REVIEW OF THE REGULATORY FRAMEWORK FOR BROADCASTING SERVICES IN CANADA

FINAL REPORT

August 31, 2007

Laurence J.E. Dunbar

Christian Leblanc

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Framework for Broadcasting
Services in Canada

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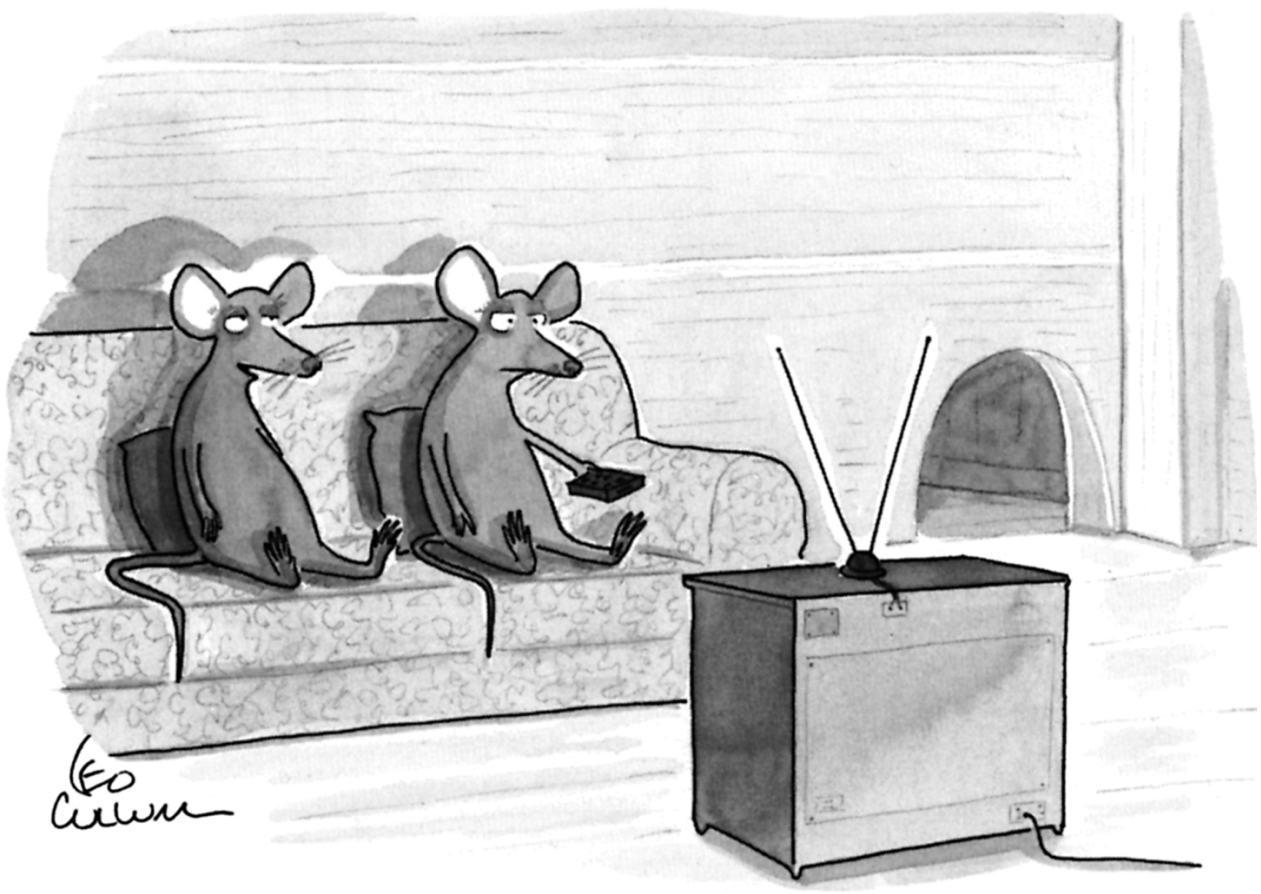

"That's the catnip channel. We had to take it to get the cheese channel."

August 31, 2007

Mr. Konrad von Finckenstein
Chairman
Canadian Radio-television and
Telecommunications Commission
1 Promenade du Portage
Gatineau, Quebec
K1A 0N2

Dear Mr. von Finckenstein,

On April 27, 2007 we were retained by the Commission to conduct a comprehensive review of the existing regulatory framework for broadcasting services in Canada and to submit a report containing recommendations for reform by August 31, 2007.

