the consumer. More and more in Canadian broadcasting, the consumer is in charge. BDUs and programmers must be able to respond to the evolving expectations, tastes and demographics of Canadian viewers. In order to meet the challenges in the years ahead, above all, licensees will need to have the flexibility to react quickly and creatively to the opportunities and challenges they encounter, and not be burdened by detailed or unnecessary regulations.

11. At the Commission's recent Diversity of Voices proceeding, Chair Konrad von Finckenstein said the following:

> "Cultural and social objectives cannot be achieved through market forces alone. That is why we need regulation. I say there will always be regulation."

12. This was a welcome reminder that there are many components of the Canadian broadcasting system that are desirable and necessary but which will not occur in the absence of regulation.

13. There is a significant concern on the part of CCAU that there is a preconceived notion that market forces are preferable to regulation in this sector. Indeed, Paragraph 12 of the Notice reads as follows:

> 12. The considerations described above would lead to the conclusion that it is time to move away from the current detailed regulation, and to take a revitalized approach to both distribution and discretionary programming undertakings that aims at reducing regulation to the minimum essential to achieve the objectives of the Act, relying instead on market forces wherever possible.

14. The key is in the words "wherever possible" of course, and these words are often overlooked by those who most seek to encourage the Commission to rely on "market forces".

15. In the Notice, the Commission also stated the following at paragraph 16:

> Parties are invited to provide their own proposals on simplified regulatory approaches, as well as comments on options identified by the Commission. Parties are encouraged to provide concrete evidence in support of whatever comments or proposals they may make. In general, the Commission will expect parties arguing for continued regulatory intervention to provide a full rationale for that intervention, with supporting evidence, to establish that such intervention is essential to the objectives of the Act. Where parties consider that regulation is required, the Commission encourages them to suggest simple and strategic forms of intervention that will constrain, to the minimum degree possible, the ability of industry players to respond to the demands of the marketplace.

16. In making this statement, the Commission places the onus on those who think the system is working well to essentially prove that the Commission's policies have been successful. Parties are obliged to prove that the regulatory system established by the Commission pursuant to the requirements of the Act is actually functioning well. In CCAU's view, it would have been much more logical for the Commission to require those who would invite the Commission to change the system to explain why it is that such a change is required or beneficial rather than the other way around.

17. That being said, however, it is abundantly clear that certain of the existing measures are absolutely essential in order to carry out the objects of the Act. They include the following

  (a) exhibition requirements for Canadian programming imposed on the pay and specialty services;

  (b) expenditure requirements for Canadian programming (the "CPE" requirements) imposed on the pay (including VOD) and specialty services;

  (c) BDU carriage of Canadian programming services; and

  (d) the levy on BDU revenues to support the creation of Canadian programming.

C) A CASE STUDY DEMONSTRATING WHY EXPENDITURE ("CPE") REQUIREMENTS ARE ESSENTIAL

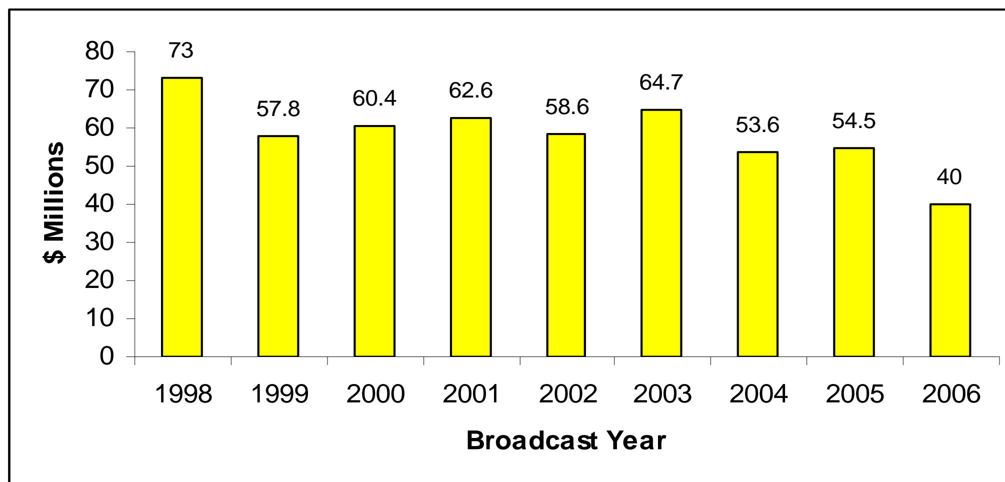
18. As noted above, the CCAU considers that one of the crucial support measures is the expenditure requirements for Canadian programming (the "CPE" requirements) imposed on the pay and specialty services.

19. In its notice, and as stated, the Commission has asked parties arguing for continued regulatory intervention to provide "a full rationale for that intervention, with supporting evidence, to establish that such intervention is essential to the objectives of the Act."

20. In the case of the CPE requirements, we have such supporting evidence directly at hand. It is the experience of the Commission in dropping expenditure requirements for the over the air TV stations in 1999. At the time it did so, the CRTC hoped that market forces would suffice to produce high-end Canadian programming. After all, it said, "in a competitive environment, licensees require high quality programming to win audience loyalty."[1]

21. The results were tragic. Except where required by virtue of new licence or transfer benefits, the OTA TV broadcasters in English Canada progressively reduced their expenditures on Canadian drama, creating the crisis we have today. The figures demonstrating this decline are shown in Chart 1 below.

Chart 1
Expenditures by Private English OTA Broadcasters on Canadian Drama
1998-2006



Source: CRTC Statistics

22. During this time, revenues increased significantly, such that the ratio of spending by conventional broadcasters on drama as a percentage of revenue declined as shown in the following chart.

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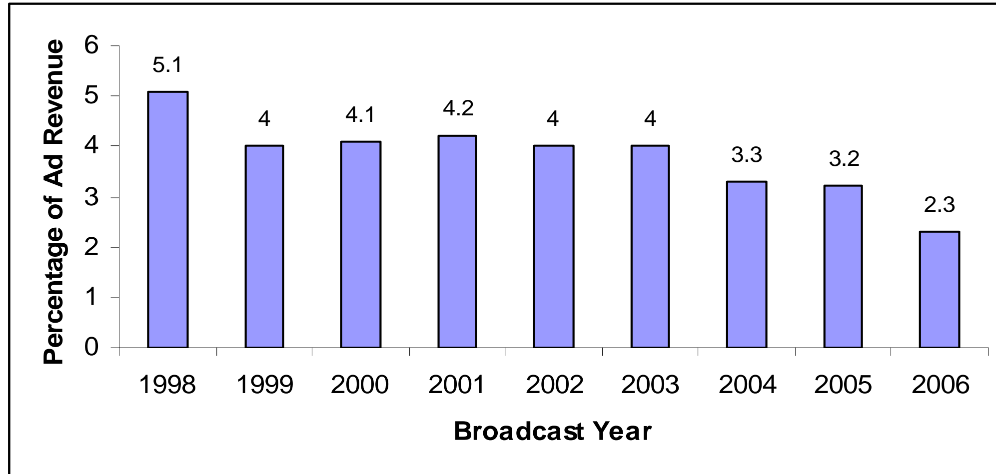
[1] Public Notice CRTC 1999-97, at para.78.

Chart 2
Ratio of Expenditures on Canadian Drama
of Private English OTA Broadcasters
to Total Advertising Revenue
1998-2006



Source: CRTC Statistics

23. During this same period, the OTA broadcasters consistently found additional funds to spend on U.S. dramatic productions. As the Commission has previously noted[2]:

> However, while spending on Canadian programming by English-language OTA broadcasters has increased commensurately with revenues, they have diminished as a proportion of total programming budgets. Commission records indicate that, between 1999 and 2006, Canadian programming expenditures by English-language OTA broadcasters decreased from 50% to 40% of total programming expenditures…
>
> Although English-language OTA licensees have maintained Canadian programming expenditures as a percentage of revenues, the continuing reduction in the proportion of total programming expenditures allocated to Canadian programming is cause for concern.

24. The Commission, during this period, knew it had a serious problem on its hands. In Broadcasting Public Notice CRTC 2003-54, it said 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

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[2] Broadcasting Public Notice CRTC 2007-53 at paragraphs 88 and 91.

> must include popular drama programs that reflect Canadian society and project Canada's stories onto the world stage.

25. That proceeding culminated in a complicated incentive system that was abandoned by the Commission earlier this year.[3]

26. Given this history, it is clear that market forces will not result in the production and airing of scripted Canadian drama. This has been documented many times, including in submissions by the broadcasters themselves. As the CCAU has pointed out on previous occasions, the number of hours of original Canadian dramatic programming has dropped significantly since the 1999 TV Policy. In 1999, 186 hours of one-hour Canadian dramas were produced. By 2006, that number had fallen to 99 hours.[4] Even the Dunbar-Leblanc report,[5] which generally supported the notion of deregulation, noted that Canadian drama would not be commissioned by the private sector broadcasters absent CRTC regulation.[6]

27. In particular, the Dunbar-Leblanc report included the following passage:

> In the English-language private television broadcasting market, the argument for regulation is based on the economic cost of producing high-quality television Canadian programming compared with the option of purchasing much less expensive Canadian rights to exhibit foreign-produced programs. While public demand for Canadian news, public affairs and sports programming is strong enough to support these types of productions, Canadian broadcasters have long contended that the relatively small size of the Canadian market and strong demand for high-profile and well marketed foreign-produced television productions, principally from the U.S., but also from the UK and other countries, makes it very difficult to recover the cost of producing home-grown dramatic programs to compete with the likes of American sitcoms, the Sopranos, "24" or the CSI series. *This is not to say that Canadians are not capable of producing good dramas and sitcoms. They clearly are. The talent is not lacking. It is the economic model that is working against us…*
>
> Again, this is not new phenomena. In 1965, the Fowler Committee made the following observation:

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[3] Broadcasting Public Notice CRTC 2007-53.

[4] In 1999, 12 one-hour 10-point drama series were produced that totaled 186 hours of programming. These were: The City, Cold Squad, Code Name Eternity, Da Vinci's Inquest, Emily of New Moon, Nothing Too Good for a Cowboy, Power Play, Psi Factor, Riverdale, These Arms of Mine, Traders and Wind at My Back. In 2006, 8 one-hour drama series were produced that amounted to 87 hours of programming. These were: Across the River to Motor City, Best Years, Blood Ties, Durham County 401, Falcon Beach, Intelligence, Josi-H, Regenesis. Note that of the 8 one-hour series in 2006 4 of them (Across the River to Motor City, Blood Ties, Durham County 401 and Regenesis) had their first window on specialty or pay services.

[5] Laurence J. E. Dunbar and Christian Leblanc, *Review of the Regulatory Framework for Broadcasting Services in Canada*, Final Report, 31 August 2007, available on the Commission's website at http://www.crtc.gc.ca/eng/publications/reports/dunbarleblanc.htm.

[6] Ibid, at pp. 40-48.

> "An adequate Canadian content in television programs is unlikely to be achieved by a laissez faire policy of minimum regulations, governing advertising volume, morality and the like. Economic forces in North America are such that any substantial amount of Canadian programs will not appear on television unless room is reserved for them by regulation." [emphasis added].

28. In the licence renewal hearings for the OTA television stations next year, CCAU will be urging the Commission to impose expenditure requirements with regard to Canadian drama to address the problem. However, for the purpose of this proceeding, it is sufficient to note that when such expenditure requirements were dropped in 1999, the production of high-end Canadian programming suffered. The same would be true if the Commission were to drop the CPE requirements for the pay and specialty services.

D) SPECIALTY AND TELEVISION PAY LICENSEES IN A WORLD WITHOUT CPE

29. As noted earlier, there are two key requirements that the Commission normally imposes on specialty and pay licensees. The first relates to Canadian content scheduling rules, while the second relates to Canadian program expenditures ("CPE") as a ratio of the previous year's revenue. The required CPE levels are unique to each service based on what each licensee proposed as part of competitive hearings when they first won their licences.

30. Given that these services were won in a bidding scenario, once the first licence term is over, Canadian programming costs as a percentage of revenue would normally be expected to shrink in subsequent licence periods as subscriber numbers and ad revenues steadily increase. The opposite has occurred. In 2004, at the licence renewal of the first specialty services licensed in 1996, the Commission decided to institute a graduated approach to Canadian programming expenditure requirements by increasing CPE requirements based on the licensee's profitability.

31. The CPE requirement is also supported by s. 3(1)(*s*) of the Act, which stipulates that "private networks and programming undertakings should, *to an extent consistent with the financial and other resources available to them*, contribute significantly to the creation and presentation of Canadian programming…"[7] As the revenues and profits of the services increase, therefore, it is logical for the CRTC to require that the financial contribution of the services to the creation of new Canadian programs increase as well.

