CCAU
Coalition of Canadian Audio-visual Unions

Filed via epass

22 February 2008

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 ("BNPH") CRTC 2007-10, 5 July 2007 as supplemented by BNPH CRTC 2007-10-1, 12 September, 2007; BNPH CRTC 2007-10-2, 26 September, 2007; BNPH 2007-10-3, 5 November, 2007; and BNPH CRTC 2007-10-4, 30 November 2007 (collectively, the "Notices"); Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services.

Attached please find the Reply comments of the Coalition of Canadian Audio-visual Unions (CCAU), prepared in response to BNPH CRTC 2007-10-3, 5 November 2007 and BNPH CRTC 2007-10-4, 30 November 2007. CCAU has already made submissions in the first and second rounds of this proceeding.

For the purposes of this submission, 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 Communications, Energy and Paperworkers Union (NABET), and the Writers Guild of Canada (WGC).

In this round, CCAU will address certain issues relating to comments made by other parties in the first and second rounds. As noted in its earlier submissions, CCAU wishes to participate in the Commission's public hearing scheduled to begin on April 7, 2008.

Yours truly,

COALITION OF CANADIAN AUDIO-VISUAL UNIONS

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EXECUTIVE SUMMARY

1. In this process, the BDU gatekeepers have spoken with a unified voice in favour of allowing what they call "market forces" to play a much more significant role in Canada's broadcasting system. The phrase "market forces" does not appear in the *Broadcasting Act* (Act). In fact, the Canadian broadcasting system has been shaped by a series of regulations introduced by the CRTC in conformity with the Act. This proceeding has forced those who of us who support these regulations to defend them, rather than forcing those who would eliminate them to prove why such a change would be positive for the broadcasting system. In CCAU's respectful view, this shifting of the onus to parties to "prove" that regulations currently in place are necessary and defensible against some abstract notion of "market forces" is an unfortunate development. The onus should clearly be on those who propose change to demonstrate unequivocally that the proposed changes would improve the system. After reviewing many of the submissions, CCAU submits that onus has not been discharged. Continued detailed regulation is required if the Canadian broadcasting system is to survive.

2. The threats from the unregulated world have been exaggerated by the BDUs and should not be treated by the Commission as a reason to deviate from the current regulatory course. In earlier proceedings, the Commission heard similar arguments for lighter regulation by the OTA broadcasters and the commercial radio broadcasters and effectively rejected them. It should do likewise here.

3. The consumer "research" filed with the Commission (to support the proposition that "consumers" should be placed in charge of the decision-making process) was lacking in substance. In fact, the only consumer group that participated in the proceedings, the Public Interest Advocacy Group, did not support the deregulatory thrust of the BDU industry. Instead, it documented that consumers are more concerned about the increases in BDU fees and the lack of choice among BDU providers, rather than among the choice of programming services offered by BDUs. There is no evidence on the public record that Canadian consumers feel they are being denied access to specific television programs was tendered in this proceeding.

4. Indeed, PIAC's poignant observation is as follows:

> PIAC believes that the greatest threats to the health of the broadcasting system do not come from unnecessary regulation, but from a concentration of market players with scant competition and deregulatory controls to shape a fairer customer relationship.
>
> Too often, regulators of important public services have been persuaded by theoretical market constructs to abandon working regulatory constructs to rely on market forces to the detriment of all but the best-resourced stakeholders. The approach to broadcasting

> regulation should be to modernize, but in so doing the lessons and experience of the past should not be discarded[1].

5. Shaw proffered an "economic" analysis by Professor Steven Globerman which argues that "market forces" should triumph over continued detailed Commission oversight. However, for the reasons outlined below, this study is seriously flawed. In many areas it shows an abysmal understanding of the economics of broadcasting, particularly in relation to smaller countries like Canada. As a result, the Commission should dismiss the study out of hand.

6. In the real world, the only question is whether the regulator will continue to be involved, or leave it to the BDUs, acting as the proxy for the consumer in the "market forces" equation, to make all the choices. If the "preponderance" proposal advanced by the BDUs gains any traction, the BDUs alone will decide which menu of programming services a consumer gets to choose from. The gatekeeping role will move from the Commission to the BDUs. Obviously a consumer cannot choose a service that a BDU refuses to carry.

7. The BDUs are doing extremely well financially in the regulated world under the existing regime. They have not proven any financial case as to why the rules need to be changed in order to allow competition to flourish. It is all based on the notional theory that giving them the authority to decide which services to offer will increase competition and that this is good for consumers.

8. One of the biggest threats to the Canadian broadcasting system is one that has not even been discussed in this proceeding to the best of CCAU's knowledge. That issue is what percentage of the bandwidth of a BDU's service must be devoted to the carriage of broadcasting services.

9. This is not a problem provided that there are must carry, distribution and linkage, and other rules that make reductions in bandwidth applicable to broadcasting services unlikely if not difficult. However, should the Commission accede to BDUs' request to abandon all of the rules that mandate the carriage requirements of the BDUs and instead withdraw from regulating and allow "market forces" to rule, there is no floor to the amount of bandwidth required to be used for broadcasting services. It seems obvious to CCAU that if BDUs are expected to follow "market forces", they will allocate much greater bandwidth than at present to services where returns are higher than in regulated video distribution, such as non-programming services. This would be disastrous for the Canadian broadcasting system.

10. Permitting unlimited "market forces" to prevail would allow the importation of any number of US services to compete with Canadian services, would allow BDUs to package them without any Canadian services, and would allow the BDUs to charge whatever they want for the package. Canadian services, if they were carried at all, could be relegated to a tier in the nosebleed section. Those services could well have to buy their way onto a BDU's pipeline in the absence of must carry rules. Alternatively, if a Canadian service were in a genre where a BDU thought money actually could be made, the BDU could simply launch its own service instead.

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[1] Public Interest Advocacy Centre, Comments on Broadcasting Notice of Public Hearing CRTC 2007-10, October 19, 2007, at p. 27.

11. The Commission should be very careful about abdicating its past regulatory practices in favour of allowing BDUs to have an even greater gatekeeping role than they currently enjoy. Unless and until full-fledged business plans and impact studies are conducted and tabled regarding what would happen if the deregulated world sought by BDUs were to occur, the Commission should not change the current structure. CCAU would suggest that there was nothing presented in the materials filed that ought to provide the Commission with any comfort in that regard.

12. CCAU continues to support the regulatory structure that has made the Canadian broadcasting system so strong. Essential component parts of that structure include genre protection, the 5:1 rule relating to BDU ownership of specialty services, the restricted entry policy toward competitive U.S. and other non-Canadian services, the distribution and linkage rules, the restrictions on VOD undertakings, etc. The need for these rules has been eloquently argued by many interveners in this proceeding.

13. Rather than jettisoning those rules, the Commission should re-impose transfer benefits requirements on BDUs, increase the quantum of BDUs' revenues devoted to Canadian programming expenditures ("CPE"), eliminate the ability of BDUs to use CPE contributions to fund their own community channels, increase the 5% CPE of both VOD and PPV; institute CPE requirements on Category 2 licensees as they complete their first licence terms and eliminate the use of licence fee top-up money from the CTF to be used to satisfy CPE requirements. The Commission should also, as it indicated it was leaning towards in Broadcasting Public Notice CRTC 2008-6, require the disclosure of much more detailed financial data of its licensees to enhance the ability of interveners to participate in the Commission's public processes.