The objective of this review was to assess the effectiveness of the existing regulatory framework in meeting Canada's requirements for broadcasting services, and to recommend ways in which those requirements can be better served, with either more efficient regulation or with less regulation.

We are pleased to submit our report containing in excess of one hundred recommendations for reform.

Thank you for entrusting us with this mandate.

Yours sincerely,

Laurence J.E. Dunbar Christian Leblanc

Acknowledgement

We would like to acknowledge the significant contributions to this report by Scott Prescott, Leslie Milton, Stephen Whitehead, Aidan O'Neill, Jay Kerr-Wilson and Anne Tardif, the research and editing performed by Anne Ko and Meghan Clarke, as well as the tireless effort we received from our support staff, including Gayle Pugliese, Diane Hendren, Deana Castello and Eileen Hudson.

Most importantly, we wish to thank Robert Buchan for his guidance throughout the project, the contributions he made to the report and for sharing his knowledge of the Canadian broadcasting sector with us. Bob is one of the leaders of the Canadian communications bar. He was indispensable to this project and worked tirelessly to help see the report to fruition.

Laurence Dunbar (Ottawa)

Christian Leblanc (Montreal)

Executive Summary

OUR MANDATE

This report was commissioned by the Canadian Radio-television and Telecommunications Commission (CRTC) on April 27, 2007. The authors were directed to conduct a comprehensive review of the existing regulatory framework for broadcasting services in Canada and to submit a report containing recommendations for reform by August 31, 2007. The CBC's special mandate was stated to be beyond the scope of our review.

It is important to note that the views expressed in this report are those of the authors. The CRTC was not involved in formulating any of our recommendations and did not participate in our consideration of the issues.

OBJECTIVES OF OUR REVIEW

The objective of our review was to assess the effectiveness of the existing regulatory and policy framework in meeting Canadians' requirements for broadcasting services, and to recommend ways in which these requirements can be better served, with either more efficient regulation or with less regulation.

While this mandate does not extend to a consideration of possible amendments to the *Broadcasting Act*, it was recognized that it would not be possible to make a meaningful assessment of the current regulatory framework, regulations, policies and procedures as they relate to Canada's broadcasting system without first reviewing the history, purpose and scope of the 1991 *Broadcasting Act*. That review inevitably includes consideration of the *Broadcasting Policy for Canada* contained in section 3 of the Act, the Commission's statutory objects, as outlined in subsection 5(1), and the regulatory policy that is contained in subsection 5(2) of the Act. This discussion is contained in chapter 2 of the report.

METHODOLOGY

The methodology that we were asked to apply to our review was summarized by the Chair of the CRTC, in an address on May 10, 2007 to the Annual Conference of the British Columbia Association of Broadcasters. Chairman von Finckenstein stated that we have been asked to consider, in respect of each CRTC regulation or policy:

- First, what was its original purpose;
- Second, what is its relevance and effectiveness with respect to present and future needs; and

- Third, should it be retained, improved, streamlined or eliminated in order to serve the purposes of the *Broadcasting Act* most efficiently and economically?

He went on to explain that "…the study will make recommendations to maximize the reliance on market forces, always keeping in mind the overriding twin objectives of Canadian content and access to the system."

In our report, we have followed this approach paying particular attention to the two key objectives identified by the Chairman.

BROADCASTING AND REGULATORY POLICY OBJECTIVES

The CRTC has authority under the *Broadcasting Act* to enact regulations and formulate policies that are applicable to the broadcasting undertakings it regulates and supervises.

In the exercise of its regulation-making power and its policy-making function the Commission is both guided and circumscribed by the clear requirement in subsection 5(1) of the *Broadcasting Act* "… to implement the objectives of the broadcasting policy set out in subsection 3(1)" of the *Broadcasting Act*, and also "… to have regard to the regulatory policy" which is set out in subsection 5(2) of the Act. As a matter of law, each of those separate policy objectives has equal weight. Therefore the Commission cannot ignore any of these policy objectives when it enacts regulations or formulates policies. In case of conflict (which rarely happens) the Act states that the broadcasting objectives in subsection 3(1) are to be given priority status over the objectives of the regulatory policy in subsection 5(2).

The number of objectives identified by Parliament, and the lack of any express prioritization, places the regulator in a difficult situation. The CRTC is directed to implement all of these diverse objectives without any guidance from Parliament as to where to place its emphasis. Since our mandate does not extend to recommending legislative change, our report reviews the CRTC's policies and regulations in light of the broadcasting policy objections in subsection 3(1), and the regulatory principles in subsection 5(2) of the *Broadcasting Act*. In this important respect, the scope of our review differs significantly from the recent review of telecommunications policies and legislation by the Telecommunications Policy Review Panel.