32. In compliance with their respective CPE requirements, services have commissioned more original higher-cost Canadian programming and made less use of reruns and library product than otherwise would be the case. Prior to 2003 there were no one-hour dramas and few half-hour dramas licensed by pay and specialty services. In 2006, they licensed 47 hours of one hour Canadian drama with titles like "Regenesis", "Durham County" and "Blood Ties". In 2006, they also licensed 69 half hour drama episodes of series like "Billable Hours", "Hank Williams First Nation" and "Rent-A-Goalie". Unlike the case with conventional broadcasters, the specialty services have engaged in sustained commissioning of new and

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[7] The Act, paragraph 3(1)(*s*).

higher quality Canadian content programming while at the same time enjoying rising revenue and profit levels. In regard to English language Canadian drama, the specialty licensees spent $98 million last year, which is more than double the amount spent by the English-language conventional services. The pay licensees for their part spent $40 million. Without this spending it would have been impossible to maintain a healthy talent pool in this industry in Canada.

33. If the Commission were to abandon the CPE requirements for discretionary services, it is not difficult to see what would happen. There is no reason to think that specialty or pay licensees would behave any differently than their colleagues in conventional television where the behaviour has been reviewed above. Indeed, many of the services are owned/controlled by the identical people. Moreover, the fact is that for $200,000, the broadcaster can obtain the rights to a highly promoted and highly popular U.S. drama that has production values of $3.2 million per episode, or the broadcaster can pay roughly $315,000 to acquire the rights to the $1.3- million Canadian drama [These figures come from the CFTPA Profile 2007, and represent the average budget and average contribution of the broadcaster]. If market forces alone decide this issue, the broadcaster will choose the U.S. show every time since it will generate substantially higher advertising revenues, particularly given simultaneous substitution rules.

34. The specialty and pay services could easily maintain their viability without commissioning higher end Canadian programming. This scenario was spelled out in a presentation made by Peter S. Grant to the Centre for Innovation Law & Policy, Faculty of Law, University of Toronto, on September 24, 2007.[8] A copy of Mr. Grant's presentation is attached as Appendix 2. In particular, Mr. Grant made the following comments:

> While the Canadian pay and specialty services spend significant amounts on Canadian programming, this is significantly more than they would spend if they were not required to do so by condition of licence. If they were only regulated as to Canadian exhibition, it would be possible to spend far less on the Canadian programming needed to fill the schedule. The pay services like *TMN* or *Movie Central*, for example, would simply use more Canadian library films and fewer original Canadian drama series. As long as their services continued to offer recent release U.S. feature films, they would lose few if any subscribers. Similarly, children's services like *YTV* could easily reduce their Canadian programming budget by running fewer original Canadian children's' programs and more library product. Few children would notice.
>
> Similar adjustments could be made by many of the other services without affecting their viability. The fact that the specialty services run more high-cost original Canadian programming is driven largely

[8] See Peter S. Grant, "Addressing the Canadian Drama Crisis: A Modest Proposal," Presentation to the Centre for Innovation Law & Policy, Faculty of Law, University of Toronto, September 24, 2007. The paper is available at the following website address: http://www.innovationlaw.org/AssetFactory.aspx?did=256.

> by their CPE requirements. If the privately owned pay and specialty services had a choice, however, they would reduce their CPE, since they could still meet their scheduling requirements and present a marketable and viable service.

35. It is trite to note that "what gets measured gets done". If there is no obligation to spend on Canadian programming, the pay and specialty licensees will simply fill their Cancon scheduling requirements with cheaper programming or repeats.

E) THE ISSUE OF PROGRAMMING COST AND "EFFICIENCY"

36. In the Dunbar-Leblanc report, the following comment is made about the CPE requirements at page xvi:

> In our view, an assessment of the effectiveness and rationalization of CPE requirements is merited. On their face, expenditure requirements can be problematic in the sense that they fail to promote efficiency. On the other hand, expenditure requirements, including in particular obligations to contribute a portion of revenues to funds to support Canadian content, are applied broadly to other classes of broadcasting undertakings including, most notably, radio and distribution undertakings.

37. The suggestion that expenditure requirements might be problematic because they "fail to promote efficiency" needs to be specifically addressed. The *Broadcasting Act* does mention the concept of efficiency in regard to the "efficient *delivery* of programming." However, it carefully avoids any reference to "efficiency" in regard to the creation of Canadian programming. The reason is obvious. If you had a purely efficient approach to programming you would never create high-cost Canadian programming at all. While cost is not always equal to quality, there can be little question that high quality Canadian programming does require more significant expenditures.

38. To give an obvious example, a Canadian network can easily lower its news cost by eliminating foreign news bureaux and relying entirely on foreign news feeds. That would be more "efficient". But it would not give Canadians the news service they need and want.

39. Similarly, drama costs can be lowered by going to assembly line production, abandoning any script development or focus group testing, commissioning fewer rewrites, scrimping on the costs of sets, offering only scale rates to performers, and minimizing the number of cameras and the amount of footage shot. But the result would immediately be evident on the screen, where Canadian drama has to compete with U.S. productions which have higher production values made possible by substantially higher budgets and thus set a high bar. If we want to have high quality dramatic productions that Canadians will want to see, broadcasters simply must allocate sufficient financial resources to do the job.

40. The disparity between U.S. and Canadian drama production costs and the effect on perceived quality is graphically described in the report of Trina McQueen to the Commission in May 2003[9]. Her graphic conclusion was as follows:

> *No broadcaster has ever made money on drama. It exists entirely and only because of political and regulatory will*[10]**.** [emphasis added]

41. With cultural product, "efficiency" is not the criterion for success.

F) ADDRESSING THE "LICENCE FEE TOP-UP" PROBLEM

42. Bearing the foregoing in mind, CCAU considers that it is essential that the Commission maintain CPE requirements for the pay and specialty television services as well as their current exhibition requirements. However, at the same time, we urge the Commission to remove the ability of specialty and pay television licensees to use "licence fee top-up" monies from the CTF to reach their CPE targets.

43. The amounts involved are staggering, and came out of nowhere. In the last two years alone, the pay and specialty television broadcasters have used public monies significantly. In 2005, they used these public monies to the tune of $33.5 million, of which more than $29.2 million was used by English-language pay and specialty television broadcasters. The corresponding figures for 2006 were more than $29 million overall of which $25.9 million was used by English-language pay and specialty television broadcasters[11]. Allowing the CTF to be accessed like this in satisfaction of CRTC obligations cannot be considered good public policy.

44. This has long been a major problem in terms of transparency and complexity. CCAU's members have made this point on earlier occasions to the Commission and it bears repeating. As the CTF monies come from either Heritage or BDU subscriber fees, they are not broadcaster funds and it is highly inappropriate for the broadcasters to get credit for spending money that is not theirs. All the licence fee top-up rule does is allow broadcasters to spend less on Canadian programming and effectively use the CTF funds to improve their bottom lines. And this came as a complete windfall to broadcasters since no mention was made of this use of CTF top-up monies in the financial projections upon which the Commission based their respective CPE percentages in 2004.

45. The rationale for eliminating the licence fee top-up policy is articulated in Mr. Grant's paper in the following terms:[12]

> The licence fee top-up policy, enunciated in 1994 as part of the announcement setting up the predecessor of the CTF, gave OTA broadcasters something of a consolation prize for not having won

[9] Part II of "Dramatic Choices," A Report on Canadian English-language Drama" by Trina McQueen (CRTC, 2003) at http://www.crtc.gc.ca/eng/publications/reports/drama/drama2.htm.
[10] Ibid.
[11] CRTC statistics.
[12] Peter S. Grant, op. cit., at footnote 19.

> "fee for carriage" from the cable industry at the Structural Hearing that year. But with the removal of expenditure requirements for the OTA television sector in 1999, the policy became relevant only for the pay and specialty sector, which quickly discovered that if properly exploited, the policy could allow them to spend less on CPE.

46. As noted in the paper, permitting those top-ups to count as part of the CPE flies in the face of transparency, is discriminatory, unnecessary and allowed the English-language pay and specialty services to underspend their CPE requirements on Canadian drama by more than $55.1 million in 2005 and 2006[13] alone. Moreover, there is no financial need on the part of the pay and specialty broadcasters who are tapping into these public funds in satisfaction of their private regulatory obligations As the Commission itself points out in the Notice, Canadian discretionary services are healthy and mature. At a time when funds are over-subscribed and when there is a real need for new money in the system, there is no justification for this regulatory crutch to be permitted. We strongly urge the Commission to eliminate the policy.

G) REGULATING THE OTA OWNERSHIP GROUPS

47. Mr. Grant's paper also included an innovative proposal to allow specialty services owned by an OTA owner to credit extra spending on scripted Canadian drama towards part of a drama expenditure requirement to be imposed on the OTA licensees. This proposal is well worth studying and should be actively considered by the Commission. Mr. Grant's proposal envisaged that a drama expenditure requirement be imposed on OTA licensees, not including transfer benefits or licence fee top-up, based on the Commission's announced target in its now-cancelled drama incentive plan. CCAU members have consistently urged the Commission to have a Canadian drama expenditure level of at least 7% of revenues for the OTA licensees and it will maintain this position at the OTA renewal hearings next year.

48. CCAU's view is that a 7% target should be the benchmark for the next licence terms of these broadcasters which will not begin until 2008-2009, given that the hearings will be held next year in respect of the OTA broadcaster renewals. This is five years since the Commission mentioned a 6% target to be achieved "over a five-year period" [14].

49. CCAU believes that this, together with the other changes it is recommending elsewhere in this submission, would permit a significant turnaround in the funding and exhibition of Canadian drama. As Mr. Grant notes in his paper, "with consolidation comes greater revenue, greater clout, and greater opportunities to support under-represented Canadian production. By taking the benefits of size into account, the Commission has a real opportunity to address the Canadian drama crisis in a significant and positive way."

H) DISCLOSURE OF BDU FINANCIAL DATA

50. In Broadcasting Notice of Public Hearing CRTC 2007-10-1, the Commission posed the following question:

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[13] CRTC statistics.
[14] Broadcasting Public Notice CRTC 2004-38, 8 June 2004 at paragraph 90.

> The Commission requests that parties address in their comments and proposals in this proceeding, in addition to issues raised in Broadcasting Notice of Public Hearing 2007-10, the possible impact of the Commission disclosing financial information of broadcasting distribution undertakings (BDUs), in particular, that of large BDUs and/or large multi-system operators, in a manner similar to that set out for pay and specialty services in Circular No. 429. The Commission's current practice is to treat the annual returns and historical financial statements of BDUs as confidential. Only the aggregated financial data at the national and regional levels for the industry as a whole is made available to the public. Should the Commission determine that it would be appropriate to disclose such information, it would propose that it be aggregated by ownership group.

51. This question follows on the heels of the question asked by the Commission in the Diversity of Voices proceeding (Broadcasting Notice of Public Hearing 2007-5-2) relating to disclosure of the OTA services' financial returns. It also follows the determination by the Commission in Broadcasting Public Notice CRTC 2006-19 that it would continue to disclose the Annual Returns of the pay and specialty licensees' returns in accordance with Circular No. 429.

52. A few years previous to that, in Public Notice CRTC 2001-27, the Commission approved the release of certain financial information relating to CTV, Global and TVA. The Commission's rationale for allowing the release of the financial information included the following:

> …although conditions of licence regarding Canadian programming expenditures are not generally imposed under the Commission's new television policy, *such data will provide an indication as to how the Commission's new policy is working over the next licence term.* Public access to the data will also allow for a more informed public discussion on the wide range of issues facing the industry. [emphasis added]

53. It is just as important in this case for parties to have as much of this information as possible in order to have an informed and constructive public discussion. BDUs are an essential component of the broadcasting landscape. Many of the issues under the microscope relate to the financial situation of the carriers. For example, as will be seen below, CCAU is of the view, based on industry statistics, that BDUs should be contributing more to the system by way of expenditures on Canadian programming.

54. As noted further below, CCAU also urges the Commission to impose in the Regulations the obligation to pay *monthly* into the CTF.

55. But beyond that, there is a consuming public out there that has an interest in knowing what is going on that might justify why consumers are seeing rate increases, access charges,

packaging choices and so on. Interveners are placed at distinct disadvantage without the necessary tools to make informed comments. The benefits to the Canadian broadcasting system far outweigh any impact that disclosure would have on the BDUs.

56. Accordingly, CCAU recommends that the Commission allow the disclosure of aggregated financial data by BDU ownership group.