14. CCAU would support fee for carriage provided that resulting funds are directed to the creation and airing of high quality Canadian dramatic productions. We are extremely disappointed that neither CBC nor CTVgm/Canwest proposed to spend so much as one penny in the area where Canadian television is most deficient.

15. Instead, neither indicates where the hundreds of millions of dollars will go. CTVgm/Canwest is mute on the issue, saying only that a given station's access to the funding will be contingent on continuing to supply local programming, while CBC indicates that the decision as to what to spend it on should be put off until licence renewal time at a point in the future. This is obviously unacceptable.

16. For CCAU to be supportive of the concept, a detailed plan for the expenditure of those funds must be provided up-front and feature expenditures on high quality Canadian dramatic productions. The dearth of funds for Canadian drama features significantly in both the brief by CBC and the CTVgm/Canwest proposal. Yet neither gives effect to a solution by offering to direct funds into that genre of programming.

17. The Commission should ignore the "evidence" supplied by the BDUs that their subscribers would desert them in droves if the BDUs chose to push through a price increase as a result of the introduction of fee for carriage. This flies in the face of past experience where BDUs routinely increase prices for their own benefit without such consequences.

18. The Commission should also deal with the significant overspending by Canadian conventional broadcasters on U.S. programming. This conduct is out of control, and violates section 3(1)(f) of the Act which requires that broadcasting undertakings make "maximum use, and no less than predominant use, of Canadian creative and other resources in the creation and presentation of programming."

19. At the time of the TV policy consideration in 2006, and again in October, 2007, the CCAU put forward its strongly held view that if the Commission did feel that OTA TV signals should attract a new subscriber fee, then significantly increased expenditures should be made on Canadian drama. The CCAU has proposed previously that OTA TV licensees be required to expend 7% of their advertising revenue on Canadian drama. This is absolutely fundamental and is independent of any incremental revenues derived from fee for carriage. If there is additional revenue from fee for carriage, most if not all should be earmarked for the hardest genre of Canadian programming to produce and finance, namely, Canadian drama, in addition to the 7% expenditure requirement we have urged elsewhere.

A Reliance on "Market Forces" can run contrary to the Broadcasting Act's requirements

1. Overview relating to "Market Forces"

20. The last year has featured a renaissance of submissions pitching for the use of "market forces" in making determinations under the *Broadcasting Act* (the "Act"). This is usually the sort of rhetoric that emanates from the most powerful entities in the chain, since they have little to fear from allowing "market forces" to prevail. So it is with this proceeding, where the BDU gatekeepers have spoken with a unified voice in favour of allowing what they refer to as "market forces" to play a much more significant role.

21. The phrase "market forces" does not appear in the Act, of course. The entire history of the Canadian broadcasting system represents the recognition of the need for regulation. Nevertheless, this proceeding forced those who believe that the Commission has done a good job over the last 40 years to defend themselves and the Commission. This shifting of the onus to parties to "prove" that the regulations currently in place are workable and defensible against some abstract notion of "market forces" is not a positive development, in CCAU's respectful view. The onus should clearly be on those who propose change to demonstrate unequivocally that the proposed changes would improve the system. That onus is nowhere close to having been discharged.

22. Even the Dunbar-Leblanc Report, itself considered by some as evidencing BDU influence, notes that,

> "We do not disagree with the conclusion that market forces alone are unlikely to achieve the policy objectives set forth in the Broadcasting Act, including the objectives relating to a preponderance of Canadian television content."[2]

23. Since coming to the Commission, Chair von Finckenstein has numerous times reiterated the need for regulation. For example, at the Commission's Diversity of Voices Proceeding, he stated 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."

24. Given the foregoing, and given that not a single party in this proceeding in the submissions reviewed by CCAU recommended the repeal of the Act, CCAU takes it as a given that continued detailed regulation is required if the Canadian broadcasting system is to survive.

25. CCAU also notes that the current system represents more than forty years of CRTC history of implementation and fine tuning to ensure a balance of rights and obligations among the parties. It also ensures that Canadian consumers benefit from a variety of home-grown fare in addition to the best television programming from around the world.

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[2] Laurence J.E. Dunbar and Christian Leblanc, Review of the Regulatory Framework for Broadcasting Services in Canada, Final Report, August 31, 2007, at p. 43.

26. A review of the first round of comments shows a sharp polarization between those who produce Canadian content on the one side and those who supply the pipeline that carries it on the other. One would expect that BDUs would seek as much freedom as they can get to select from non-Canadian and Canadian services as well as virtually unrestricted ability to package, price, and generally allocate "their" bandwidth as they and they alone see fit.

27. The BDUs pointed to the threats from the unregulated world. They alluded to the fact that in the free market, a consumer is not going to put up with restrictions on their choices and will simply tune out and be lost to the Canadian broadcasting system forever. And so on and so on. Shaw produced a consumer survey which purported to demonstrate overwhelming consumer demand for U.S. channels. It contains the usual "Do you wish you could get HBO?" sort of question that one would expect.

28. A much better pair of questions was answered by the Alliance Atlantis submission of October 19, 2007. It read as follows:

> What policy objectives would be served by relaxed entry for foreign services? Would it address the issue of consumer choice, giving Canadians greater access to diverse foreign programming? In fact, beyond all of the conventional U.S. programming already here, the vast majority of the programming on the most popular U.S. cable services is already available in Canada**. In our analysis of the top 200 cable telecasts in the U.S. by audience in the first half of 2007, fully 97% were already available in Canada.**[3] [emphasis in original]

29. The BDU submissions failed to note that when the transition to digital television is complete within a few years, the 11% of Canadians who do not subscribe to a BDU are going to lose the ability to get OTA signals. While the results of this migration will only be known at the time it occurs, it has the potential to be the biggest windfall for BDUs since the CAPEX rules, and at a minimum one that should be taken into consideration in assessing financial relationships in the broadcasting industry.

30. We note, however, that consumers were actually represented in the filings in the form of submissions by the Public Interest Advocacy Group ("PIAC"). PIAC made the following astute observation in its October 19, 2007 submission:

> PIAC believes that the greatest threats to the health of the broadcasting system do not come from unnecessary regulation, but from a concentration of market players with scant competition and deregulatory controls to shape a fairer customer relationship.
>
> Too often, regulators of important public services have been persuaded by theoretical market constructs to abandon working regulatory constructs to rely on market forces to the detriment of all

[3] See Appendix A of Alliance Atlantis' October 19, 2007 submission for the full list of top ranked cable telecasts, January-June 2007.

> but the best-resourced stakeholders. The approach to broadcasting regulation should be to modernize, but in so doing the lessons and experience of the past should not be discarded[4].

31. Nevertheless, that did not prevent the BDU industry from clamouring for freedom to do as it wished. Leading the parade was Shaw Communications which included a submission by Professor Steven Globerman entitled "An Economic Analysis of the Regulatory Framework for Broadcasting Distribution Undertakings and Discretionary Programming Services". This submission will be explored in the next section.

2. Market forces: Rebuttal of the economic theories of Professor Globerman

32. Professor Globerman purports to carry out an economic analysis of the regulatory framework for BDUs and discretionary programming services. However, his study is significantly flawed and in many areas betrays an appalling lack of understanding of the real economics of broadcasting, particularly as they relate to smaller countries like Canada. As a result, the Commission should dismiss the study out of hand.