SCOPE FOR REFORM

Notwithstanding the large number of statutory policy objectives in subsection 3(1) and their specificity, the *Broadcasting Act* confers a significant amount of discretion on the CRTC with respect to how it goes about the job of regulating and supervising the Canadian broadcasting system.

The statutory framework established in the *Broadcasting Act* therefore does not foreclose regulatory reform, nor does it mandate regulation when it is not required to implement

the policy objectives in subsection 3(1). Rather it empowers the Commission to apply a test of materiality to the issue of whether regulation is required to achieve the statutory policy objectives, and it empowers the Commission to define the extent of regulation, as well as the nature of regulation required to implement those objectives when a blanket exemption is not justified on the facts.

In considering the issue of regulatory reform in the broadcasting sector, it is also important to note that paragraph 5(2)(g) states that the Canadian broadcasting system should be regulated and supervised in a flexible manner that "is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings."

FRAMEWORK FOR EVALUATING REGULATION

To be effective, regulation must be directed at achieving policy objectives, it must be achievable in the sense that compliance must be within the control of the regulated entity, and it must be enforceable. It should also, to the extent possible, reflect performance-based standards, rather than dictating the means to achieve those standards.

The costs of regulation include the direct costs of complying with the regulation that must be borne by the regulated undertaking and the ongoing supervisory and enforcement costs of the regulator, as well as market costs and inefficiencies caused by regulatory intervention. In general, the least costly or intrusive regulatory measure necessary to achieve the policy objective is preferable to more intrusive or costly measures. Inconsistency between regulations should also be avoided, since inconsistent regulation introduces unnecessary costs and undermines the effectiveness and transparency of the regime.

It is with these principles of "smart regulation" in mind that we have reviewed the CRTC's regulations and policies with respect to broadcasting.

Smart regulation requires the regulator to engage in a disciplined approach to regulation. It requires the regulator to clearly identify the policy objective being pursued, and it requires an assessment of whether the policy objective in question can be adequately addressed in the absence of regulatory intervention (whether by market forces or by the regulated entity's own self-interest). This analysis requires a detailed understanding of the industry and market conditions.

If it is determined that regulatory intervention will materially advance a statutory policy objective when compared with the option of no intervention, then the regulator should use a regulatory mechanism that will fulfill the policy objective in the least intrusive manner possible, having regard to possible unintended effects of regulatory intervention. Where licensees compete with each other, there is also the need to maintain competitive neutrality among them by applying uniform rules to comparable undertakings.

These principles are not new to the Commission. They were reflected in the report of the External Advisory Committee on Smart Regulation and have been adopted by the Government of Canada. These principles were recently articulated by the Telecommunications Policy Review Panel in its 2006 *Report to the Government of Canada* and they were codified in the Policy Direction to the CRTC issued the Governor in Council pursuant to section 8 of the *Telecommunications Act*. While the circumstances of the telecommunications and broadcasting industries regulated by the Commission may be very different, these principles of smart regulation are equally applicable and adaptable.

COORDINATION OF REGULATORY ACTION

While the CRTC plays a pivotal role in the regulation of the Canadian broadcasting system, it is not the only governmental agency with responsibilities that affect this sector.

As the broadcasting sector faces new challenges posed by the Internet and digital media, it will be important for all of these governmental departments and agencies to continue to coordinate their activities in a manner that best achieves the policy objectives being pursued.

The External Advisory Committee on Smart Regulation also addressed this issue in its report. It recommended the establishment of a mechanism to support inter-departmental discussions to foster the development of government-wide positions on regulatory issues and to ensure that departments take appropriate action to design regulations with national priorities. The goal is to ensure that policy objectives are clearly spelled out and that regulatory action is coherent and integrated.

Given the importance of the Canadian broadcasting system to Canada's cultural identity, and given the fact that our broadcasting system is affected by externalities beyond the jurisdiction of the CRTC (such as copyright laws, cultural policies and fiscal and trade policies), we recommend that the Commission explore the creation of a multi-disciplinary committee to address important issues of common concern and to bring to bear in a coordinated manner all the levers of government and regulation. An obvious candidate for this type of initiative is digital media, as discussed further in our report.

THE ROLE OF COMPETITION IN THE BROADCASTING SECTOR

The original rationale for regulating commercial broadcasting activity was the notion that radio spectrum was a scarce public resource that should be allocated for the highest and best use. Canadian broadcasting legislation has refined what that use should be by setting forth both a comprehensive set of policy objectives and guidelines on how the CRTC should regulate.