I) ANNUAL BDU CONTRIBUTIONS

57. Sections 29 and 44 of the BDU Regulations generally require BDUs to make a 5% contribution to Canadian programming. CCAU believes that this figure should be increased for cable companies, and proposes that the starting point for a discussion on this issue should be 6%, for the reasons we describe below. CCAU also believes that a portion of the additional 1% should be directed to new media productions.

58. It is fascinating to go back and recall how those requirements came about. In the mid-1990s, the Commission was in the process of introducing competition in the distribution sector. The 1997 BDU Regulations, which replaced the 1986 Cable Television Regulations, contained a myriad of new provisions, not the least of which was to free BDUs from rate regulation.

59. One of the many tradeoffs was the imposition of the 5% requirement. This seemed reasonable enough at the time. Indeed, in introducing the new provision, the Commission said the following in Public Notice CRTC 1996-69:

> Broadcasting distribution undertakings are important participants in the Canadian broadcasting system and play a crucial role in achieving the objectives of the Act. The Act stipulates in paragraph 3(1)(e) that *"each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming". The Commission has determined that all distributors should contribute a minimum of 5% of their gross annual revenues derived from broadcasting activities to achieve this fundamental objective.*
>
> Consistent with the Commission's licensing approach for DTH distributors, it would remain a requirement that these undertakings allocate 5% of the gross annual revenues derived from their broadcasting activities to an independently-administered production fund. As noted earlier, DTH distributors would not be required to provide opportunities for local self-expression. [emphasis added]

60. In the CTF Task Force Report issued this past June, the Commission described the origins of the CTF in the following manner:

> In Public Notice 1993-74, the Commission determined that contributing to the development of Canadian programming was an important Canadian broadcasting policy objective and laid the

> groundwork for the creation of a fund based upon voluntary contributions by BDUs.
>
> Building on a proposal by the Canadian Cable Television Association (CCTA), cable BDUs were permitted to voluntarily pay into a fund. The Commission would then suspend the reductions required under the Cable Television Regulations, 1986 for licensees who contributed 50% of the amount by which the basic monthly fee would otherwise have been reduced. BDUs that contributed to the fund were permitted to keep the remaining 50% [15].

61. The scale of the contributions has grown over the years as BDU revenues have increased. The Commission noted elsewhere in Public Notice 1996-69 that

> …, based on the 1995 cable television annual returns, licensees spent approximately $43 million on direct expenses for community programming during the year ended 31 August 1995. This amount represents about 1.7% of the $2.5 billion in gross annual revenues reported by the cable industry for that year.

62. The following year, the Commission's Public Notice that actually accompanied the release of the new BDU Regulations indicated that,

> 121. Having considered all of the evidence, the Commission is of the view that all distribution undertakings, with the exception of Class 3 terrestrial distribution undertakings, should be required to contribute a minimum of 5% of their gross annual revenues derived from broadcasting activities to assist in meeting the objective set out in paragraph 3(1)(*e*) of the Act.
>
> 122. Based on the comments received during the written and oral phases of this process, the Commission also intends to include in the new regulations a requirement that DTH distributors allocate the entire 5% programming contribution to an independently-administered production fund.

63. There was a significant debate at the public hearing about how the 5% should be split between community programming and arms-length independent funds. The cable industry wanted as much as possible allocated to the community channel. The Commission allowed some of the funds to be directed in that manner, but not all. In this regard, it said,

> 130. In light of the above, the Commission intends to adopt an approach to local expression that will provide distributors maximum flexibility to meet their obligations under the Act to contribute to the creation and presentation of Canadian programming in a manner and

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[15] Report of the CTF Task Force, 29 June 2007, available at http://www.crtc.gc.ca/eng/publications/reports/ctf2007.htm

> form that takes into account their respective circumstances. While the Commission remains of the view that community programming, and the broader goal of local expression, are vital components of the broadcasting system, it does not intend to require any distributor to provide an outlet for local expression under the new regulations.
>
> 131. This policy reflects the Commission's belief that opportunities for local expression would continue to be provided in the absence of a regulatory requirement. In the Commission's view, after more than twenty-five years of operation, the community channel has achieved a level of maturity and success such that it no longer needs to be mandated. Apart from its benefits to the public through local reflection, the community channel provides cable operators with a highly effective medium to establish a local presence and to promote a positive corporate image for themselves.

64. In other words, that programming would get done anyway and it serves as a real public relations vehicle for the cable industry (and in many ways a competitive advantage over DTH who are in no position to offer such a service).

65. Since that time, BDU revenues have soared, reaching more than $6 billion in 2006 for cable and more than $1.7 billion for DTH. This contrasts with the $2.5 billion total in 1995 when the 5% figure was first introduced. PBIT in 1995 of $618 million is now dwarfed by the 2006 PBIT of $1.437 billion, more than double. Clearly, the 5% that was instituted when cable was about to face competition for the first time has allowed BDUs to fulfill the requirement of Section 3(1)(*e*) of the *Broadcasting Act*. Is it sufficient going forward?

66. CCAU thinks the Commission should revisit the programming contribution made by cable. The PBITs and operating profits of those entities have increased substantially. CCAU notes as well that DTH is in a worse position financially than its cable competitors, such that a “one-size fits all” approach to increasing the contribution might not fit.

67. The 2006 BDU figures released by the Commission in July 2007 also showed that there have been some remarkable increases between 2005 and 2006. For example, the sales and promotion expense shot from $162 million to $446 million. As the Commission’s note on the figures indicates that the “annual results in this report are not comparable,” CCAU is not in a position to conduct much of the additional analysis the Commission would require.

68. However, clearly the cable industry can afford to increase the amount it puts into Canadian programming. As noted by the Commission, the Act stipulates in paragraph 3(1)(e) that "each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming".

69. Programming undertakings have had their contributions consistently hiked by the Commission at licence renewal time. Since cable renewals are all non-appearing, the opportunity for that discussion is now. CCAU believes that cable’s contribution can and

should be increased. Without more information, CCAU would suggest that a 6% figure would be an appropriate place to start the discussion.

70. In CCAU's view, the additional funds should be directed to an arms-length funding agency, preferably the CTF as presently constituted. If the previous recommendations of the CTF Task Force are implemented, CCAU does not support this incremental funding to the CTF. Community channel funding is sufficient at the present time. It is noteworthy that in 2006 alone, the amount spent by Class 1 cable systems on community programming increased from $94 million to $101 million. That ought to be sufficient for a vehicle that also serves as a cable promotional exercise.

J) MAINTENANCE AND INCREASE OF TRANSFER BENEFITS

71. In the Diversity of Voices proceeding held in September 2007, the issue as to whether it was appropriate to dispense with transfer benefits was raised. CCAU feels strongly that the transfer benefit policy should be maintained for two reasons. First, it fills a public policy vacuum. Second, it funds a volume of high quality Canadian programming.

72. The transfer benefits were instituted by the Commission to enable it to avoid having to hold competitive licence transfer situations. In the 1970s the Commission considered calling for bids when a broadcaster wanted to sell his or her business. The Commission decided that that this would not be workable and instead decided that requiring "significant and unequivocal benefits" on changes of control would be the appropriate method by which to proceed.

73. In other words, in effect, the benefits policy is a substitute for a competitive process and is what allows the Commission to say, as it routinely does, that it must be satisfied that this is the best possible transaction in the circumstances as far as the Canadian broadcasting system is concerned. (see Public Announcement CRTC, July 25, 1978 "Proposed Procedures and Practices Relating to Broadcasting Matters".)

74. Accordingly, removal of the transfer test would leave the Commission right back where it was in the late 1970s. The Commission might want to again consider what it called a "competitive transfer system" but this is an unlikely approach.

75. Second, if one recalls the chart shown earlier with respect to Canadian drama expenditures, it is apparent that one cannot rely on either routine broadcaster expenditures or transfer benefits to supply sufficient funding to allow for the creation and exhibition of an appropriate quantity of scripted Canadian dramatic productions. Both are required. Both are essential. As is made evident by the chart, expenditures plummeted even with the transfer benefits (which were supposed to be incremental, and not a replacement). It is clear that both an expenditure requirement and a benefits policy are key ingredients of a successful drama policy.

76. Rather, CCAU has the following recommendations for amending the current formulation of the benefits test:

    (a) stipulate that the 10% benchmark is a *minimum level* and that it may be increased to higher levels to take account of larger transactions or special circumstances;

(b) ensure that a given portion of the transfer benefits goes to 10-point Canadian drama in the same manner that a given percentage of radio transfer benefits must be given to FACTOR/Musicaction. CCAU recommends that no less than two-thirds would be the correct percentage, even though FACTOR/Musicaction receive five-sixths of radio transfer funds;

(c) widen the scope of the definitions so that they cover not only changes of control, but also situations where the transfer is from one of clear cut control to one of no clear cut control; and

(d) consider a requirement that a portion of transfer benefits in excess of the 10% benchmark be spent on new media productions.

K) PROGRAMMING OBLIGATIONS

77. Turning now to programming obligations, the Notice outlines the various levels of programming obligations and then asks the following questions:

> 49. The Commission seeks comment on how programming obligations of pay and specialty services should be balanced with providing greater competition among programmers and more flexibility for BDUs with respect to the distribution of programming services. For example, if the Commission were to eliminate genre requirements and/or access rights for analog and Category 1 services, what factors or criteria should be taken into account to determine what appropriate contribution levels should be? How would the obligations of such services relate to those of Category 2 services? The Commission also seeks comment on whether both exhibition and expenditure requirements for analog and Category 1 pay and specialty services are still relevant to ensure appropriate levels of support for Canadian programming while providing maximum flexibility for such services to compete and to take advantage of on-demand and new platforms to extend their programming.

78. CCAU has a strong concern with respect to the direction this suggests. This question suggests a scenario where a number of programming service supports such as genre protection or access rights are removed in the name of “market forces” with the consolation prize being that the programming service can apply to reduce its Canadian content “contribution levels”. This would be a horrible trade-off for the Canadian broadcasting system.

79. Currently, Canadian consumers have a broad range of choice of services. Programming services schedule or make available a selection of Canadian programs, including drama, primarily because of the CPE requirements. CCAU would argue there is still room for improvement which is an issue that is appropriately addressed at licence renewal time. Advertising revenues are growing so advertisers seem to be content that the services are delivering audiences to them. And both the programming services and BDUs are making

money. Regulatory requirements are essential to ensure the existence of high quality and original Canadian drama. It cannot be left to the mercy of "market forces".

80. Introducing "competition" by lowering Canadian content obligations is not what the CRTC should be looking at, especially in a situation where there has been no demonstrable proof of a desire by Canadian viewers or subscribers for such an outcome.

81. Indeed, the Commission has rejected that approach in the past. In the mid-1980s, the Commission licensed a number of competing pay television services. It then had to consider what to do in light of the fact that they were all losing money and threatened with bankruptcy. The Commission was faced with two possible visions. One was to reduce Canadian content and allow the "competition" to continue in light of the theoretical benefits to Canadian consumers. This was the view espoused by the Competition Bureau, then headed by Lawson Hunter, which appeared as an intervener in the CRTC proceeding.

82. The Commission took a different tack. It approved a scenario where the country was divided into regional monopolies, with what became part of Corus in Western Canada and with what became part of Astral in Eastern Canada. This allowed the services to become profitable without sacrificing their significant Canadian content obligations. More recently, when the CRTC finally felt that the industry was mature enough to sustain the addition of a direct national competitor to Corus and Astral, it made it clear that the new competitors would be subject to the same if not higher Canadian content obligations.

83. Specifically, CCAU's concern in this regard is that the lower levels of Canadian programming exhibition (and particularly, the lack of CPE requirements) of the Category 2 digital services will be touted as the new benchmark for Canadian specialty services. This would be a disaster for Canadian broadcasting policy, and would undermine the objects of the Act.

L) ADDITIONAL COMMENTS

84. The Commission has asked for comments on a number of additional issues. CCAU proposes to review the first round submissions of the parties and potentially to come back in the second round with additional commentary. However, CCAU does wish to offer the following preliminary observations as regards a number of collateral matters.

(a) Maintenance of the CTF

85. Although not officially part of this process, CCAU is aware of the Commission's forthcoming decision relating to the CTF. Since this proceeding relates to the BDU Regulations, it should be made clear that:

(a) The CTF should fund 10 point Canadian productions only;

(b) The funding of CTF should not be decreased and, if anything, it should be increased as discussed above;

(c) It should be written into the BDU Regulations that BDU payments to the CTF are to be made monthly;

(d) Funds should not be taken out of the CTF for new media. If funding is required for "new" media, then there should be "new" funding. It is not appropriate to reduce funding of "traditional" media when there already is insufficient funding in that area. One idea in that regard is set out in the next section; and

(e) Only one stream for the CTF funds, not two as proposed by the CRTC Task Force.