33. Professor Globerman's analysis starts with a cursory summary of economic theory as it applies to normal commodities or services, concluding with the trite observation that "the production of the socially efficient output rate of a product at lowest possible cost maximizes the real income level of a society," and so is a desirable policy objective. Later, his analysis refers to the desirability of perfect competition between buyers and sellers, and his view that while there may not be "perfect" competition in the broadcasting field, there is "workable" competition between BDUs and between programming services that would be enhanced by deregulation.

34. What this analysis largely assumes, of course, is that economic principles based on the notion of perfect competition can be applied to a cultural service like the broadcasting field. But it is widely acknowledged by economists that cultural services like broadcasting have the attributes of a "public good" and that economic principles applicable to ordinary commodities simply cannot be applied to broadcasting.[5] As a public good, the cost of adding a viewer to a broadcast program is close to zero. However, because recovery of program production costs cannot occur if such programs are priced at the socially optimal price of zero, broadcast programs are priced (particularly across borders, but in others ways as well) in a highly discriminatory basis which bears little or no relationship to cost.

35. The problem of treating broadcast programs like ordinary commodities is magnified by the fact that (a) unlike ordinary commodities, broadcast programs are "experience goods" which consumers must see before they can fully evaluate them, adding to the unpredictability of demand; (b) the "shelf space" choice is made by gatekeepers not by consumers, and their decisions erode any notion of "consumer sovereignty"; (c) the industry is characterized by sharply increasing returns to scale, which benefits larger distributors; (d) because of their

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[4] *Ibid*., Note 1, at p. 27.

[5] See, e.g. Bruce M. Owen and Steven S. Wildman, Video Economics (Cambridge, MA: Harvard University Press, 1992) at pp.23-24.

intellectual content, broadcast programs can never be perfect substitutes for each other; and (e) because of the cultural specificity of programs, the industry is characterized by significant cultural premiums and discounts.[6]

36. Most if not all of these distinctions are lost on Professor Globerman, who at no point acknowledges the "public good" character of broadcasting. While Globerman does refer to the phenomenon of U.S. price discrimination at paragraphs 13 and 14, he never follows through to acknowledge why this necessitates regulation. In fact, he argues at paragraph 16 that assumptions supporting regulation are "either unrealistic or overly simplistic."

37. Professor Globerman also assumes that the only possible basis for broadcasting regulation is the scarcity of spectrum argument, which has been eroded by technological developments. But this is not the only or even the most salient argument for the regulation of broadcasting. The key argument is that absent regulation, viewers in smaller countries like Canada would be presented with a menu of program choices in the entertainment genre largely dominated by high-cost production acquired from the U.S. at a fraction of its cost. This is a phenomenon recognized throughout the English-speaking world. It is also one of the reasons why so many countries supported the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, an initiative spearheaded by Canada.

38. A comprehensive analysis of this problem in the European context was prepared in 2005 by David Graham & Associates Limited, a highly regarded U.K. economic consulting firm that specializes in the audiovisual sector.[7] The Graham analysis included the following passage, which equally applies to Canada:[8]

> Substantial economies of scale and scope, combined with the culturally specific nature of much TV and audiovisual content, leaves the USA – which has the world's most valuable and culturally homogeneous audiovisual market – with an unbeatable competitive advantage when it comes to international trade in TV and related material. This in turn leads to persistent trade deficits in audiovisual activities for even the largest European countries.
>
> The USA TV market – which is eight times the size of Europe's largest national markets of Germany and the UK – has the scale to fund large volumes of high-value drama and comedy. Although this output does not necessarily appeal directly to the various national cultures in Europe, high production values, plus the fact that most of the production cost has been recouped in the USA, means that such programming can prove extremely cost effective for commercially driven national European broadcasters.

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[6] For a summary of the differences between ordinary commodities and cultural goods and services, see "Curious Economics", chapter 3 in Peter S. Grant and Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Vancouver: Douglas & McIntyre, 2004), at pp. 42-60.

[7] David Graham and Associates Limited, "Impact Study of Measures (Community and National) Concerning the Promotion of, Distribution and Production of TV Programmes provided for under Article 25(a) of the TV Without Frontiers Directive," Final Report for the Audiovisual, Media and Internet Unit, Directorate-General Information Society and Media, European Commission, May 24, 2005. The report is available on the European Commission website at http://ec.europa.eu/avpolicy.

[8] *Ibid.*, at pp.68-69.

> Even though audiences and consumers in these foreign domestic markets may have a preference for home-grown material, the US material is still able to secure a high share of their domestic markets as it often contains 10 to 20 times the production value and creative endeavour of domestic content, while effectively being sold in the domestic market at the same, or even lower, price than the domestic material… So…a €5m per episode US TV comedy is competing against a €1m UK-made comedy, but the US episode is only looking to recoup €100,000 from the UK market.
>
> Once such an advantage is established, it can reinforce itself. The US industry becomes commercially vibrant and actively seeks overseas appeal. While foreign markets struggle to find a business model that works – capital, quality commercial management and creative talent flow into the US industry and out of the domestic sectors, reinforcing the US advantage…

39. After an extensive analysis of this and other factors (including market structure, the need to safeguard and promote culture, the need to encourage pluralism, and the benefits of supporting a healthy independent production sector), the Graham study concluded that market intervention was absolutely required in the broadcast sector in Europe. The European Commission, which had commissioned the study, subsequently affirmed this position when it adopted its new *Audiovisual Media Services Directive* in December 2007, which amended and renamed the *Television without Frontiers Directive*.

40. Unlike the extensive research that was done to support the Graham study, there is no indication that Professor Globerman interviewed any people in the production industry to support his analysis. In that regard, he made a number of factual statements or assumptions which to anyone knowledgeable about the broadcasting industry would be unsupportable.

41. For example, at p.9, he argues that "the successful exporting of Canadian made-for-television programming documents the feasibility of Canadian program suppliers competing in the U.S. and other foreign markets." It is true that some Canadian programming has been sold successfully abroad. But what Professor Globerman ignores or fails to realize is the fact that the prices obtained for such programs are only a small fraction of their production cost. All countries finance their indigenous broadcast programs largely from their domestic market and then sell their programs abroad (if they can sell them at all) at prices that are a fraction of cost.

42. This economic reality is graphically shown in the Nordicity study filed by the CBC on January 25, 2008.[9] Although English-language drama had production costs of $668 million in 2006, only $40.7 million of that (or 6.1%) was recouped from after-market export sales. The highest recovery rate achieved from export sales was children's programming, which still only recouped 10.2% of its production cost from export sales.

43. A related overstatement in Professor Globerman's analysis occurs at paragraph 18, where he suggests that "competition among broadcasters for the median viewer will lead to relatively high cost programming." But this fails to acknowledge that with U.S. programming

[9] Nordicity Group Limited, "Canadian Television: Why the Subsidy?" Appendix B to the CBC submission to the CRTC in response to BNPH 2007-10, January 25, 2008, at Table 13 on p.18.

available at a fraction of its cost, broadcasters will always prefer it to higher cost Canadian programming even if that programming delivered equivalent ratings. What drives broadcasters' decisions is cost per viewer, not overall ratings per program. For Professor Globerman to miss this distinction means that his entire subsequent analysis is flawed.