However, even in this regulated environment, competitive market forces have always had an important role to play.

- Traditionally, commercial television and radio stations competed with each other for program rights, audience share and advertising revenues.

- Networks also competed for coverage.

- More recently, pay television, specialty services, pay-per-view and video-on-demand (VOD) services have also competed for audiences, program rights and, in some cases, advertising revenues.

- There are now a number of different types of broadcasting distribution undertakings competing for customers.

Nonetheless, regulation is still pervasive even in areas where undertakings compete: Examples include:

- limits on market entry;

- regulated formats;

- restrictions on advertising;

- genre protection;

- restrictions on program content;

- restrictions on program production; and

- restrictions on program distribution and marketing.

In our report, we have made a number of recommendations to inject more competition and more consumer choice into the Canadian broadcasting system.

Less Genre Protection

The system of genre protection is breaking down as the distinction between genres gets blurred. Genre protection was intended to protect a nascent pay and specialty market against competition – to get them on their feet. While we see a need to continue to protect Canadian programming services from directly competing non-Canadian services, we question the need for genre protection between Canadian services.

Recommendations

- Allow market forces to play a greater role in responding to consumer demand for discretionary programming services.

- Stop enforcing genre protection among Canadian programming services, unless there is reason to believe that competition in respect of specific genres would not advance the policy objectives in s. 3(1) of the Act.

Collapsing Licence Classes

The existing regulatory framework addresses criteria for distinguishing various classes or categories of broadcasting licences from each other. This regime has been designed to insulate licensees from inter-licence class competition, and to ensure diverse voices. With the blurring of old distinctions between providers of linear and non-linear programming, and with different classes of licensee often competing with each other for the same programming, the utility of maintaining all of these regulatory distinctions is questionable.

Recommendations

- We recommend that the Commission consider the feasibility of collapsing some of the existing licence classes that are starting to exhibit similar characteristics and permit the market to decide whether it wants more subscription-based specialty or VOD services, more pay-per-view services, or more advertising-based services. Any such changes in licence classes should be accompanied by a new set of regulatory obligations that apply evenly within the class.

Restrictions on Advertising

Time limits on advertising by radio licensees were eliminated over a decade ago. Since then, the amount of advertising broadcast by radio licensees has been dictated by market forces. The 2006 *Broadcasting Monitoring Report* indicates that a very significant portion of the advertising incentive minutes available to English and French-language conventional over-the-air (OTA) and specialty television broadcasters were not in fact used by these broadcasters. This suggests not only that these minutes had little or no incentive value, but also that market forces limit the amount of advertising that is broadcast.

Recommendations

- We recommend that the Commission reassess the current restrictions on advertising that apply to various classes of television services, in light of the realities of the market and new trends in narrowcast advertising, and consider whether the existing restrictions limit the revenues available to the broadcasting system.

- It should then consider the feasibility of removing the restrictions and allowing broadcasting undertakings to decide how best to offer their services to the public – whether through an advertising-based model, a subscription service, or on a transactional basis.

Rationalizing the Categories of Specialty Services

There are currently five categories of specialty programming services with varying regulatory obligations. These services vary in terms of carriage rights, access rights, access rules and wholesale fees they may charge. Many of the rights and obligations attaching to these licences appear to depend on when the specialty service was launched, and not on merit. The different rights attaching to these types of licences limit competition between these services, as some are carried as of right at a prescribed rate, some are carried at negotiated rates, and some do not have to be carried at all.

Recommendations

- We recommend that the Commission consider rationalizing the regulatory structure for specialty services in advance of the completion of digital migration in the 2010 to 2013 time period.

- We recommend that consideration be given to moving to a new system that rewards services that make significant contributions to furthering the objectives of the Act (through higher levels of Canadian content, significant Canadian programming expenditures or public safety initiatives), with greater carriage and access rights.

Competitive Entry into OTA Television

At present, applications for new radio and over-the-air television services are scrutinized to ensure that the market can support an additional service provider. While we understand the rationale for this approach, the limitations on entry may come at a fairly high cost. In effect, this approach protects inefficient competitors and can serve to preclude entry by new players that might operate more efficiently than existing service providers, respond better to consumer demand, offer more Canadian content and more high-quality programming to consumers.

In the period between 2003 and 2006, the Commission licensed 233 new OTA radio stations, including 76 new stations in 2006 alone. This has resulted in more competition for advertising revenues and greater choice for consumers. In contrast, the Commission is more reticent towards allowing new entry in the OTA television market.