(b) A New Media Fund

86. The figures published by the Commission in July suggest that cable is making an 85% profit margin on the exempt Internet services it is carrying. Since ISPs are making such tremendous margins carrying traffic to subscribers the Commission should consider a levy on ISPs to support a new media fund.

87. While on the subject of new media, it ought to be a principle that creators of new product that is distributed via new media should be compensated for it, and that accordingly broadcasters should not be permitted to dictate the terms under which they will acquire new media rights, including acquiring the rights for no additional or token licence fees. Under such circumstances the broadcaster earns all of the added revenue from the new media exploitation, either through direct fees earned from viewers or the added advertising opportunities, and no revenue is flowing back to the producers to be shared with the writers, directors, performers and other creative talent.

88. CCAU appreciates that these are more properly the subject of a more fulsome discussion at next year's anticipated New Media proceeding.

(c) Genre Exclusivity

89. As this is one of the underpinnings of the specialty industry, CCAU does not see the need, or the desirability, for its removal. Having specialty services fighting with one another will inevitably result in less money for Canadian programming, and in particular, Canadian dramatic productions. More importantly, without genre exclusivity, the Canadian broadcasting system runs the risk of losing diversity of programming as broadcasters switch to lowest cost programming to meet their CPE requirements. This would mean both a glut of cheap reality programming but also the amortization of program costs by airing the same programs across station groups. We have recently seen this latter phenomenon with the increased frequency of the "CSI" franchise on Alliance Atlantis specialty channels regardless of their licensed genre. The result is less original Canadian programming on the air.

90. The issue of genre exclusivity is compounded by the disappearance of wholesale rate regulation for specialty services in the digital migration policy, and the proposed removal of distribution and linkage, access rules, etc. as outlined in the Notice. One has no difficulty imagining a scenario where there are only two or three large broadcasters left in the system with the independent voices all having been crushed by services who had the size and muscle to overcome the removal of these supports.

91. Genre exclusivity has been a key ingredient that has allowed an entrepreneur to take the risk and try to develop a particular programming niche. Once successful, the high fence around the genre ensured that the core programming franchise remained intact. If genre exclusivity is removed, the race will simply be won by the party with the deepest pockets.

92. CCAU has not been persuaded by anything it has read on the file that genre exclusivity is a problem. Those who might favour removal of genre exclusivity should be required to show how that would help to fulfill the objectives of the *Act*.

(d) Authorisation of non-Canadian services

93. CCAU does not think that reducing the barriers to foreign entry is an appropriate regulatory response at this time. The system of not authorizing for distribution in Canada a non-Canadian satellite service that would compete in whole or in part with a Canadian pay or specialty service(s) has worked well for many years. Canadians are not deprived of access to foreign programming in particular genres. The Canadian service in a particular genre is free to acquire, and frequently does acquire, the rights to foreign programming and to make it available to Canadians. So, we continue to have access to U.S. and other foreign history, food, gardening programs, and other categories.

94. As a practical matter, it would seem to CCAU that even if Canada were prepared to loosen the restrictions on entry for non-Canadian services, it should consider such a move at a time when there might be a possible quid pro quo in terms of a chip at the trading table. At the present time there is nothing being offered by any foreign country in exchange.

95. The premise for a change is “should the Commission elect to eliminate, or broadly define, genre for Canadian pay and specialty services.” As noted, CCAU does not think that the premise would be advisable either.

96. In conclusion, the current case by case approach to admitting non-Canadian services appears to be working in an acceptable manner and should not be changed.

(e) Access and Preponderance

97. The idea of moving to a preponderance regime (as opposed to what we have now) appears to mean nothing more than the potential removal of a number of Canadian television services and their replacement by non-Canadian services. This appears to be an inappropriate method of dealing with the current situation. In addition, the status quo has the side benefit of avoiding having to deal with a number of Commission issues such as how to measure “preponderance”.

98. With respect to “access,” the Commission has stated, at paragraph 32 of the Notice, the following:

> Given the Commission’s objectives with respect to reducing regulation to a minimum and considering the maturity of the discretionary services industry, the Commission regards it as timely to consider eliminating all or most access rules pertaining to analog

> and Category 1 pay and specialty services, relying instead on a preponderance requirement or requirements, such as that set out above, to ensure that Canadian programming services occupy a central place within the broadcasting system. *In the Commission's view, such an approach would contribute significantly to a simplification of the rules applicable to BDUs, perhaps facilitating a reduction in the number of licence classes and the elimination or reduction in the number of specific rules applicable to various sizes and/or types of distributors.* Accordingly, the Commission seeks comment on such an approach, including comment on any particular issues or considerations relevant to French-language pay and specialty services. [emphasis added]

99. CCAU has highlighted the rationale in the quote above. In exchange for handing BDUs the ability to decide which licensed Canadian services it wishes to carry, and to negotiate better terms from services in exchange for such carriage, CCAU understands that the regulatory benefit is that this would "contribute significantly to a simplification of the rules applicable to BDUs." That is not an object of the Act in and of itself. BDUs understand the rules as they now are, and are operating quite profitably within them. As noted previously, cable revenues exceeded $6 billion in 2006 and the PBIT margin was almost 23%.

100. It will not be lost on the Commission that all revenue from a pay or specialty service attracts a meaningful CPE. If cable negotiates lower affiliation payments with a service (which would follow as certainly as night would follow day if the access distribution and rate-setting rules are all jettisoned), that revenue and the concomitant CPE would decline. Nothing that is on the record of this proceeding would justify this result. That money should be used for on-screen benefits, not BDU profits.

101. The moment a BDU does not have to carry every Canadian service, each specialty service will have to buy its way on to a BDU. Until it has paid the price, it will not be entitled to be carried. The price will go directly to the bottom line of the BDUs. And the worst part is that since the payment can be taken by lowering affiliation payments, there is no CPE that kicks in at the BDU level.

102. Take the following simple example. A BDU is currently paying a service that it must carry $1 million per year in affiliation payments. It no longer has to carry the service if the Commission eliminates the access rules and replaces them with a preponderance test. It tells the service (and CCAU is being charitable here), $750,000 next year. The service, of course, is just thankful to be carried in the new Wild West where the BDU is the sheriff. It receives $250,000 less next year. if it has a 40% CPE requirement, then $100,000 less will be spent on Canadian programming.

103. This scenario cannot help but be repeated over and over and over. And there is no corollary benefit. BDUs are not about to lower their subscriber fees. Since this is a cost saving to BDUs and not additional revenue stream, it is not even subject to the 5% of revenue that BDUs contribute to Canadian programming.

104. It is to be recalled that this "negotiation" between BDUs and the services will happen even if no Canadian service is dropped. It is the ability of the BDU to threaten the service with being dropped that causes the problem. No service will know whether it will or will not be carried. And this is true of both programming services looking for carriage and of programming services looking to maintain carriage.

105. In CCAU's view, the Commission might as well have simply determined that BDUs were in need of a significant profit infusion and that the way to accomplish this would be to set up a scheme that resulted in either outright payments for carriage by pay and specialty services or reduced affiliation payments to them by BDUs. Either way, this represents a sea change in the direction of the broadcasting ecosystem. This is the American way, with services begging for the right to be carried by BDUs. This is the way that decades of CRTC policy had managed to avoid.

106. It is clear to CCAU that the existing rules are part of a package that has served the system very well. Kicking out the supports for licensed Canadian programming services can only result in lower payments to services, engendering lower expenditures on Canadian programming. Since this is the mother's milk of the Canadian production industry, the results can only be detrimental to the health of the Canadian broadcasting system.

(f) Distribution and Linkage

107. In the Notice, the Commission states that

> 43. It is the Commission's view that program packaging should be a matter left more to negotiations between programmers and distributors. Accordingly, the Commission proposes to eliminate most of the distribution and linkage rules, in respect of both analog/SD and HD services, and both analog and digital distribution.

108. This is another "BDU as gatekeeper" question. Thus far the Commission has moved away from rate regulation (in the digital migration decision, Broadcasting Public Notice CRTC 2006-23) and now is looking at eliminating the access rules and the distribution and linkage rules. It is CCAU's thesis that this will simply transfer the role of deciding which licensed Canadian services should live and which should die from the Commission to the BDUs.

109. CCAU would recommend the status quo unless there is some compelling evidence that turns up in Round One of these comments. Depending on the final rules the Commission adopts in relation to the Diversity of Voices hearings, (Broadcasting Public Notice CRTC 2007-5), it is likely that there will be increasing corporate integration between programming services and distribution undertakings. Without appropriate access and distribution rules, the potential for self-dealing and anti-competitive behaviour is enormous. This is contrary to the interests of other players in the broadcasting system and to consumers.

(g) Video on demand and pay per view

110. These services have low Canadian requirements that should be increased. Given that it is not possible to oblige Canadians to order Canadian programming, the Commission's focus

should be on ensuring shelf space for Canadian programming as well as on raising the Canadian content expenditure levels.

111. Generally, the pay per view services are doing well financially. They are more mature and have healthy PBITs. In CCAU's view, they should be reviewed at renewal time with the same approach as the Commission has used in renewing the specialty services in 2004. If the "low introductory price" of 5% of revenues has outlived its usefulness, then the Commission should increase it. That could be done on a case by case basis as well. The 5% could be left as a floor with the equivalent of a "surtax" levied on those on whom the Commission feels it appropriate.

112. VOD services should, in CCAU's view, be treated in the same manner although they have developed in earnest more recently. Some are doing very well while others are just setting up. There should be a floor as well as an increase if such an increase is warranted.

113. There is another issue with respect to VOD services which the Commission has identified in the Notice. At some point, a subscription VOD ("SVOD") channel becomes very confusing with a linear channel. If the linear channel has higher Canadian content and other obligations, it is placed at a disadvantage. A related problem occurs when the SVOD programming service features programming from services not currently permitted entry into Canada.

114. This can be both temporary and permanent. For example, a service which has been "sponsored" but which is awaiting approval by the Commission can, in effect, launch a year early by placing its branded programs on VOD in order to achieve some sort of recognition in the Canadian marketplace. Having thus tilled the soil, it is an easy thing to move to the linear channel once Commission approval is obtained. The VOD offering may or may not be terminated at that point.

115. More nefarious is the possibility that the non-Canadian service will not, or can not, gain entry into Canada. There is little point in maintaining the Eligible Satellite Lists if a non-Canadian service that is not "eligible" can gain entry to the Canadian broadcasting system via this backdoor mechanism. These non-Canadian program packages have no Canadian content obligations. As digital migration continues and digital box penetration increases, the Commission needs to continue to be vigilant in ensuring that this is not a route to have a quasi-linear channel dressed up as a VOD offering.

116. At this juncture, CCAU is not certain of the degree of the impact and looks forward to reviewing the submissions of other parties with more direct knowledge of this area before making any detailed recommendations.

(h) New revenue opportunities

117. CCAU is generally supportive of new revenue opportunities for broadcasters as long as it gets measured and brought back into the Canadian broadcasting system by way of CPE. CCAU notes again that the CPE requirements are much more significant for broadcasters than they are for BDUs and therefore, without examining the specifics of each case, are intuitively inclined to want to see broadcasters increase their revenues.

(i) Category 2 Applications

118. CCAU is sympathetic to the workload created for Commission staff by the processing of services that never see the light of day. However, it is unlikely that a BDU will want to be put in the position of "green-lighting" a service a year or two in advance of when it might launch if approved by the Commission. Other alternatives that the Commission offered for comment included requiring evidence of a business plan and/or program arrangements. The reality is that program suppliers, especially large non-Canadian ones, will not want to waste their time negotiating a program agreement with someone who does not yet (or may never) have a licence. At street level, in other words, just like at the Commission, nobody wants to waste time with a "wannabe" Category 2 service.

119. CCAU has an alternative suggestion. Perhaps the Commission could require "would be" Category 2 service providers to post a "bond" of sorts with the Commission which is forfeited if the Commission approves the application but the service does not launch within 3 years. The amount should not be punitive but should be in the nature of cost recovery. That way, the Commission can retain the necessary staff to process these applications. Chances are good that this requirement might narrow down the number of Category 2 applicants as well.

120. CCAU reiterates its concern that the lower thresholds for Canadian content on Category 2 services should not be seen as the "lowest common denominator" to which other licensed services aspire. They were permitted to launch with lower Canadian content levels in an effort to populate the burgeoning digital world with an attractive array of services. Once these services have completed their early years, they become indistinguishable from other services on the dial and should be required to step up their contributions at licence renewal time.

(j) Undue preference or disadvantage

121. CCAU would support placing the onus back on the BDU to prove that it did not engage in an undue preference or subject a service to an undue disadvantage. The task is difficult one for a complainant as the rule now stands as the BDU is usually in possession of the information that is required in order to prove the case. It also requires a programming undertaking with extraordinary courage to come before the Commission to take advantage of this mechanism given the control that the BDUs have on distribution to end users.