44. At paragraph 22, Professor Globerman suggests that the theory of the "Long Tail" undercuts the notion that "Canadian programs produced for specialized and relatively small audiences cannot be distributed by programmers or will fail to attract substantial numbers of viewers in the aggregate." The Long Tail effect does nothing of the kind. Canadian programs are being produced for specialized and relatively small audiences, particularly on Canadian specialty channels, but their financing and production is vitally dependent on the expenditure and scheduling requirements imposed on those channels by the CRTC, not on any purported "Long Tail" effect. Absent those regulatory requirements, Canadian broadcasters would inevitably go to U.S. programs in the same genre (e.g. children's, animation, nature or science programs) available at a fraction of the cost. And for Professor Globerman to suggest that the cumulative viewing of these kinds of programs – rerun endlessly on specialty channels—can approach the impact of first run water-cooler mainstream entertainment programs, or that these programs could somehow be financed through a purported Long Tail effect, betrays his complete lack of understanding of the economics of the broadcast sector.[10]

45. At paragraph 33, Professor Globerman acknowledges that the Dunbar and Leblanc report, which otherwise favours deregulation, states that the marketplace cannot be relied upon to adequately support high cost programs like Canadian drama. But he then argues that such support should be provided only through direct government subsidization, not through private sector regulation. He promotes the former because of its greater "transparency" and "efficiency."

46. In this regard, Professor Globerman's approach is of course at odds with the clear prescription in the *Broadcasting Act*. Paragraph 3(1)(e) of the Act states explicitly that "each element of the broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming." This and other provisions in the Act make it clear that the private sector must contribute to program creation, not just the government. Even stronger wording can be found in the DTH Direction from the government to the CRTC, which requires the CRTC to ensure that the distribution undertaking "is subject to equitable obligations and makes maximum contributions to Canadian programming, including a significant financial contribution derived from a percentage of gross annual revenues to the production of Canadian programming, and that the financial contribution is administered independently of the undertaking."[11]

47. In addition to ignoring the statutory framework for broadcasting in Canada, however, Professor Globerman has also ignored obvious reasons why government subsidy should not

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[10] For a discussion of the impact of the Long Tail on Canadian television production, see Peter S. Grant, "Canadian Cultural Product and the Long Tail: The New Economics of Production and Distribution in Canada," Presentation to the Law Society of Upper Canada Entertainment, Advertising and Media Symposium, April 27, 2007. Available under "Publications" at www.mccarthy.ca

[11] *Direction to the CRTC (Direct-to-Home (DTH) Satellite Distribution Undertakings) Order*, SOR/95-319, at para.4(c)

be the only support mechanism for high cost Canadian programming. This issue was examined in the Graham study in the European context where the following comments were made:[12]

> [Trying to address the US audiovisual advantage] may not be helped by various domestic government initiatives to subsidize and support the local industries. These policies can breed a culture of dependency and a self-fulfilling non-commercial attitude amongst those left in charge of the domestic industry. Not able to compete with the US industry on commercial terms, domestic sectors can, instead, focus almost exclusively on intellectual and social issues, reinforcing the USA dominance of the commercial sector and the flow of funds through the industry.

48. Leaving the support only to government subsidy, in other words, risks creating other problems. Moreover, by obligating the private sector to support domestic production, the number of "green lights" available to producers is increased, adding to diversity and pluralism. The fact that Professor Globerman ignored all these social benefits demonstrates the narrowness of his purported analysis.

49. Professor Globerman's appalling lack of understanding is highlighted at paragraph 39, where he suggests that "if genre protection did not exist, the U.S. version of *E! Entertainment Television* (U.S. version) could enter Canada, thereby increasing choice for consumers, while CH would have strong incentives to develop attractive alternative Canadian content as opposed to importing both a U.S. brand and U.S. programming." What Professor Globerman is really suggesting here is that all the major U.S. broadcast services could come directly into Canada and presumably sell ads here. In that scenario, none of the Canadian private networks could survive in their present form. Instead they would simply become affiliates of the U.S. networks. The only Canadian programming on their services would be news and sports. Almost all entertainment programming would be supplied by Hollywood, armed with the economic price advantages we have noted above. Can Professor Globerman be serious in suggesting that this would give Canadians more choice?

50. In summary, given the obvious flaws in his reasoning, the inadequacy of his research, and its incompatibility with the legislative framework, the Globerman study should be entirely rejected by the Commission.

3. Real life and "market forces"

51. If one returns from the theoretical world of Professor Globerman to consider real life examples of "market forces", CCAU notes that the last BDU that tried to introduce "pick and pay" in a meaningful way was Look TV and, as they say, "Look what happened to Look". There is no doubt that tiering/packaging makes a lot more sense for everyone--consumers, BDUs and broadcasters. The only question is whether the regulator will be involved or whether it will be BDUs (acting as the proxy for the consumer in the "market forces" equation) who will make all the choices. If the "preponderance" proposal advanced by the BDUs gains any traction, the BDUs alone will decide which services a consumer gets to

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[12] *Ibid.,* note 7, at p.69.

choose. The gatekeeping role will move from the Commission to the BDUs. Obviously a consumer cannot choose a service that a BDU refuses to carry.

52. CCAU suspects that the BDU proposals have far more to do with leverage in carriage negotiations than about any notion of “consumer choice”. CCAU notes that the Shaw proposal would contain only three requirements as follows:

    (a) The provision of a basic service;

    (b) A requirement for a simple preponderance of Canadian services; and

    (c) Maintaining existing rules against granting an undue preference or disadvantage.

53. Shaw maintains that “no other rules are required”. CCAU respectfully and strongly disagrees.

54. BDUs suggest that the Canadian broadcasting system is in peril as a result of unregulated forces and that they need to have more freedom from regulation in order to “compete”. This is the same gambit that the Commission saw through first in the commercial television policy hearing and then in the commercial radio hearing. In both cases, the Commission noted that while there were certainly unregulated competitors in abundance, they did not present the sort of threat to the well-being of the industries in question to justify changing the regulatory structure in either case. Nor should it here.

55. The BDUs are doing extremely well in the regulated world under the existing regime. They have not proven any financial case as to why the rules need to be changed in order to allow competition to flourish. It is all based on the notional theory of increased competition being good for consumers.

56. Rather than succumbing to the threat of “unregulated competitors” and abandoning the detailed regulation currently in place, the Commission might wish to consider some of the other causes of BDUs’ angst. One of those is consumer dissatisfaction, stemming in large part from significant price increases in what is supposed to be a “competitive” sector. The submissions by CBC and PIAC displayed eloquently that BDUs think nothing of increasing prices by up to several dollars at a time, as long as the money goes to them and not to a third party. More will be said about that below.

57. One of the biggest threats to the Canadian broadcasting system is one that has not even been discussed in this proceeding to the best of CCAU’s knowledge. That issue is what percentage of the bandwidth of a BDU’s service must be devoted to the carriage of broadcasting services.

58. This is not a problem provided that there are must carry, distribution and linkage, and other rules that make reductions in bandwidth applicable to broadcasting services unlikely if not difficult. However, should the Commission accede to BDUs’ request to abandon all of the rules that mandate the carriage requirements of the BDUs and instead withdraw from regulating and allow “market forces” to rule, there is no floor to the amount of bandwidth required to be used for broadcasting services. It seems obvious to CCAU that if BDUs are

expected to follow "market forces", they will allocate much greater bandwidth than at present to services where returns are higher than in regulated video distribution. This would be disastrous for the Canadian broadcasting system.