Recommendations

- We recommend that consideration be given to allowing competitive entry into OTA broadcasting markets where spectrum is available (by new entrants who are unaffiliated with incumbent broadcasters in the same local market).

- In our view, less weight should be given to economic arguments in favour of protecting the incumbent broadcaster's market share and more weight should be given to letting market forces decide which broadcasters respond best to consumers' needs.

Packaging by BDUs

At present, broadcasting distribution undertakings (BDUs) are heavily restricted in their packaging of programming services for retail sale. These rules limit the ability of BDUs to compete with one another by offering innovative service packages that are responsive to consumer demand. Although the Commission is proposing to relax some of these requirements in a fully digital environment, in the 2010 to 2013 timeframe, this is a long time to continue to operate under a more restrictive regime.

Recommendations

- We believe that if the Commission maintains a strengthened Canadian basic service package with a buy-through requirement, it may be possible to allow market forces and consumer demand to dictate most of the remaining packaging issues.

- We recommend that the Commission give greater flexibility to BDUs to market discretionary services to the public in order to better respond to consumer demand.

- To this end, are recommending that a number of tiering and linkage rules be eliminated.

CANADIAN CONTENT

We do not consider that that market forces alone are likely to achieve all the statutory policy objectives relating Canadian programming services. However we question whether all of the existing regulations and policies are working in a manner that effectively achieves these objectives. The current system involves a myriad of rules embodied in regulations, policies and conditions of licence that vary both between and within various classes of licence.

Although OTA television services have typically been considered to be the preeminent contributors to Canadian content development and exhibition, total expenditures by pay and specialty services on Canadian programming now exceed, by a significant amount, total expenditures by commercial OTA television services. Specialty and Pay TV services also spent a significantly higher portion of their revenues on Canadian content than commercial OTA television. While CPE as a percentage of revenues has remained relatively flat for commercial OTA television services, expenditures by OTA television services on non-Canadian programming has increased as a percentage of total revenues.

The overall viewing share of specialty and pay services now exceed that of conventional OTA television. The same is true for overall viewership of Canadian programs. These data suggest that specialty and pay are taking on a bigger role with repect to Canadian content and that presumptions underlying our existing framework may have changed.

Priority Programming

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.

The incentives which permit OTA services to gross up Canadian drama programming broadcast during peak viewing periods effectively reduce the amount of Canadian programming that these services must broadcast during such peak periods.
The advertising minute incentives, at least in the case of OTA television services, will have no value once the limits on advertising minutes are lifted for this class of licensee and, in any event, they do not appear to have been effective. Many of the advertising incentive minutes available to conventional and specialty services have not been utilized, suggesting that these minutes have little or no incentive value.

The economic incentives associated with simultaneous substitution appears to dictate, to a very large extent, the peak period program schedules of English language commercial OTA television broadcasters, ensuring that foreign content is predominantly displayed during peak viewing periods. These factors suggest that existing measures to promote the production and exhibition of Canadian content need to be reexamined. It is not at all apparent that the economics of producing Canadian entertainment magazine or reality television programming suffers from the same challenges as Canadian drama programming, or that this type of programming merits specific regulatory incentives.

Recommendations

- We believe it is imperative to develop more targeted and effective measures to incent the exhibition of Canadian content during peak viewing periods where market forces will not achieve this goal.

- Consideration should also be given to targeting peak programming obligations to a narrow class of programs, such as drama, which are not adequately supported by the marketplace, and imposing targeted exhibition obligations which require television services to broadcast a minimum number of hours of these types of

Canadian programs between 7 and 11 pm during each six month period over the course of a licensee's broadcast year to ensure that they will be exhibited during months when Canadians are watching significant amounts of television.

Canadian Program Expenditures (CPE)

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 and are often included in OTA television benefit packages. It appears to us that there is a need to rationalize the CPE rules with other Canadian content obligations in order to make them more transparent and uniform within competing groups of licensees.

Recommendation

- We recommend that consideration be given to rationalizing exhibition and expenditure requirements both within and across different categories of television services.

Simultaneous Substitution

Simultaneous substitution maximizes the value of Canadian exhibition rights of American programming. It is often cited as a means to help to fund Canadian content.

However, if one looks at the examples of program schedules for the major English language commercial television networks during the regular season peak viewing period (in Appendix C of our report) one can see that, with very few exceptions, they are filled with American programs scheduled at the same time that the American networks have scheduled the same programs. In a very real sense, simultaneous substitution appears to be dictating the scheduling of Canadian English-language OTA television networks – pushing Canadian programs into non-peak viewing periods or into the summer months.