122. CCAU does support the recommendation in Dunbar-Leblanc that

> Consideration should also be given to asking the Minister of Heritage to consider the possibility of tabling legislation to grant the CRTC a power to impose administrative fines similar to the amendments proposed by the Telecommunications Policy Review Panel to the Commission's powers under the *Telecommunications Act.* In our view, the Commission's power to revoke broadcasting licences, and the criminal sanctions in the Act, are not very practical means of

> enforcing regulatory obligations – except in the most egregious cases[16].

123. Under the current regime, there is very little risk for having been found to have abused a gate-keeper position.

(k) Dispute Resolution

124. The Commission has asked for comment on changes to its dispute resolution system should it decide to replace access requirements with a preponderance requirement. CCAU has already indicated that it does not think that moving to a preponderance regime is the right approach. It has no recommendations as to how to streamline/improve the dispute resolution mechanism at this time but will review the comments of others in the first round of comments.

(l) Independent production thresholds

125. Independent production is one of the elements that assures Canadians of a diversity of voices within our broadcasting system. What is needed is to have a stronger, not weaker, independent production community. Independent productions are developed with the marketplace in mind and tend to be of higher quality and budget due to those competitive pressures. English-language Canadian programs must compete with the U.S. market for audience, are not protected by being in a distinct language and therefore must have high enough budgets to be of comparable quality to the U.S. programs. Only the best independent productions can raise the necessary financing and earn broadcast licences. The independent producers present a range of alternative projects to the broadcasters, who then choose only the very best. The competitive process also ensures a wider pool of talent working on these productions which not only supports diversity but also strengthens our indigenous production industry.

M) CONCLUSION

126. CCAU appreciates the opportunity to make its views known in this important proceeding. CCAU is very concerned about the rapidity of the proposed deregulation process and strongly urges the Commission to continue with measured steps that will improve the strength of the broadcasting system and fulfill the objectives of the Act.

127. As stated, CCAU has set out in Appendix 1 a list of our recommendations. We look forward to reviewing the recommendations of others and participating in the next round of this process and in the public hearing scheduled for February, 2008.

[16] Dunbar-Leblanc, page xviii.

APPENDIX 1

SUMMARY OF RECOMMENDATIONS

CCAU makes the following recommendations with respect to matters raised in Broadcasting Notice of Public Hearing CRTC 2007-10, 5 July 2007:

Recommendation 1

CCAU feels it is clear that a number of the Commission's existing measures are essential in order to carry out the objects of the *Broadcasting Act* (the Act). They include the following:

(a) exhibition requirements for Canadian programming imposed on the pay and specialty services;

(b) expenditure requirements for Canadian programming (the "CPE" requirements) imposed on the pay (including VOD) and specialty services;

(c) BDU carriage of Canadian programming services; and

(d) the levy on BDU revenues to support the creation of Canadian programming.

Recommendation 2

Exhibition and expenditure requirements for pay and specialty services must remain in place. These requirements are critical to the Canadian broadcasting system's success and have been very successful in supporting the objects of the Act. The evidence submitted by the CCAU in this submission demonstrates that if the Commission eliminates expenditure requirements, there will be disastrous effects on Canadian programming, particularly drama.

Recommendation 3

The Commission should eliminate the ability of specialty and pay television licensees to use "licence fee top-up" monies from the CTF to reach their CPE targets. To permit those top-ups to count as part of the CPE flies in the face of transparency, is discriminatory, unnecessary and has allowed the English-language pay and specialty services to underspend their CPE requirements on Canadian drama by more than $29 million in 2006 alone. At a time when funds are over-subscribed and when there is a real need for new money in the system, there is no justification for this regulatory crutch.

Recommendation 4

CCAU recommends that the Commission actively consider the proposal by Peter S. Grant, in a paper recently delivered to the Centre for Innovation Law & Policy, Faculty of Law, University of Toronto, to allow specialty services owned by an OTA broadcaster to credit extra spending on

scripted Canadian drama towards part of a drama expenditure requirement to be imposed on the OTA licensee. CCAU also recommends that the appropriate expenditure requirement to be imposed on the OTA broadcasters be 7% of their revenues.

Recommendation 5

The Commission should make available to the public aggregated financial data by BDU ownership group. The benefits to the Canadian broadcasting system in terms of transparency, views into how current policies are working and a more informed public discussion on the issues facing the industry, far outweigh any impact that disclosure would have on the BDUs.

Recommendation 6

BDUs should continue to be required to contribute a percentage of their revenue to Canadian programming, and that percentage should be increased given the financial circumstances of the BDU industry. CCAU recommends that cable operators be required to increase their contributions from 5% to 6%. The additional 1% should be directed to the CTF assuming it remains as presently constituted and the changes proposed by the CTF Task Force in June are not implemented. A portion of the amount represented by the additional 1% should be allocated to new media productions.

Recommendation 7

The CRTC should amend the *Broadcasting Distribution Regulations, 1997* to require BDUs to make their payments to the CTF on a monthly basis.

Recommendation 8

With regard to the CTF and the Commission's forthcoming decision regarding that fund, CCAU reiterates that:

(a) the CTF should fund 10 point Canadian productions only;

(b) the funding of CTF should not be decreased and, if anything, it should be increased as discussed above;

(c) it should be written into the BDU Regulations that BDU payments to the CTF are to be made monthly;

(d) funds should not be taken out of the CTF for new media. If funding is required for "new" media, then there should be "new" funding. It is not appropriate to reduce funding of "traditional" media when there already is insufficient funding in that area; and.

(e) there should be only one stream for the CTF funds, not two as proposed by the CRTC Task Force.

Recommendation 9

The CRTC's transfer benefits policy should be maintained for two reasons. First, it fills a public policy vacuum. Second, it funds a volume of high quality Canadian programming. We do, however, have the following recommendations for amending the current formulation of the benefits test:

(a) stipulate that the 10% benchmark is a *minimum level* and that it may be increased to higher levels to take account of larger transactions or special circumstances;

(b) ensure that a given portion of the transfer benefits goes to 10-point Canadian drama in the same manner that a given percentage of radio transfer benefits must be given to FACTOR/Musicaction. CCAU recommends that no less than two-thirds would be the correct percentage, even though FACTOR/Musicaction receive five-sixths of radio transfer funds;

(c) widen the scope of the definitions so that they cover not only changes of control, but also situations where the transfer is from one of clear cut control to one of no clear cut control; and

(d) consider a requirement that a portion of transfer benefits in excess of the 10% benchmark be spent on new media productions.

Recommendation 10

Since ISPs are making significant margins carrying Internet traffic to subscribers, the Commission should consider a levy on ISPs to support a new media fund. A new media fund should be financed with new funds, and not funds diverted from traditional media.

Recommendation 11

CCAU urges the Commission to retain genre exclusivity. The introduction of competition amongst the pay and specialty services will inevitably result in less money for Canadian programming, and in particular, Canadian drama. Without genre exclusivity, the Canadian broadcasting system runs the risk of losing its diversity of programming as broadcasters switch to lowest cost programming to meet CPE requirements and amortization of program costs by airing the same programs across station groups. The end result of this "race to the bottom" is less original Canadian programming on the air and less diversity.

Recommendation 12

The barriers to entry of non-Canadian satellite services that would compete with Canadian pay or specialty services should remain in place. The current system ensures Canadians are not deprived of access to foreign programming as the Canadian services are free to acquire foreign programming in their particular genres. Further, even if Canada were prepared to loosen the restrictions on entry, it should consider such a move at a time when a foreign country is offering a like benefit in exchange.

Recommendation 13

CCAU strongly urges the Commission to keep current access rules pertaining to analog and Category 1 pay and specialty services. The current system has been successful and balanced as both BDUs and specialty services find themselves in strong financial positions. A removal of the access rules and a shift to a preponderance regime would lead to a strengthening of the position of BDUs as gatekeepers to the detriment of the specialty services. The resulting reduction in affiliation payments to services would mean lower expenditures on Canadian programming, endangering the Canadian production industry and the Canadian broadcasting system as a whole.

Recommendation 14

CCAU recommends that current distribution and linkage rules remain in place. A removal of these rules can only serve to strengthen the BDUs' position as gatekeepers. Without appropriate access and distribution rules, the potential for self-dealing and anti-competitive behaviour is enormous. This is contrary to the interests of other players in the broadcasting system and to consumers.

Recommendation 15

Video on demand and pay per view services have low Canadian requirements that should be increased. The Commission's focus should be on ensuring shelf space for Canadian programming as well as on raising the Canadian content expenditure levels. CCAU recommends that VOD services be reviewed at renewal time with the same approach as the Commission used in renewing the specialty services in 2004.

Recommendation 16

CCAU generally supports new revenue opportunities for broadcasters as long as they are measured and some portion of those streams is brought back into the Canadian broadcasting system by way of CPE.

Recommendation 17

The lower levels of Canadian programming exhibition (and particularly the lack of CPE requirements) of the Category 2 digital services should not be treated as the new benchmark for Canadian specialty services.

Recommendation 18

CCAU supports placing the onus back on the BDU to prove that it did not engage in an undue preference or subject a service to an undue disadvantage.

Recommendation 19

CCAU supports the recommendation in Dunbar-Leblanc calling for increased power for the CRTC to impose administrative fines.

APPENDIX 2

PRESENTATION MADE BY PETER S. GRANT TO THE CENTRE FOR INNOVATION LAW & POLICY, FACULTY OF LAW, UNIVERSITY OF TORONTO, ON SEPTEMBER 24, 2007

Addressing the Canadian Drama Crisis:
A Modest Proposal

Presentation to the
Centre for Innovation Law & Policy
Faculty of Law, University of Toronto

September 24, 2007

Peter S. Grant[1]

Introduction and Executive Summary

Today I want to address what is one of the most difficult and unresolved issues for the CRTC – namely, the broadcast of original Canadian scripted drama by the over-the-air English language TV stations in Canada. (In this presentation, the term "drama" includes both drama and comedy). Six years ago, the incoming chair of the CRTC lamented the relative scarcity of popular indigenous drama series on our private broadcast schedules, given the importance and impact of this program genre. Over the next five years, the CRTC studied the problem and initiated a complicated incentive system to address it. But only six months ago, the CRTC abandoned the incentive system. Apart from being overly complex, it simply didn't work. Last year, advertising revenues for the English TV stations in Canada were at an all-time high -- $1.69 billion. Yet despite the incentive plan, they spent only 2.4% or $40 million on Canadian drama, the lowest amount in 10 years.

The decline in support for drama from the English language over-the-air ("OTA") private TV broadcasters is understandable. After all, apart from expenditure commitments made as part of new licence or transfer benefits, the CRTC has not imposed expenditure requirements on these broadcasters since 1999. They only have scheduling requirements, and these can be fulfilled with cheaper forms of Canadian programming. Yes, we have had some successful Canadian drama programs like *Corner Gas* or *Degrassi: The New Generation* on private television, but these were only funded because of drama expenditures committed to as part of time-limited transfer benefits. Unless they have to, it makes eminent financial sense for Canadian private broadcasters to avoid funding Canadian drama. It is risky and expensive programming that makes no money for them.

Why focus on the private OTA broadcasters to address the Canadian drama problem? After all, some argue that their future is uncertain as advertisers move to the Internet. And others

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[1] Senior Counsel, McCarthy Tétrault LLP, Toronto, Canada. © Peter S. Grant, 2007. The views expressed in this presentation are those of the author only and do not represent the views of McCarthy Tétrault LLP or any of its clients.

argue that the only solution to the drama problem lies with the CBC, which spent $57 million last year on Canadian drama, and had the unexpected hit, *Little Mosque on the Prairie*. Others would focus on the pay and specialty television sector, which had record profits last year and spent $138 million on English language Canadian drama.

So why the emphasis on the private OTA broadcasters? For a number of reasons. The OTA TV broadcasters remain the foundation of the system. They alone are capable of garnering the kind of ratings that generate the "water cooler" effect. Canadian drama programs aired first on the OTA broadcasters then become the library that supports the specialty services, none of which can individually afford to commission original mainstream drama at the costs that are required. In addition, if we want true diversity of voices, we need to have more green lights for Canadian drama, not less, and it makes sense to require the private OTA broadcasters -- which are dependent on high-ticket U.S. drama -- to support Canadian drama as well.

Moreover, the private OTA broadcasters are better positioned than ever before to support big-ticket Canadian drama. Years ago, the English language private TV sector was made up of quarrelling CTV affiliates and a handful of independents, none of which had national coverage. Now the privately-owned English language OTA television system has devolved to three big players, CTV, CanWest and Rogers, each with national coverage. Consolidation allows them to be more efficient. And more to the point, they all have profitable specialty services in their stable. So their combined clout has never been greater.