59. Unlimited market forces would, in Shaw's world, allow the importation of any number of U.S. services to compete with Canadian services, would allow Shaw to package them without any Canadian services, and would allow Shaw to charge whatever they want for the package. Canadian services, if they were carried at all, could be relegated to a tier in the nosebleed section. Those services could well have to buy their way onto a BDU's pipeline in the absence of must carry rules. Alternatively, if a Canadian service were in a genre where a BDU thought money actually could be made, the BDU could simply launch its own service instead.

60. CCAU applauds the courage of those programming services who have spoken up in this proceeding. In particular, CCAU applauds the small independent specialty channels who have been vocal in this process, seeking fair access to the system, but finding themselves up against larger and stronger BDUs and facing a growing imbalance of power.Admittedly, they did not really have the alternative of remaining silent in the face of the tenor of the Notices.

61. The Commission is aware that the ink was barely dry on the renewal decisions in March, 2004 of the DTH services when a number of services that had, albeit perhaps circumstantially, the temerity to speak up were threatened with relegation to poorly penetrated tiers and sought Commission relief.

62. Although the Commission decided that it would not use section 9(1)(h) of the Act to help the services but in a ringing dissent, Commissioner Noel indicated that

> Notwithstanding the Commission's announcement, and given the facts surrounding this case, I do question the motives that would have Star Choice use brutal, not to say uncivilized, commercial practices in its dealings with the programming undertakings. I would hope that the public process announced by the Commission in its decision restores civilized negotiations.

63. The Commission's reaction was to issue a public notice relating to "good commercial practices". Regrettably, CCAU is unaware of any improvement in the behaviour of BDUs as a result of that public notice, notwithstanding its earnest intentions.

64. It does cause CCAU to suggest to the Commission that it should be very careful about abdicating its past regulatory practices in favour of allowing BDUs to have an even greater gatekeeping role than they currently enjoy. Unless and until full-fledged business plans and impact studies are conducted and tabled regarding what would happen if the deregulated world sought by BDUs were to occur, CCAU would not change the current structure. CCAU would suggest that there was nothing presented in the materials filed that ought to provide the Commission with any comfort in that regard.

65. More specifically, CCAU notes that there were no suggestions offered with respect to any of the following:

(a) Percentage of bandwidth to be used for broadcasting;

(b) Caps on rates, especially for the basic tier;

(c) Floors on rates paid to licensed Canadian specialty services;

66. These are presumably all to be left to "market forces". The only certainty is that "market forces" will be very kind to the share prices of publicly traded BDUs if the Commission goes the route proposed by the BDUs.

4. Other pay/specialty/BDU issues

67. While the CCAU proposes to review the fee for carriage issue in the next section, before doing so it wishes to comment on several specific matters that were contained in the Commission's original Notice in this proceeding. CCAU clearly continues to support the regulatory structure that has made the Canadian broadcasting system so strong. Essential component parts of that structure include genre protection, the 5:1 rule relating to BDU ownership of specialty services, the restricted entry policy toward competitive U.S. and other non-Canadian services, the distribution and linkage rules, the restrictions on VOD undertakings, etc. The need for these rules has been eloquently argued by many other interveners in this proceeding.

(i) Transfer benefits for BDUs

68. In Broadcasting Public Notice CRTC 2008-4, the Commission considered the issue of the payment of tangible benefits on the transfer of BDUs. It referred back to its own Public Notice CRTC 1996-69 which said the following:

> Given that entry to the cable industry has been restricted to date, and in the absence of competing applications for authority to transfer the ownership or effective control of existing cable undertakings, the benefits test has served the purpose of ensuring that the Commission, in dealing with such transfers, is presented with the best possible proposal, taking into account the size and nature of the proposed transaction. However, with adoption by the Commission of a policy that removes all or most of the existing licensing restrictions on market entry and which, in fact, encourages the imminent entry of new competitors using a variety of distribution technologies, the underlying rationale for applying the benefits test in considering future applications for authority to transfer the ownership or control of distribution undertakings has essentially disappeared.

69. As will be seen in the next section, each of the CBC, CTVgm/Canwest and PIAC submissions from last fall in this proceeding suggest that competition in the BDU sector is illusory. In any event, one would be hard pressed to suggest that the BDU sector is any more or less competitive than the radio or television sectors which still have public benefit requirements.

70. In its Diversity of Voices decision last month[13], the Commission noted that "the appropriate contribution of distribution undertakings to Canadian programming has been identified as a matter for discussion at the upcoming review of the BDU regulatory framework." In CCAU's view, it is timely for the Commission to perform its role of identifying where the needs are in the broadcasting system and where parties have benefited from the regulatory scheme to such an extent that they can afford to make an enhanced contribution. In short, there is no longer any justification for exempting BDUs from the payment of tangible benefits on changes in control.

(ii) Increase in Canadian Programming Expenditures ("CPE")

71. A number of parties in the first round of this proceeding commented on the need for the Commission to review and increase CPE requirements on various sectors of the broadcasting industry[14]. CCAU is either already on the record or supports others' recommendations for the Commission to examine a number of such new initiatives as they relate to pay/specialty services and BDUs including the following:

(a) Increasing the quantum of the 5% BDU percentage of revenue devoted to CPE to 6% or greater;

(b) Eliminating the ability of BDUs to use their CPE contributions to fund their own community channels;

(c) Increasing the 5% CPE of both VOD and PPV;

(d) Eliminate the use of licence fee top-up funds from the CTF to be used to satisfy CPE requirements; and

(e) Instituting a CPE requirement on Category 2 specialty services as they complete their first licence terms.

72. Clearly, a review of the PBITs of these entities (who benefit from numerous regulatory protection measures) would justify an increase, or a imposition of, additional measures such as those outlined above. At a minimum, CCAU supports the maintenance of the existing CPE requirements that the Commission has imposed on pay and specialty services. In the absence of such obligations, there is no doubt that specialty and pay television broadcasters would seek out "lowest common denominator" Canadian programming to minimize costs. This is the unfortunate pattern already taken by OTA broadcasters which CCAU's proposals seek to remedy. It would compound the misfortune if that approach were to spread to specialty services rather than requiring the OTA sector to be subject to spending requirements. In this regard, CCAU supports the CFTPA when it indicates that

> The CFTPA fundamentally believes that both exhibition and expenditure requirements for analog and Category 1 pay and

[13] Broadcasting Public Notice CRTC 2008-4, at para. 134.
[14] See, for example, October 2007 submissions of CFTPA, Telefilm, Manitoba Motion Picture Industry Association, Ontario Media Development Corporation, and FilmOntario,

> specialty services are still relevant and indeed necessary to ensure appropriate levels of support for Canadian programming. The well known disastrous effects of the 1999 Television Policy, which removed expenditure requirements for OTA television broadcasters, are proof of what will happen if expenditure requirements are removed for analog and Category 1 services. History has shown time and time again that broadcasters will not spend adequately on Canadian programming unless required to by regulation. Market forces alone will not ensure that this key objective of the Broadcasting Act is met. The CRTC's regulatory approach for specialty TV services has proven that a combination of exhibition and expenditure requirements is a winning formula for Canadian content.[15]

73. In CCAU's view, the maintenance of CPE is not some sort of punishment for doing well. It is an appropriate quid pro quo for the privilege of being able to reap private profits from the use of a CRTC licence and is also consistent with the public policy objectives of the Broadcasting Act.