This undermines the economic value of Canadian programming and the very great efforts that the regulatory system and the industry exert to produce more Canadian content. Simultaneous substitution also increases the price paid for Canadian rights to American programs.

Recommendation

- We recommend that the Commission reassess the net impact that simultaneous substitution has on the Canadian broadcasting system and assess whether there are

other regulatory mechanisms that might break the very strong economic incentives for Canadian broadcasters to schedule American television programs in peak viewing periods, to the detriment of Canadian programming.

Independent Television Production

S. 3(1)(i)(v) of the *Broadcasting Act* states that the programming provided by the Canadian broadcasting system should "include a significant contribution from the Canadian independent production sector." Requirements vary widely across different classes of licence – from 75% for priority programming by conventional OTA television, to 25% for Category 1 specialty services, to a prohibition on in-house production by pay television licensees. These restrictions extend to related production houses. There are signs that this policy may not be working in a manner that is most conducive to the production of Canadian content in the current economic and technological environment.

Recommendations

- We recommend that the Commission study the pros and cons of reducing the requirements on broadcasting undertakings to use high percentages of independently produced programming.

- This review should include consideration of economies of scale and scope in production, rights management issues, and incentives to maximize returns from Canadian programming.

- At the same time, the Commission should consider rationalizing the independent production requirements of different classes of television undertakings and, in the absence of clear regulatory distinctions, imposing common obligations on these services.

- We recommend that this be done in a staged manner and that following any such reduction or rationalization, the CRTC should carefully monitor the impact of the changes on Canadian content production and independent producers.

ACCESS

We believe that the priority carriage rules and the power conferred on the Commission in s. 9(1)(h) to designate other programming services for compulsory carriage by BDUs, are important tools to ensure that Canadians have access to specific programming services that the Commission considers important to achieving the policy objectives in s. 3(1) of the Act. We favour the maintenance of a basic service that exhibits a high level of Canadian programming, and we favour the continuation of a "buy-through" requirement that requires Canadians to subscribe to this basic service before buying other discretionary services. We see this as an important part of the equation if the

Commission is going to consider increasing the options available to consumers to purchase discretionary services in a more consumer-friendly environment.

We suggest that consideration be given to further enhancing the visibility of discretionary services that provide high levels of Canadian content, significant Canadian program expenditures or perform a public interest function, by tying access rights to the contribution that a service makes toward furthering the objectives of the *Broadcasting Act*. Incentives might include such benefits as compulsory carriage, subscription fees, inclusion in the basic service or even channel placement. We consider that this approach would have merit over the existing framework that has rewarded discretionary services with carriage rights based more on their launch date than on their merits.

Recommendation

- We recommend that the Commission consider supplementing its access and carriage rules with a new regime that incents broadcasters to increase their Canadian content levels in discretionary services, to invest in certain types of Canadian content, such as drama, or to provide a service that fulfills a public interest function, such as public safety, in order to achieve more favourable access and carriage rights.

Channel Placement

There appear to be divergent views on the importance of channel placement. While specialty services claim that it is an important determinant of their success, BDUs appear to take the opposite view. If it is determined that channel placement is still important to the success of programming services, consideration should be given to requiring that Canadian services, particularly those that satisfy high Canadian content thresholds, receive better placement on the BDU dial than non-Canadian services or Canadian services with lower Canadian content levels.

Recommendations

- We recommend that the Commission assess the importance of channel placement to the success of programming services. If it is determined that channel placement is still important to the success of programming services, consideration should be given to requiring that Canadian services, particularly those that satisfy high Canadian content thresholds, receive better placement in the BDU channel line-up than non-Canadian services.

- In assessing this issue, consideration should also be given to the impact of channel placement on the overall demand for Canadian programming services and the ability of BDUs to differentiate themselves from other BDUs in a competitive marketplace.

Carriage Fees

The requirement to regulate carriage or wholesale fees should be investigated in light of the relative bargaining power of parties. A must-carry obligation appears on its face to enhance the bargaining power of a programming service, provided that the service is entitled to seek carriage fees. On the other hand, a programming service with no must-carry rights would appear to be in a much weaker bargaining position than the BDU unless its programs are in great demand by consumers.

In our view, market forces should have a role to play in determining the value of the service being carried. However, the Commission should be prepared to engage in a dispute settlement or adjudicative role, when there is an inequality in bargaining power on either side. As discussed further on, we favour strengthened anti-discrimination provisions and increased enforcement powers to deal with these types of disputes.

Carriage of Related Services

We recommend eliminating some of the existing requirements that inhibit BDUs from carrying affiliated programming services. (For example, the current rules require the BDU to carry five specialty services for each related specialty service that it carries.) In our view, this type of rule may inhibit carriage of new Canadian programming services without necessarily addressing the issue of discriminatory conduct.