All of which leads to a modest proposal as to how to address the Canadian drama crisis. The key point is to regulate the privately owned OTA broadcasters on the basis of their group holdings.

One would start by imposing a simple condition of licence on the privately owned English language OTA broadcasters when they come up for renewal next year. Going forward, they should expend at least 6% of their regulated revenue from the previous year on scripted Canadian drama. Back in 2004, the CRTC itself set the 6% level as an appropriate target in its now-dead drama incentive plan. But it would now be elevated from a target to a requirement. So now it would have teeth.

At the same time, I would introduce some new rules for the pay and specialty sector.

I would keep the existing requirement that pay and specialty services expend a minimum percentage of their revenue on Canadian programming (the so-called "CPE" requirement) , but make three changes in policy. First, I would eliminate the "licence fee top-up" policy, under which the services can count money independent producers receive from the Canadian Television Fund towards their CPE requirement. Second, I would regulate all the pay and specialty services owned by one firm as a group. Under this plan, it would be possible for a service to underspend its CPE requirement provided this was matched by overspending on a sister service. As long as the total CPE requirement was met, the licensees would be in compliance. This would give a lot more flexibility for the licensees in regard to spending.

My third proposal is more revolutionary. All specialty licensees currently report how much they spend each year on each program genre. I would use the average amount spent over

the last three years on scripted Canadian drama as a benchmark. And for every dollar spent by a specialty service on scripted Canadian drama in excess of that benchmark in future years, I would allow the group owner to count that towards at least half of the 6% requirement for such drama imposed on its OTA services, provided the resulting drama was given a first run on those services. In effect, this would create a system of "drama credits," which could be used to satisfy up to half of the 6% scripted drama requirement imposed on the OTA station groups.

What would be the result of this plan? In essence, it would result in a greater proportion of Canadian program expenditures on specialty services going towards scripted Canadian drama than before. Instead of 15%, the number might rise to 23%. If one uses 2006 numbers, the result would be to increase support from the private broadcasters for Canadian drama by up to $85 million a year.

Would this be enough to make a difference? I think so. That increase is more than the CBC spent on drama last year -- $57 million. And with that kind of added money to the system, licence fees could increase, lessening the pressure on the CTF, and allowing it to support more high end drama productions.

Of course, financing is not the only issue that needs to be addressed. But it is the most important issue. Once you have improved the funding equation, you can then begin to address other issues.

We have seen in the past decade an incredible consolidation take place in the television industry in Canada. Many see this as a bad thing. But with consolidation comes greater revenue, greater clout, and greater opportunities to support under-represented Canadian production. By taking the benefits of size into account, the Commission has a real opportunity to address the Canadian drama crisis in a significant and positive way.

The Canadian Drama Crisis

In June 2002, the incoming Chair of the CRTC, Charles Dalfen, barely five months into his five year term, lamented the relative scarcity of popular indigenous drama series on our private broadcast schedules, given the importance and impact of this program genre.[2] He identified English-language Canadian drama as one of the most critical problems needing attention on the broadcast agenda. In 1993, the Commission followed this up by noting 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 broadcasting system must include popular drama programs that reflect Canadian society and project Canada's stories onto the world stage."[3] And over the next few years, the CRTC studied the drama problem and initiated a complicated incentive system to address it.[4]

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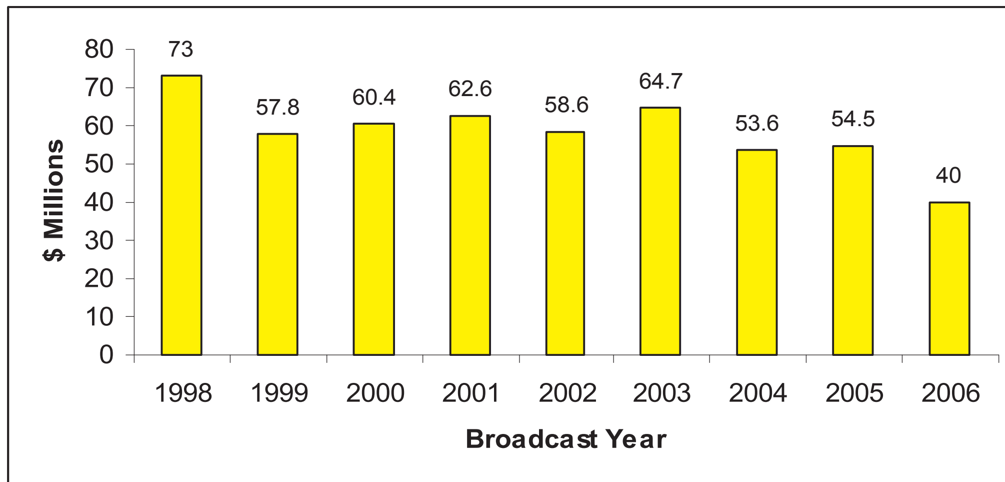
[2] Charles Dalfen, "Going for Gold: Let's Make an Appointment for Canadian Drama," Address to the Banff Television Festival, June 10, 2002. Available at http://www.crtc.gc.ca/eng/NEWS/SPEECHES/2002/s020610.htm
[3] Broadcasting Public Notice CRTC 2003-54.
[4] See Broadcasting Public Notice CRTC 2004-93, Broadcasting Public Notice CRTC 2006-11.

But only six months ago, the CRTC abandoned the incentive system.[5] Apart from being overly complex, it simply didn't work. Over the past ten years, the advertising revenues of the private English OTA broadcasters have increased from $1.33 billion in 1997 to $1.69 billion in 2006, an increase of 27%[6]. But their expenditures on Canadian drama have steadily declined. As shown in Chart 1 below, the number had dropped to only $40 million in the year ending August 31, 2006.

Chart 1

Expenditures by Private English OTA Broadcasters on Canadian Drama 1998-2006



Source: CRTC Statistics

The decline to $40 million is particularly distressing because that number includes drama expenditures committed to as part of transfer benefits when BCE bought CTV and CanWest Global bought WIC, both in 2000. Those benefits over the next seven years were supposed to be incremental to expenditures that would otherwise be made. But even when the transfer benefits are included, the expenditures went down.

The decline in Canadian drama expenditures *as a percentage of ad revenue* is even more problematic. In 2004, the CRTC suggested that the target for Canadian drama expenditures by the private OTA licensees (not including CTF licence fee top-up or transfer or new licence benefits) should be 6%.[7] But as shown in Chart 2 below, only 2.3% of ad revenue was spent by the private OTA television stations on Canadian drama in 2006.

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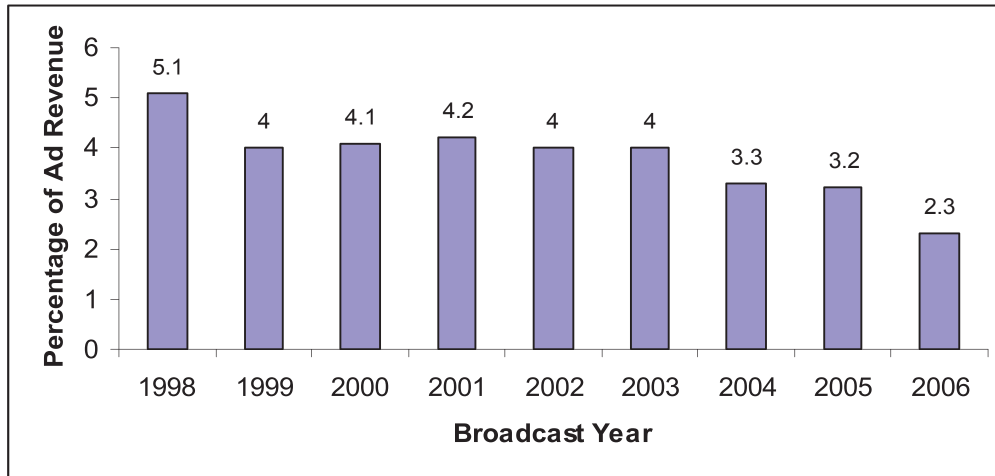
[5] Broadcasting Public Notice CRTC 2007-53.
[6] CRTC *Broadcasting Policy Monitoring Report 2007*, Chart 3.12 at p.66.
[7] Public Notice CRTC 2004-32, May 6, 2004, confirmed in Public Notice CRTC 2006-11, January 27, 2006, at para. 8.

Chart 2

Ratio of Expenditures on Canadian Drama of Private English OTA Broadcasters to Total Advertising Revenue

1998-2006



Source: CRTC Statistics

The decline in support for drama from the English language OTA private TV broadcasters is quite understandable. After all, apart from expenditure commitments made as part of new licence or transfer benefits, the CRTC has not imposed expenditure requirements on these broadcasters since 1999. They only have scheduling requirements, and these can be fulfilled with cheaper forms of Canadian programming. Yes, we have had some successful Canadian drama programs like *Corner Gas* or *Degrassi: The New Generation* on private television, but these were only funded because of Canadian drama expenditures committed to as part of time-limited transfer benefits. Unless they have to, it makes eminent financial sense for Canadian private broadcasters to avoid funding Canadian drama. It is risky and expensive programming that makes no money for them.[8]

The decline in Canadian drama spending over the past seven years was accompanied by other developments which have further contributed to the problem. Private broadcasters in Canada have typically paid lower broadcast licence fees as a percentage of the production budget for indigenous commissioned productions than in other countries. However, over the last seven years, producers have also had to hand over more rights for those licence fees, including longer broadcast windows, more plays, and the right to broadcast the program on affiliated specialty services as well as on the OTA service. In a situation where there are few buyers and many sellers, and lacking any Terms of Trade, Canadian drama producers had little choice but to agree.

Producers had also hoped that the introduction of federal and provincial tax credits might give them more of a back end, but this didn't happen. Instead the credits became essential to the

[8] For a discussion of the difficulties faced by English-language Canadian drama as compared with the situation in other countries, see Peter S. Grant and Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Vancouver: Douglas & McIntyre, 2004), at pp. 321-323.

financing of the programs. The result is that the economic situation for producers has become much more difficult.[9] Little wonder that Alliance Atlantis, despite its clout and experience, decided to get out of the Canadian drama production business in 2004. As a publicly traded company, it was rewarded for its broadcast assets but analysts gave no value to its Canadian production business.

All of these developments have led to what many have described as a crisis for Canadian drama. And this is happening just as a number of Canadian drama series have achieved ratings success.

So what to do about it? Let's look first at what's been happening to the private over-the-air (OTA) television broadcasters.

The Impact of Consolidation

Years ago, the English language private TV sector was made up of quarrelling CTV affiliates and a handful of independents, none of which had national coverage. But this has changed dramatically in the last ten years.

Now the privately-owned English language OTA television system has devolved to three big players, CTV, CanWest and Rogers. Assuming current applications are approved by the CRTC, each of them will have national coverage, with TV outlets in most of the major markets. Of the three players, CTV will be the largest, with $852M in revenue from OTA TV. CanWest Global is next in size, with revenues of $594M. And Rogers, assuming you can the CITY-TV assets to its ethnic and religious stations, would have revenue of $241 million from its TV stations. (These are 2006 revenue numbers. To complete the picture, CBC had $224 million in ad revenue from its English TV stations last year.)

Some have argued that the future for the OTA TV broadcasters is a dire one, noting that TV programs are increasingly available on the Internet. It is certainly true that TV stations have reached maturity and their ad revenues may not increase significantly over the next few years. However, the evidence to date does not support the suggestion that revenues will decline significantly either. OTA viewing to Canadian English TV stations has not declined significantly. And there is no indication that advertisers are any less interested in buying time on the "water-cooler" programs that only the OTA broadcasters deliver.

And the recent consolidation makes possible a number of efficiencies. These involve more than just consolidations of sales, staff and overheads. Having a second TV outlet in a number of major markets, as CTV, CanWest and Rogers will all do if current applications are approved, can lead to much more efficient buys of foreign programs, and more efficient use of simulcast opportunities. And although the move to HDTV over-the-air digital transmission will involve capital costs in the future, this may be mitigated if OTA digital transmission is limited to the top 40 markets, and coverage in rural and remote areas is left to the BDUs, allowing hundreds of expensive remote analog transmitters to be closed down.

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[9] For an analysis of the comparative position of broadcasters and independent producers, see Nordicity Group Ltd., *Analysis of Canadian Broadcaster Financial Performance and Programming Expenditures* (Ottawa: CFTPA, October 31, 2005).