(iii) Disclosure of financial information

74. A number of parties attempted to demonstrate how financial disclosure is harmful[16] but most parties appear to have accepted that the Commission is moving down the track of more disclosure being in the public interest. In Broadcasting Public Notice CRTC 2008-6, "Call for comments on the public disclosure of aggregate financial data for large ownership groups of over-the-air television and radio broadcasters", the Commission outlined its preliminary view that public disclosure of aggregated financial data of OTA television and radio broadcasting undertakings owned by large ownership groups could serve the public interest.

75. CCAU strongly supports the Commission in this regard. Interveners are hamstrung in some regards in the absence of full and timely disclosure of financial results. This is especially the case when both the Commission and the licensee are in possession of the information but the public process is denied access to them.

B) Fee for Carriage

76. The Commission re-opened this proceeding to allow conventional broadcasters to have another opportunity to try to convince the Commission that it should institute a fee for carriage regime. The January 25, 2008 round of comments contained the usual "beggar thy neighbour" submissions that have become a hallmark of recent Commission proceedings where fee for carriage is involved. BDUs complain that conventional broadcasters are suffering from self-inflicted wounds and that their subscribers will desert the Canadian broadcasting system in droves if fee for carriage were to be implemented. Broadcasters, for their part, claim that that specialty services are fragmenting their audiences and that they are victimized by not having access to subscriber revenues. Broadcasters point with envy to the

[15] CFTPA submission, October 19, 2007, at p. 15.
[16] See, for example, the October, 2007 submissions of Astral, Rogers and others.

PBITs of the BDUs and the specialty services (many of which they now own) to bolster their claims for fee for carriage.

77. As regards the BDU assertions that their customers will abandon them if a charge were to be levied, CBC correctly points out that there may not even need to be a pass-through. Basic cable packages have become so bloated that a streamlined basic package could be offered at a lower price than it is currently. In fact, it is interesting to read PIAC's submission which deals with why BDU customers are unhappy. As noted above, it is not because of a lack of choice, as some would have the Commission believe.

78. Rather, the biggest reason that Canadian consumers are unplugging and considering unplugging relates to increasing BDU rates and a lack of choice of BDU suppliers, not a lack of choices of services carried by the BDU. A June 2005 study by Bell, Telus and PIAC showed that 44% of respondents felt that cable television service had "unreasonably high prices". Still with respect to cable television services, a stunning 58% of respondents felt that there was not enough choice "of competitors from which you can buy this service, or not enough choice." After presenting data showing BDU price increases since 1997, PIAC concludes with the following understatement:

> "The increases, for the most part, do not appear to be reflective of the discipline of competition that is supposedly congruent with the cable forbearance process…If affordability and connection to BDU networks is a broadcasting priority, these numbers are cause for concern, particularly as they are appearing during a time of growth for satellite BDUs and, in theory, more competition."

79. BDUs have now succeeded in convincing the Commission to abandon regulation of retail subscriber fees as well as the setting of wholesale rates of specialty services. Thus the only remaining glue that keeps the system together is the battery of requirements relating to must carry, packaging, self-dealing, Canadian market entry and so on. As noted previously, there can be no doubt that if you remove the mechanisms that support the system, it would collapse.

80. On January 25, 2008, the BDUs (Rogers, Bell and Telus) filed two studies, one by Harris/Decima and one by Professor Globerman and Suzanne Blackwell. No doubt others will have comments on these studies but CCAU would make the following additional comments. In the Blackwell/Globerman Report, the conclusion is reached that a $3 per subscriber per month fee increase would result in anywhere from 565,000 to 1.8 million subscribers cancelling their service. It would "accelerate the pace at which consumers seek out [such] alternatives to the Canadian broadcasting system." A $5 per subscriber per month increase "will cause more than one-third to one-half of BDU subscribers to downgrade their existing BDU services" and so on. Many pages of the Blackwell/Globerman Report are devoted to the determination of the correct elasticity model to apply. CCAU does not think the Commission need look any further than the information that it already has on the record of this proceeding.

81. More particularly, the Commission has in hand the CBC's filing of October 19, 2007. CCAU notes in particular the assemblage of quotes from annual reports of BDUs, bragging to their shareholders about how they succeeded in implementing huge rate increases that fell to their bottom lines. In particular, Addendum 1 to Appendix D of CBC's October filing should be required reading for participants in this proceeding. Simply said, if the conclusions of Blackwell/Globerman were accurate, it is stunning that BDUs have any subscribers left, given the size of the rate increases that they have each pushed through to their subscribers.

82. CBC's analysis displays graphically that "competition" between BDUs in this country is illusory. This is reflected in the oligopolistic pricing practices of the BDUs. The graphs show endlessly upward sloping lines with each BDU in lockstep. It is little wonder that so many consumers are dissatisfied with their BDU providers as noted in the PIAC submission cited earlier.

83. In fact, having read the CBC and PIAC submissions, one cannot help but feel that BDUs' purported concern over subscriber fees only surfaces when the money to be raised by those increases is destined for some place other than the BDUs' bottom lines. Over the years, BDUs have argued that subscriber fees should not go to programming services, to copyright payments, to the CTF, to fee for carriage or generally to any place other than a BDU's bottom line.

84. The submission by CTVgm/Canwest makes the same point, but on a forward looking basis. It notes the following:

> While the advent of DTH was meant to encourage competition in the broadcasting distribution industry, which theoretically should have resulted in lower rates for consumers, the reality is that the cable companies and the DTH providers have settled into a very cozy oligopoly whereby both types of distributors are able to charge subscribers higher rates than a genuinely competitive environment would normally permit. Indeed, recent statements by Rogers, Shaw and Cogeco make it clear that prices will continue to go up, not down.
>
> For example, at the recent CRTC telecom hearing on essential services, Rogers acknowledged that it had told an investor conference in the United States that
>
> > …unlike the competitive situation in the U.S., the prices on Internet and TV have actually been moving up quite nicely for Rogers. We don't seem to have the competitive pressure to take these decent margin products and move their prices down, so we see good lift there. [underlining in original]
>
> In a Globe and Mail article published on October 27, 2007, both Shaw and Cogeco were also noted as experiencing healthy profits and

> looking forward to higher prices: "Consistently, all telcos and cablecos will continue to raise rates," Mr. Shaw said yesterday on a conference call to discuss the company's fourth-quarter financial results." The article also noted that, in contrast, prices are being cut by U.S. cable operators[17].

85. Turning to the broadcaster submissions, both CBC and CTV/CanWest produced proposals for fee for carriage. In its January 25, 2008 submission, CCAU indicated that it would wait to review the proposals before commenting. Having now reviewed them both, CCAU cannot support either one of them as presented for the reasons outlined below.

86. Predictably, both indicate that the plight of conventional broadcasters is dire while the financial situation of specialty services and BDUs is robust. In the view of these conventional broadcasters, what is required urgently is an infusion of money from BDU subscribers. In CCAU's view, what is required is that conventional broadcasters stop spending so much money on Hollywood programming

87. The joint CanWest/CTV submission makes the rather remarkable assertion that "Canadian broadcasters have no real control over the cost of U.S. programming[18]" and that "the non-Canadian programming expenses of English-language conventional broadcasters increased by 12.9% from 2005 to 2006 alone.[19]" CCAU's understanding is that these expenses occur in some cases even though the Canadian broadcaster does not have room in its schedule(s) to air the programming being bought. Whether this is because U.S. programming is only made available in packages or whether Canadian broadcasters are overbuying to keep such programming away from each other are questions worth posing to the Canadian broadcasters. Whatever the rationale, it has resulted in large increases in the amounts they spend on U.S. shows.