In order to offset the ability of BDUs to engage in anti-competitive conduct in respect of their own or related programming services, we recommend that the Commission strengthen its test of discriminatory conduct and its enforcement mechanisms.

Preponderance

In *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, the CRTC proposed a rule that would require BDUs to ensure that customers receive a simple preponderance (51%) of Canadian programming services (based on all services received). We agree that the CRTC's proposal would provide for a simpler form of regulation. In our view, consumer demand should play a greater role in the Canadian broadcasting system, as it does in other sectors of the economy.

Forcing Canadians to subscribe to truly "discretionary" services that they do not want, in order to get one they do want, is precisely the type of regulation that may drive consumers to the Internet, pay-per-view and on-demand types of services. If the Canadian broadcasting system is to remain relevant and attractive to viewers in an age of watching "anything, any time", it needs to adapt to the new environment.

Recommendation

- We recommend that the Commission move to a simple preponderance rule (51%) for Canadian programming services subscribed to by consumers and that it eliminate many of the additional tiering and linkage rules that are currently in place. (Detailed recommendations on the application of these principles are provided in the report.)

Dispute Settlement and Enforcement

We believe that a shift to greater reliance on market forces in the broadcasting sector must be accompanied by enhanced dispute resolution mechanisms that address, efficiently and effectively, competitive disputes and include credible sanctions on anti-competitive conduct. In many cases, a complainant will not have access to the evidence necessary to satisfy this requirement because relevant examples of a BDU's conduct with respect to third party or self-dealing will not be publicly available and will be exclusively within the knowledge of the BDU.

Recommendation

- We recommend that, consistent with the test found in subsection 27(4) of the *Telecommunications Act*, the onus of demonstrating that the BDU has not conferred an "undue" or unreasonable preference or disadvantage be shifted to the BDU, once an allegation of discriminatory conduct has been established.

Administrative Fines

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.

NEW MEDIA

Much has changed since the New Media Exemption order was issued by the Commission in 1999:

- The Internet is no longer primarily a text-based information medium;

- While there are still limitations on bandwidth, significant advances have been made in the development of high-speed Internet access services and Canadians have shown robust demand for these services;

- Multiple platforms have developed for the delivery of digital media;

- While much of the video programming available on the Internet is in short-form format, conventional broadcasters and rights holders are increasingly making long-form programming available;

- Advertisers are starting to devote more resources to Internet advertising and, in some cases, have diverted advertising dollars away from conventional television.

- Joost, Jump TV, YouTube, Facebook, Apple TV, and many other services are exhibiting video programming of various sorts.

Major American television networks have begun to make episodes of their conventional television shows available on the Internet the day after their initial broadcast. In Canada, broadcasters have also begun to experiment with Internet-based shows. The CBC and other Canadian networks have also begun to make some of their programs available on the Internet and more recently, some Internet-only programming has been exhibited – such as the post-game shows following NHL playoff games in 2007. The Internet also provides an important outlet for specialty channels – some of which have had difficulty obtaining carriage rights on conventional BDUs.

While "geoblocking" has proven to be effective in blocking access to American content when the owner of that content has an interest in maintaining a system of geographic licensing, it is not effective where programming rights are ignored and the site offering the content is operating outside of copyright laws. Therefore, while Joost and the American television networks may be blocking access by Canadians to content already licensed to Canadian broadcasters, not all sites are doing the same. In addition, if American producers of television programs start selling Internet distribution rights separately from Canadian television distribution rights (which they have not yet started to do), Canadian broadcasters could face competition from the very programs that they purchase from U.S. distributors, without the benefit of simultaneous substitution. In 2006, Internet-based advertising amounted to approximately 6% of ad dollars in both Canada and the United states – breaking through the $1 billion barrier in Canada. It is predicted to continue to grow at a high rate.

In this new environment, some stakeholders in the Canadian broadcasting system are voicing concerns about the suitability of our existing statutory and regulatory framework for addressing the impact of new media on the Canadian broadcasting system. The Internet differs in certain respects from other previous technological threats to the Canadian broadcasting system insofar as it provides users access to worldwide content – not just content originating in Canada or south of the border. This makes the enforcement of other forms of protection, such as copyright laws, less effective than they might be in an exclusively North American context.

Recommendations

- In our view, the solutions to this issue lie not in imposing new regulatory restrictions on Canadian companies as some stakeholders have suggested – but rather in encouraging them to stake out territory on the Internet, and in facilitating the production of Canadian new media content for the Internet.