But the real key to the health of the OTA broadcasters lies with the fact that they also own and operate profitable specialty services. Last year, viewership, revenues and profits for Canada's specialty services soared to new highs. And while the OTA broadcasters were not awarded "fee for carriage" in the CRTC decision on OTA policy, the Canadian specialty services continue to derive revenue from both advertising and subscription. As long as they have access to affordable packages on cable and satellite distribution systems, their future continues to be bright.

The benefit of owning pay or specialty services can be seen in Table 1 below. The revenue from OTA for the major English language TV groups is shown in the second column. The revenue from the English language pay and specialty services (assuming current applications are approved) is in the third column.

Table 1

Revenue of Canadian English-Language Over-the-Air, Pay and Specialty Television Services for Major OTA Television Ownership Groups, 2006

($ million)

Name of Group	*English Language Over-the-Air TV Revenue*	*English Language Specialty, Pay, PPV and VOD Revenue*	*Total Revenue from English Language TV Services*
CBC	673	84	757
CTV	852	648	1500
CanWest	594	303	897
Rogers	241	188	429

Source: CRTC Statistics, Communications Management Inc. Assumes CTV acquires CHUM except for CITY-TV assets; Rogers acquires CITY-TV assets, and CanWest acquires Alliance Atlantis assets. Note that the revenue of $673M shown for the CBC OTA English TV service is made up of $224M in ad revenue and $449M from its Parliamentary grant and other sources.

The result is obvious. CTV emerges as the largest player. In addition to its revenues from *TSN* and *The Comedy Network*, it can add the revenues from the services acquired from CHUM like *Bravo!* and *Space*. So its total revenue increases to $1.5 billion. CanWest, by adding the Alliance Atlantis family of services to its *TVtropolis* service, increases its total revenue to almost $900M. And Rogers brings up the rear, with total revenue of $429M when one includes services like *SportsNet*.

Having higher revenue is only part of the benefit of consolidation. Another real benefit comes from using these services as a second window for programming purchased for the OTA network. So episodes of *Corner Gas,* originally appearing on CTV, reappear on *The Comedy Network.* And episodes of *Traders,* originally appearing on CanWest Global, reappear on *TVtropolis*.

Canadian Drama on the Pay and Specialty Services

Let's turn to the pay and specialty sector, and ask what they do for Canadian drama.

At present, each analog and Category 1 digital specialty or pay service is generally regulated as to Canadian content on two levels: (1) Canadian content scheduling rules, and (2) Canadian program expenditures ("CPE") as a ratio of the previous year's revenue. The required CPE levels are unique to each service based on what each licensee proposed as part of competitive hearings when they first won their licences.

As part of this system, the pay and specialty services provide significant support for Canadian drama. Last year in fact, the English language specialty services spent $98M on Canadian drama, which was 15% of their overall expenditures on Canadian programming. The fact that only 15% of the money from specialty services goes to Canadian drama is a reflection of the fact that only a few of the services focus on drama in their mandate. Among the specialty services, the largest supporters of Canadian drama in 2006 were *Teletoon, Showcase, YTV, The Comedy Network* and *Space*. Services devoted to niches like news, sports, home and garden, and weather understandably spent little or no money on Canadian drama. This is shown in Table 2 below, which focuses on the top 20 English language specialty services, i.e. those with more than $20M in revenues in 2006.

Table 2

Canadian Drama Expenditures by the 20 Largest English-Language Specialty Services

Name of Service	*Owner*	*Revenue in 2006 ($ million)*	*Canadian Drama Expenditures in 2006 ($ million)*
TSN	CTV, 80%	201.3	0
SportsNet	Rogers	141.5	0
YTV	Corus	88.6	14.5
Discovery	CTV, 64%	85.6	0
Teletoon	Astral/Corus	81.7	21.6
Newsworld	CBC	76.8	0
W	Corus	65.7	4.2
Showcase	CanWest	59.5	18.1
MuchMusic	CTV	53.3	0
Space	CTV	48.8	8.6

HGTV	CanWest, 80%	46.7	0
Comedy Network	CTV	45.1	14.4
Weather	Pelmorex	45.0	0
Bravo!	CTV	40.7	3.1
History	CanWest	36.3	0.5
Slice	CanWest	34.4	0
The Score	Score Media	28.2	0
Food	CanWest, 58%	27.7	0
TVtropolis	CanWest,. 67%	25.5	3.6
Country Music	Corus, 90%	24.1	0
Business News	CTV	20.6	0
Vision	S-Vox	20.4	1.0

Source: CRTC Statistics. Assumes CTV acquires CHUM except for CITY-TV assets; Rogers acquires CITY-TV assets, and CanWest acquires Alliance Atlantis assets. Teletoon and Weather show bilingual revenues. Program expenditures do not include any credit for CTF licence fee top up.

The pay television services, being driven largely by feature films and drama series, are obviously more focused on the drama niche, and they make a significant contribution to Canadian drama spending. In 2006, the English language pay TV services spent $40 million on Canadian drama, which was 80% of their expenditures on Canadian programming. Table 3 shows how this breaks out among the major pay services.

In hindsight, the CRTC strategy of requiring pay and specialty services to expend a certain percentage of their revenue on Canadian programming (in addition to exhibition requirements) has turned out to be highly successful. The CPE levels were generally set for each service based on their business plan for the first licence term. These levels needed to be high enough to win the licence in a competitive scenario, but low enough to bring the service into profit by the end of the licence period.

Absent regulation, Canadian programming costs as a percentage of revenue would normally decline in subsequent licence periods as subscriber numbers and ad revenues steadily increase. The imposition of CPE requirements ensures that as revenues increase, so too do Canadian programming expenditures. Thus the services – faced with the CPE requirement -- have commissioned more original higher-cost Canadian programming and made less use of reruns and library product than otherwise would be the case. The result has been a win-win for everyone – sustained commissioning of new programs to support the Canadian production sector, higher quality Canadian content for the benefit of viewers, and rising revenue and profit levels for the services.

Table 3

Canadian Drama Expenditures by the Largest English-Language Pay Television Services

Name of Service	*Owner*	*Revenue in 2006 ($ million)*	*Canadian Drama Expenditures in 2006 ($ million)*
TMN	Astral	109.8	20.0
Movie Central	Corus	82.6	10.4
Family Channel	Astral	48.6	7.2
Mpix	Astral	21.0	2.5
Encore Avenue	Corus	9.9	0.4

Source: CRTC Statistics. Program expenditures do not include any credit for CTF licence fee top up.

Imposing CPE requirements on broadcasters is completely consistent with the objects of the *Broadcasting Act*, which states that "private networks and programming undertakings should, *to an extent consistent with the financial and other resources available to them*, contribute significantly to the creation and presentation of Canadian programming…"[10] As the revenues and profits of the services increase, therefore, it is logical for the CRTC to require that the financial contribution of the services to the creation of new Canadian programs increase as well.

While the Canadian pay and specialty services spend significant amounts on Canadian programming, this is significantly more than they would spend if they were not required to do so by condition of licence. If they were only regulated as to Canadian exhibition, it would be possible to spend far less on the Canadian programming needed to fill the schedule. The pay services like *TMN* or *Movie Central*, for example, would simply use more Canadian library films and fewer original Canadian drama series. As long as their services continued to offer recent release U.S. feature films, they would lose few if any subscribers. Similarly, children's services like *YTV* could easily reduce their Canadian programming budget by running fewer original Canadian children's' programs and more library product. Few children would notice.

Similar adjustments could be made by many of the other services without affecting their viability. The fact that the specialty services run more high-cost original Canadian programming is driven largely by their CPE requirements. If the privately owned pay and specialty services had a choice, however, they would reduce their CPE, since they could still meet their scheduling requirements and present a marketable and viable service.

Some argue that despite their recent ratings and revenue success, the pay and specialty services will also face tough times with unregulated Internet competition. If this were to occur, of course, the Commission could, upon application, lower the CPE levels of the services

[10] *Broadcasting Act*, paragraph 3(1)(*s*).

affected, just as it increases them at the time of licence renewal if their profits have increased.[11] But it would not be appropriate to jump the gun and lower CPE levels before harm has been shown, since if the harm turns out to be exaggerated, the CPE levels cannot be raised back until after at least five years of the licence term have expired.

So What to Do about Canadian Drama?

With all that as background, we come back to the question, what can the CRTC do to address the Canadian drama crisis? Even the recently released Dunbar-Leblanc report, which generally favoured deregulation wherever possible, conceded that Canadian drama was uniquely vulnerable and would not be commissioned by the private sector absent CRTC regulation.[12]

So what to do? Some might want to argue that we should give up on the private OTA television licensees, and rely only on the CBC. After all, the CBC spent $57 million last year on Canadian drama, and had the unexpected hit, *Little Mosque on the Prairie*. Others would focus on the pay and specialty sector, which had record profits last year and spent $138 million on English language Canadian drama.

So why focus on the private OTA broadcasters? For three very simple reasons.

First, the OTA TV broadcasters remain the foundation of the system. They alone are capable of garnering the kind of ratings that generate the "water cooler" effect. Canadian drama programs aired first on the OTA broadcasters then become the library that supports the specialty services, none of which can individually afford to commission original mainstream drama at the costs that are required.

Second, the main driver for the profits of the private OTA broadcasters is U.S. drama, the rights to which are bought at a fraction of their production cost. But if the broadcasters are running U.S. drama, shouldn't they be running Canadian drama as well?[13]

Third, in a world where the ratings success of individual cultural products is inherently unpredictable (the famous "nobody knows" thesis),[14] it makes sense to have multiple gatekeepers making the decisions for drama, not just one. If we want true diversity of voices, we need to have more green lights, not less.

Moreover, the private OTA broadcasters are better positioned than ever before to support big-ticket Canadian drama. The privately-owned English language OTA television system has devolved to three big players, CTV, CanWest and Rogers, each with national coverage.

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[11] In 2004, the Commission announced that it had decided to increase CPE levels for a number of specialty services at the time of licence renewal, based on their relative historical profitability. See Broadcasting Public Notice CRTC 2004-2. Again, this is consistent with paragraph 3(1)(*s*) of the Act.

[12] Laurence J. E. Dunbar and Christian Leblanc, *Review of the Regulatory Framework for Broadcasting Services in Canada*, Final Report, August 31, 2007, at pp. 40-48

[13] In fact, in Broadcasting Public Notice CRTC 2007-53, at para.91, noting the significant increase in expenditures on foreign drama by English OTA TV stations, the Commission expressed concern with "the continuing reduction in the proportion of total programming expenditures allocated to Canadian programming" by those licensees.

[14] I have discussed this aspect at some length in Chapter 4, "Why Hits are Flukes," in *Blockbusters and Trade Wars, op. cit. supra,* note 8, at pp. 61-79.

Consolidation allows them to be more efficient. And more to the point, they all have profitable specialty services in their stable. So their combined clout has never been greater.

But if you want the OTA private broadcasters to commission more high-ticket drama, how do you go about it?

In 1999, the CRTC required the larger private OTA broadcasters to schedule 8 hours a week of so-called "priority programming" between 7 and 11 p.m. Drama was one of the categories included in the definition of "priority programming." But as noted above, this did not lead to more high-cost original Canadian drama being commissioned. Nor did the "drama incentive" plan work. The Dunbar-Leblanc report tells the story:[15]

> "The available data strongly suggests that the existing regulatory incentives and obligations with respect to English language Canadian drama programming are not effective. Snapshots of the schedules for OTA stations in specific markets suggest that the amount of Canadian drama that is being broadcast during peak time in the regular season by English language commercial OTA television services is very limited. Priority programming obligations appear to be largely satisfied by the broadcasting of entertainment magazines and reality television programming, and by scheduling priority programming during lower viewing periods, such as Friday and Saturday nights and the summer period."

If the definition of "priority programming" is too broad, some might argue that the solution is to impose a sub-quota just on Canadian drama. To avoid the rerun problem, one could zero in on "original" Canadian drama, and require so many hours to be commissioned per year by each broadcaster. But there are real problems with this. There is a wide range of types of Canadian drama, each with a different production cost and broadcast licence fee. At the high end are feature films. Then come movies-of-the-week and high-end hour-long series. Animation and children's programs are less costly to broadcasters, as are industrial drama programs jointly commissioned by U.S. networks. Still less costly would be "soaps," which benefit from assembly-line volume production. And at an even lower cost would be stand-up comedy, where there is little or no scripting. (In fact, any measure directed towards high-end drama would need to focus on "scripted" drama and exclude improvised material).

If broadcasters are presented with a definition that is too broad, they will inevitably be pressed by their accountants to opt for the lowest cost Canadian drama to fill their scheduling needs. If you want to maximize chances of ratings success, however, it is necessary to commission all kinds of drama, including high-end drama that has the kind of production quality that viewers are used to seeing from the U.S.