88. This was set out in graphic form in CCAU's October 2007 submission in this proceeding and reproduced below. It showed that spending by Canadian private English OTA broadcasters on non-Canadian programming has soared compared with their spending on Canadian programming. As the chart submitted with that submission displayed, those broadcasters spent only 25% of their advertising revenues on all eligible Canadian programming in 2006, a reduction from 27% in 1999. At the same time, however, spending on non-Canadian programming jumped from 27% of advertising revenues in 1999 to 37% of ad revenue in 2006, a new high.

89. What makes this even more unconscionable is that with the rise of the purchasing power of the Canadian dollar versus the U.S. dollar, one would have expected to see the spending of those Canadian dollars diminish. However, sadly, that is not the case as there seems to be no ability on the part of the conventional broadcasters to rein in their American spending habits.

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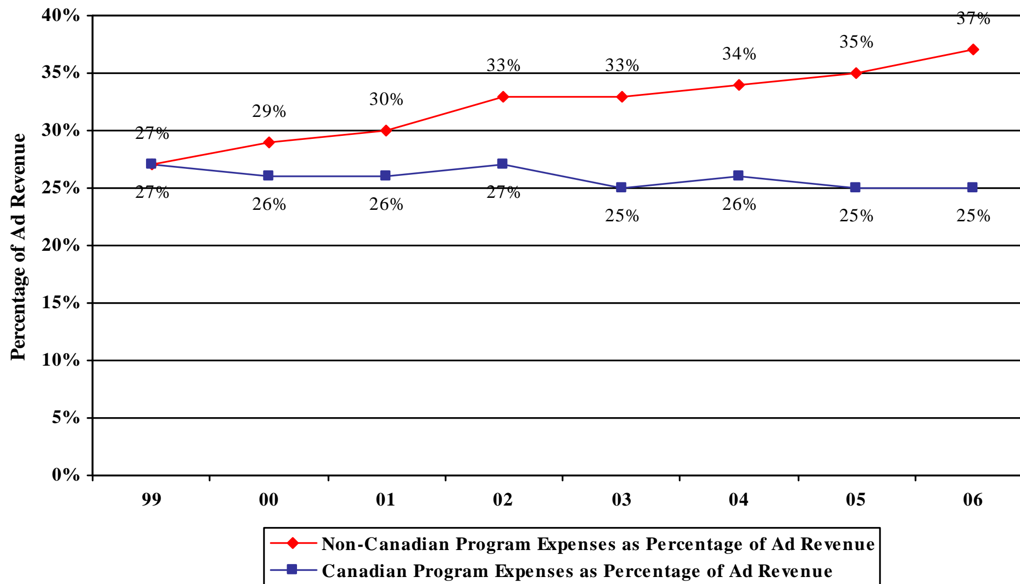
[17] CTVgm/Canwest Joint submission of January 25, 2008 at pages 44-45.
[18] *Ibid.* at p. 31.
[19] *Ibid.*



Source: CRTC Statistics

90. CCAU concluded by noting that:

> In its OTA decision last May, the Commission specifically drew attention to this disturbing development and stated that "the continuing reduction in the proportion of total programming expenditures allocated to Canadian programming is cause for concern."[20] The CCAU will not reiterate all the points made in its previous submissions regarding the importance of Canadian drama. However, it is clear from the soaring expenditures made on U.S. drama productions by the private English OTA TV broadcasters that money exists in the system but is being allocated to items other than Canadian drama by those broadcasters.

91. This point has also been noted by the BDUs who argue that the conventional broadcasters have the money, but that they are just choosing to spend it in Hollywood rather than on other items and that the current financial plight of the broadcasters is a direct result of their own business choices.

92. CCAU notes that the Commission has been very patient in allowing Canadian broadcasters to consolidate in order to be "competitive". CRTC hearings routinely feature CEOs claiming that they will act responsibly when they go down to Hollywood next time. For example, at the time BCE acquired CTV, Canwest was concerned that BCE's deep pockets would cause

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[20] *Determinations regarding certain aspects of the regulatory framework for over-the-air television*, Broadcasting Public Notice CRTC 2007-53, May 17, 2007, at para. 91.

them to overspend in Los Angeles. CTV CEO Ivan Fecan indicated the following in response to questioning from the CRTC Panel:

> CanWest has a concern about what they imagine to be Mr. Monty's largesse, which I don't think is justified. And I think there's a mutual, an interesting balance there. I think both of us will work hard to make sure that the balance is maintained because I don't think the consequence of not maintaining that balance would be helpful and, shorter or long-term, frankly to either company or the system[21].

93. However, even though they know they should restrain themselves when they head to California, Canadian OTA broadcasters just cannot seem to resist another binge outburst. And once again, as alluded to by Mr. Fecan, the Canadian broadcasting system is the poorer for it.

94. As seen above, in its October, 2007 submission, CCAU displayed the degree to which the U.S. spends have increased. This is particularly indefensible in light of section 3(1)(f) of the Act which reads as follows:

> (*f*) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

95. CCAU does not believe that a licensee that voluntarily spends more of its resources on American programming than on Canadian programming is operating in accordance with that requirement. Accordingly, CCAU expects to come forward at the time of the licence renewals of these conventional TV broadcasters with a proposal that addresses this concern since broadcasters seem unwilling to show any discipline in this area. In Broadcasting Public Notice CRTC 2007-53 regarding the regulatory framework for OTA television, the Commission evidenced concern over this U.S. spending pattern when it noted:

> 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.

96. Earlier, CCAU indicated that it could not support either of the fee for carriage proposals that are presently being advanced by the conventional broadcasters. In the case of CTV/CanWest, they propose to tie access to such funds to the provision of more local programming which they themselves would produce. In the case of CBC, entitlement to any such funds would

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[21] Transcript, September 19, 2000, at line 2851.

depend on a subsequent hearing and a further decision of the Commission that the target programming area is the right one.

97. CCAU had earlier indicated that the area that needs support, and urgently, is Canadian scripted drama. CBC spends considerable time in its January 25, 2008 submission explaining why conventional TV broadcasters were so important to the exhibition of Canadian drama. CBC demonstrates that over 85% of the drama/comedy aired (and almost 90% of the drama/comedy viewed) on specialty services consists of repeat programming. It is clear from these numbers that conventional television broadcasters are absolutely essential to the creation and airing of *new* high quality Canadian dramatic productions.

98. CBC's study results

> "confirm that the vast majority of viewing to Canadian drama/comedy broadcast by conventional broadcasters is viewing to original drama/comedy programming that has not previously been shown on another service-either conventional or specialty."

99. Indeed, this leads CBC to the following important conclusion:

> "Clearly, without the direct funding, developmental commitment, and prime time shelf space provided by Canada's public and private conventional broadcasters for original Canadian drama and comedy programming, prime time television in Canada would effectively be devoid of all such programming.
>
> Properly defined to include all conventional broadcasters, Dunbar/Leblanc's suggestion that conventional broadcasters are no longer playing a key role in promoting Canadian content is not correct. On the contrary, as a result of their broad programming makeup, mass prime-time audiences, and investment in original programming, conventional broadcasters play the cornerstone role in the Canadian broadcasting system."

100. Notwithstanding the foregoing, CBC did not go the next step and indicate that it would direct funding from fee for carriage into Canadian drama. This was disappointing to CCAU given that CBC included a study with its submission that seemed to point so clearly in that direction.