The Australian regulator has recognized this problem – the tendency of broadcasters to opt for the lowest cost indigenous drama to fill their drama exhibition requirement – and has addressed it by using a "point system" approach. In Australia, private broadcasters are required to meet sub-quotas for each of adult drama, documentaries, and children's programs.[16] The Australian drama sub-quota requires minimum levels of first release (adult) drama in prime-time. The minimum annual drama score is 250 points, with a three year minimum score of 860 points. A drama program that is part of a series produced at a rate of more than 1 hour per week

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[15] *Ibid*, note 12, at p.xiii.

[16] More detail on the Australian content system can be found on the website of the Australian Communications and Media Authority (ACMA) at www.acma.gov.au.

(typically an assembly-line "soap") gets only one point per hour. But if the program is a series produced less frequently and acquired from an independent producer for a licence fee of at least $300,000 per hour, it gets 3 points per hour. And an Australian drama program that is a "telemovie, mini-series or self-contained drama" gets 4 points per hour, as does a feature film in certain circumstances.

So the Australian system adjusts for cost differences. "The advantage of this system," as noted by the Australian broadcast regulator, "is that it does not require a set minimum number of [drama] hours to be broadcast by individual licensees. Instead the standard sets a range of score values for program formats and allows each licensee the flexibility to determine a mixture of formats to meet the sub-quota requirements."

Would this kind of system work in Canada? My answer is no, for two reasons. First, it would require extensive research to establish the relative costs of drama genres and this would be complicated by the myriad of financing structures involved, with some drama hours getting more subsidies or outside financing than others. The second reason is more obvious. In Australia, the three private TV networks are roughly similar in size, reach and revenues. Thus, the same minimum point count can be applied to each of them. But in Canada, there are significant differences in revenue between the three big private TV players. So applying the same drama scheduling obligation or point count system to each of them would not be fair.

That brings us back to a simple drama expenditure requirement based on a percentage of revenue instead of an absolute number. This is similar to the CPE approach currently used in the pay and specialty sector and it has much to recommend it. First, it gives the licensee complete flexibility in regard to the kind of drama to be financed. The licensee can opt for a larger volume of cheaper drama. Or it can elect to support a fewer number of higher-cost dramas. The licensee can make the "quality vs. quantity" trade-off, but in the end it must still spend the dollar amount required. The result is that the focus for the licensee will turn away from the accountant's question, "how can I get away with spending less?" and towards the programmer's question, "since I have to spend the money anyway, *which Canadian drama will get me more viewers?*" This is a profound change in attitude but it will only come if there is an expenditure requirement for drama.

By using a percentage of revenue as the test, it also makes it possible to apply the same policy to the three OTA ownership groups – CTV, CanWest and Rogers -- even though their OTA revenues are different.

Finally, I should address a concern often expressed by regulators – how do you measure expenditures? Won't broadcasters play games with the numbers? Given the myriad forms of financing for drama, how can you tell whether a dollar is a dollar?

This is a legitimate question and my answer is to turn to Public Notice CRTC 1993-93, which currently governs how the CPE rules apply for the specialty sector. This policy document was put in place specifically to address accounting problems that had emerged when the CRTC had regulated OTA expenditures in the late 1980's. In brief, the policy clarifies what would qualify as an expenditure, and excludes anything other than licence fees and unrecouped equity investments.

A Modest Proposal

All of which leads to my modest proposal as to how to address the Canadian drama crisis. The key point is to regulate the privately owned OTA broadcasters *on the basis of their group holdings*.

One would start by imposing a simple condition of licence on the privately owned English language OTA broadcasters when they come up for renewal next year. Going forward, I propose that they be required to spend at least 6% of their revenue from the previous year on scripted Canadian drama.

Why 6%? The CRTC itself set the 6% level as an appropriate target in its now-dead drama incentive plan, to be reached by 2008-09.[17] That 6% level was to be calculated over and above transfer or new licence benefits and would not include any credit for CTF licence fee top-up. The 6% would be a hard number, and would now be elevated from a target to a requirement. So now it would have teeth.

Could the station groups afford it? Clearly it involves a significant increase in drama spending, compared to their typical drama spending level of 3 to 4%.[18] Some would argue that this can easily be accommodated within the revenue levels involved. However, I am sympathetic to the arguments that the conventional TV sector may face difficult times ahead. That being said, the fact that the major TV groups have consolidated their ownership of specialty services opens up a major opportunity to address the drama problem, using the benefits of group ownership.

So to accompany this change, I would introduce three new rules for the pay and specialty sector.

I would keep the CPE requirements applicable to the pay and specialty services, but make three changes in policy. First, I would eliminate the "licence fee top-up" policy, under which the services can count money independent producers receive from the Canadian Television Fund towards their CPE requirement. This little-known policy dates back to 1994 and flies in the face of the goal of transparency. It is discriminatory, unnecessary and allowed the English-language pay and specialty services to underspend their CPE requirements on Canadian drama by $25.9 million last year. The policy should be canned.[19]

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[17] See Broadcasting Public Notice CRTC 2006-11, at para.8

[18] In Broadcasting Public Notice CRTC 2006-11, at para.12, the Commission noted that the expenditures on Canadian drama by the English-language private OTA stations represented 3.3% of the industry's total revenues in 2003-04, excluding CTF top-ups and benefit related spending, and that the level had been 3.7% in 2002-03.

[19] The licence fee top-up policy, enunciated in 1994 as part of the announcement setting up the predecessor of the CTF, gave OTA broadcasters something of a consolation prize for not having won "fee for carriage" from the cable industry at the Structural Hearing that year. But with the removal of expenditure requirements for the OTA television sector in 1999, the policy became relevant only for the pay and specialty sector, which quickly discovered that if properly exploited, the policy could allow them to spend less on CPE. In their renewal applications over the next few years, most pay and specialty services made no reference to the licence fee top up policy, nor did they incorporate any adjustments from it in their seven year projections. As a result, after their CPE levels were set for the renewal period, based on their projections, they were able to treat CTF top-up money as a complete windfall. The result has been is lamentable. Instead of having the BDU money that flows into the CTF operate as a separate

My second proposal is to regulate all the pay and specialty services owned by one firm as a group. Under this plan, it would be possible for a service to underspend its CPE requirement provided this was matched by overspending on a sister service. As long as the total CPE requirement was met, the licensees would be in compliance. This would give a lot more flexibility for the licensees in regard to spending.

My third proposed change would be more revolutionary. All specialty licensees currently report how much they spend each year on each program genre. I would use the average amount spent over the last three years (2005, 2006 and 2007) on scripted Canadian drama as a percentage of revenue in the previous year as a benchmark. And for every dollar spent by a specialty service on scripted Canadian drama in excess of that benchmark in future years, I would allow the group owner to credit that amount towards at least half of the 6% requirement for such drama imposed on its OTA services, provided the resulting drama was given a first run on the OTA services.

In effect, we would create a system of "drama credits," which could be used to satisfy up to half of the 6% scripted drama requirement imposed on the OTA station groups. (Why just half? My thinking is that at least 3% can and should be borne directly by the OTA services because they have typically expended this amount in the past.[20])

In developing this plan, thought would need to be taken as to how such credits would apply when two services are not wholly-owned, and the minority shareholders are be treated equitably. However, there is nothing here that cannot be resolved with creative thinking..

What would be the result of this plan? In essence, it would result in a greater proportion of Canadian program expenditures on specialty services going towards scripted Canadian drama than before. Instead of 15%, the number might rise to 23%.

Nor would this proposal affect the viability of the specialty services. Yes, those services would be using some of their CPE requirements to fund drama on the OTA services. But the specialty services would continue to be perfectly viable, because this spending would all count towards meeting their overall CPE levels.

To give a sense of how the OTA station groups might accommodate to this proposal, let's look at each of their specialty services and ask whether they could spend more on Canadian drama. Table 4 below focuses on the CTV specialty services with more than $20 million in revenue last year.

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and additional source of funding for under-represented programming, it has too often allowed the pay and specialty services to reduce their effective CPE levels and have the difference drop right to the bottom line. Producers and the audiovisual unions have urged the CRTC to eliminate the policy and Telefilm Canada added its voice to this pressure in 2004. However, as indicated in Public Notice CRTC 2004-93 at paragraphs 170-173, the CRTC has so far resisted any change. In proposing to eliminate the policy, I acknowledge that to be fair it should occur only at the time of licence renewal for each pay and specialty service, so that they can indicate whether or to what extent the policy was crucial to their viability in the past licence period, and have this taken into account in setting their overall CPE level for the next term. However, for the reasons indicated, I see no justification for continuing the policy.

[20] See note 18 above.

Table 4

Canadian Drama Spending by CTV Specialty Services

Name of Service	*2006 Revenue ($Million)*	*PBIT Margin in 2006*	*CPE Requirement (% of Revenue in Previous Year)*	*Canadian Drama Expenditures in 2006*	*Canadian Drama as % of CPE in 2006*
TSN	201.3	24.1%	44%	0	0
Discovery	85.6	38.7%	45%	0	0
MuchMusic	53.3	24.9%	7%	0	0
Space	48.8	37.7%	40%	8.6	40%
Comedy Network	45.1	31.5%	45%	14.4	91%
Bravo!	40.7	29.3%	33%	3.1	35%
Business News	20.6	20.0%	50%	0	0

As you can see, within the CTV group of services (now augmented to include the CHUM stable of specialty services), only *Comedy Network, Space* and *Bravo!* spent anything on Canadian drama last year. But many of the other services had good revenues and healthy PBIT margins – for example, *TSN* or *Discovery*. They could easily use some of their CPE requirements to expend money on drama, if there was an incentive to do so.

Now let's look at the CanWest specialty services with more than $20 million in revenue last year. These are shown in Table 5 below.

As will be seen, of the CanWest specialty group (now augmented to include the Alliance Atlantis stable of specialty services) only *Showcase* and *TVtropolis* spent a significant amount on Canadian drama last year. Some of the other services could easily put more support to Canadian drama if this counted towards a drama requirement of CanWest's OTA services.

Table 5

Canadian Drama Spending by CanWest Specialty Services

Name of Service	*2006 Revenue ($Million)*	*PBIT Margin in 2006*	*CPE Requirement (% of Revenue in Previous Year)*	*Canadian Drama Expenditures in 2006*	*Canadian Drama as % of CPE in 2006*
Showcase	59.5	22.0%	42%	18.1	97%
HGTV	46.7	32.9%	50%	0	0
History	36.3	34.3%	40%	0.5	5%
Slice	34.4	-1.2%	71%	0	0
Food	27.7	29.3%	40%	0	0
TVtropolis	25.5	17.8%	43%	3.6	29%

Finally, Table 6 shows the numbers for the Rogers pay and specialty services with more than $20 million in revenue last year.

Table 6

Canadian Drama Spending by Rogers Pay and Specialty Services

Name of Service	*2006 Revenue ($Million)*	*PBIT Margin in 2006*	*CPE Requirement (% of Revenue in Previous Year)*	*Canadian Drama Expenditures in 2006*	*Canadian Drama as % of CPE in 2006*
SportsNet	141.5	17.9%	54%	0	0
Rogers on Demand	30.2	3.7%	-	na	na

As will be seen, Rogers SportsNet has a 54% CPE requirement and revenue of $141.5 million last year. To help the CITY-TV stations spend more on Canadian drama, some of this could easily be earmarked for this purpose.

If one uses 2006 numbers, the result would be as follows. Support from the private OTA broadcasters for Canadian drama would rise from $40M to over $100M a year. And by

eliminating the licence fee top-up, the contribution of the pay and specialty services towards Canadian drama could rise from $138M a year to as high as $164M. In total, then, the net support for English-language Canadian drama from the private sector would increase by up to $85M a year.

Would this be enough to make a difference? I think so. That increase is more than the CBC spent on drama last year -- $57 million. And with that kind of added money to the system, licence fees could increase, lessening the pressure on the CTF, and allowing it to support more high end drama productions.

I don't want to suggest that this is all that is necessary to resolve the matter. The Canadian drama problem is a complex one, with many moving parts. However, financing is absolutely key. Trina McQueen noted in her report to the Commission in March 2003 that "the achievements in [Canadian] drama have occurred against all odds; and they conceal the central problem, which is financing." The CRTC followed this with a statement that "the Commission agrees that the lack of funding is a key contributor to the difficulties facing Canadian drama."[21] Once you have improved the funding equation, you can then begin to address other issues.

We have seen in the past decade an incredible consolidation take place in the television industry in Canada. Many see this as a bad thing. But with consolidation comes greater revenue, greater clout, and greater opportunities to support under-represented Canadian production. By taking the benefits of size into account, the Commission has a real opportunity to address the Canadian drama crisis in a significant and positive way.

[21] Broadcasting Public Notice CRTC 2003-54, para.24.