101. The Nordicity study[22] filed on January 25, 2008 by CBC, paints a picture wherein there is a significant shortfall between the revenue stream and the programming costs attributable to various genres of Canadian programming. While Canadian variety programming is the only genre that turns a profit (and it is barely above breakeven), the genre that is obviously in dire need of funding support is Canadian drama. It accounts for more than 50% of the shortfall between revenues earned and expenses incurred.

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[22] *Ibid.*, Note 9, at p. 19.

102. Against that backdrop, CBC should offer unqualified support for the directing funds garnered through fee for carriage toward Canadian drama. To allow the funds to be directed elsewhere is simply perpetuating the same problems as have occurred following the Commission's 1999 TV Policy and the now defunct Drama Incentive Plan. As soon as a broadcaster has an option to avoid spending on Canadian drama, that option is inevitably exercised.

103. CCAU continues to emphasize that OTA broadcasters must meet their regulatory obligations regardless of whether fee for carriage is introduced. This includes the introduction of a requirement that OTA broadcasters spend 7% of advertising revenues on the creation and exhibition of high quality Canadian drama**.** The introduction of fee for carriage could provide additional resources for this purpose, but it is not an alternative.

104. The CTVgm/Canwest joint submission is even more of a disappointment to CCAU. The submission quotes the Commission's BNPH CRTC 2007-10-3 and in particular its requirement that it wanted to examine, if such a fee [fee for carriage] were implemented, what proportion of the fee should be dedicated to incremental expenditures on Canadian programming, including local programming.[23]"

105. Just like CBC, CTVgm/Canwest put forward an eloquent case as to the importance of local conventional television stations as "the Cornerstone of the System". They cite the Chair of the Commission as having recently noted that;

> We continue to see OTA television as the cornerstone of the Canadian television system and as the main vehicle for showcasing high-value Canadian content[24].

106. Canwest and CTVgm indicate their agreement that their OTA stations act as the cornerstones of the regulated system and "are the main vehicles for the display of high quality Canadian content to mass audiences.[25]" and that they are "also the primary source of quality Canadian programming and offer invaluable opportunities to the Canadian independent production community[26]."

107. Canwest and CTVgm then arrive at the following key conclusion:

> Most original Canadian programs enjoy a first window on conventional OTA stations where they receive mass exposure and substantial promotion, with second windows and more limited audiences on specialty services. This not only reinforces the importance of private conventional OTA broadcasters as generators and/or exhibitors of original programming, but means that OTA

[23] *Ibid.*, Note 17, at p. 12.
[24] Konrad von Finckenstein, Speech to the Canadian Association of Broadcasters, 5 November 2007.
[25] *Ibid.*, Note 17, at p. 14.
[26] *Ibid*. Note 17, at p. 14.

> broadcasters pave the way for the subsequent presentation of such programming on Canadian specialty services.[27]

108. The Commission will appreciate that it is not the local newscasts of the broadcasters that are then appearing in second windows on specialty services. The local programming of OTA broadcasters does not "travel" particularly well, whether it is outside the local community or later in time. News, the key component of local broadcaster production, grows stale very quickly.

109. Thus, having made the pitch as to the importance of OTA broadcasters as a critical component in the creation of high quality programming, an assertion with which CCAU wholeheartedly concurs, the proposal then does nothing to breathe life into those assertions. Instead, there is simply a suggestion that "Eligibility for the fee should be linked to the ongoing provision of original local programming by the originating broadcaster.[28]" Notwithstanding that they state that "a detailed description of this proposal is contained in Section X of this submission," there is but a single phrase in that section that gives any indication as to where all the money is going to go. It reads, "If local programming targets are not hit in a given month, no subscription fee is permitted." There is no further amplification of this lame proposal.

110. CCAU finds this shocking. The Commission provided the OTA broadcasters with a second chance to convince it of the necessity and importance of fee for carriage and asked for detail as to the proportion of the fee that would be dedicated to incremental expenditures on Canadian programming, including local programming. Instead, the broadcasters want hundreds of millions of dollars to keep on doing what they are already doing, namely the "ongoing provision of original local programming."

111. As shown above with respect to the CBC proposal, and as CCAU and its members have noted time and time again in various regulatory filings, the programming sector that is in dire need of support is Canadian drama. Indeed, the joint CTVgm/Canwest submission recognizes this and makes all the right noises right up until the moment when it is time to put money on the table. At that point, the broadcasters then switch gears and purport to direct all of the funds to "the ongoing provision of original local programming."

112. There is no suggestion anywhere as to why this is a good idea or why local programming is in such dire straits that without this infusion it would not get made. Moreover, is not every newscast an "original local program"? Does this mean that as long as a local broadcaster does not cancel its newscast, it will qualify? This would be a new low in broadcaster definitions of "incremental".

113. CCAU is obviously disappointed in both the CBC and the CTVgm/Canwest proposals. As a practical matter in terms of the Commission's requirements for re-opening the fee for carriage discussion, one would have thought that the proposals would contain a comprehensive analysis of where and how the money will be used what impact it would have on the broadcasting system.

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[27] *Ibid*, Note 17, at p. 15.
[28] *Ibid*, Note 17, at p. 9.

114. CCAU supports the concept of fee for carriage provided that resulting funds are directed to the production and exhibition of Canadian drama. As noted previously, the requirement for OTA broadcasters to spend 7% of their advertising revenues on Canadian drama is independent of the fee for carriage issue.

115. In its January 25, 2008 submission, Bell Aliant Regional Communications, Limited Partnership, and Bell Canada argue that the Commission lacks jurisdiction to impose a fee for carriage. With respect, CCAU believes that conclusion to be incorrect. As noted in its October 19, 2007 submission, from a legal perspective, CCAU believes that the Commission *does* have the requisite authority to impose a fee for carriage should it wish to. Indeed, the Commission has so indicated in its OTA TV decision last May.[29]

116. The Commission's broad powers in this regard flow from the Act, and in particular from section 3(1)(*e*) which states that

> "each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming."

117. That section is not mentioned in the Bell submission.

118. That said, the ability of the Commission to withstand a legal challenge to its jurisdiction to introduce a fee for carriage regime will turn on the use of the resulting funds to further the goals of the Act. As noted above, the creation and presentation of under-represented Canadian programming is such a goal.

119. At the time of the TV policy consideration in 2006, and again in October, 2007, the CCAU indicated its strongly held view that if the Commission did feel that OTA TV signals should attract a new subscriber fee, then significantly increased expenditures should be made on Canadian drama. The CCAU's proposed requirement that OTA TV licensees expend 7% of their advertising revenue on Canadian drama is absolutely fundamental and should not be dependent on any incremental subscriber fees derived from fee for carriage. If there is additional revenue from fee for carriage, most if not all of that incremental revenue – in addition to the 7% expenditure requirement we have urged elsewhere -- should be earmarked for the hardest genre of Canadian programming to produce and finance, namely, Canadian drama.

120. The bottom line is that if the Commission intends to establish a fee for carriage regime, then incremental revenues should be put to work for the benefit of the Canadian broadcasting system, particularly for the creation of Canadian drama. The Commission has the requisite legal authority to introduce a fee for carriage regime, but should ensure that funds received from it are directed to the programming area of greatest need for financial support, namely that of Canadian drama.

121. All of which is respectfully submitted.

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[29] *Ibid.*, Note 9, at para 23.

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