- To regulate Canadians, while the rest of the world competes in an open market, would in our view be counterproductive and would not achieve the objectives of the *Broadcasting Policy for Canada*.

- In our view, the answer also lies in ensuring that the Canadian broadcasting system adapts to some of the trends that the Internet has spawned in order to remain relevant. These trends include a desire on the part of many consumers for content "anywhere, anytime", the desire of younger consumers to have an interactive experience with digital media, the desire of advertisers to be able to target relevant audiences with interactive media, and the development of new "communities of interest" that are not necessarily tied to local or regional geographic areas.

- Canada is in need of a national policy for digital media, and needs to have available all of the tools of government to give effect to it. This likely includes copyright, fiscal measures, and new programs to incent Canadian participation in new media ventures. While it is beyond the jurisdiction of the CRTC to implement this national policy on its own, we urge the Commission to consult with other Governmental agencies and departments to begin such a process.

- Consideration should also be given by the Government of Canada to establishing restrictions on deductibility of advertising expenses on non-Canadian Internet sites in order to encourage more investment in Canadian sites in a manner similar to Bill C-58. Again, this recommendation cannot be implemented by the CRTC. It needs the involvement of other government departments – consistent with the principles of smart regulation.

DETAILED ASSESSMENT OF REGULATIONS AND POLICIES

Following our discussion of these broad policy issues, our report focuses on application of these principles to the specific regulations and policies formulated by the Commission.

Chapter 10 discusses in turn the regulations applicable to the different elements of the Canadian broadcasting system. This includes the regulations applicable to private conventional and community television undertakings, pay television, specialty services, pay per view and video on demand, broadcasting distribution undertakings, and commercial and community radio.

Chapter 11 addresses major Commission policies applicable to the broadcasting sector. These include the Commission's policies on ownership, benefits, aboriginal broadcasting, ethnic broadcasting, cultural diversity, educational broadcasting, services for persons with disabilities and religious broadcasting.

Finally, Chapter 12 addresses broadcasting procedures, including the application and licensing process, the *CRTC Rules of Procedure*, and information returns and licence fees.

These chapters contain detailed discussions of the origins of the regulations and policies, their original purpose and the extent to which we consider them to be effective and necessary in the current broadcasting environment. These chapters contain detailed recommendations for reform.

Since it is not possible to accurately summarize our report in seventeen pages, reference should be made to the text of the report and to the full text of the recommendations contained in it. A complete and accurate compendium of all our recommendations is contained in Appendix A to the report.

INDEX

(1) INTRODUCTION

> "He that will not apply new remedies must expect new evils; for time is the greatest innovator."
>
> Sir Francis Bacon

This report was commissioned by the Canadian Radio-television and Telecommunications Commission (CRTC) on April 27, 2007. The authors were directed to conduct a comprehensive review of the existing regulatory framework for broadcasting services in Canada and to submit a report containing recommendations for reform by August 31, 2007.

The CRTC has a broad statutory mandate from Parliament, under section 5 of the *Broadcasting Act*, "… to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in doing, shall have regard to the regulatory policy set out in subsection 5(2)."

In the implementation of that mandate, the CRTC enacts regulations that are applicable to various classes of broadcasting licensees, and also formulates broadcasting policies.

The objective of this review is to assess the effectiveness of the existing regulatory and policy framework in meeting Canadians' requirements for broadcasting services, and to recommend ways in which these requirements can be better served, with either more efficient regulation or with less regulation.

While this mandate does not extend to a consideration of amendments to the *Broadcasting Act*, it was recognized that it would not be possible to make a meaningful assessment of the current regulatory framework, regulations, policies and procedures as they relate to Canada's broadcasting system without first reviewing the history, purpose and scope of the 1991 *Broadcasting Act*. That review inevitably includes comments on the *Broadcasting Policy for Canada* contained in section 3 of the Act, the Commission's statutory objects, as outlined in subsection 5(1), and the regulatory policy that is contained in subsection 5(2) of the Act.

The first part of this report therefore briefly reviews, in a non-prescriptive manner, the purpose and scope of the *Broadcasting Act* as well as the responsibilities of the CRTC with regard to the regulation and supervision of the Canadian broadcasting system.

Our approach to this review involves a three step process with respect to each constituent element of the system. The first step is to identify the CRTC's regulations, orders and policies applicable to the broadcasting sector in question, and to identify their original purpose. The second step involves an assessment of the relevance of that purpose in the current and near future environment and the extent to which the regulatory mechanisms in question are effective in meeting the

objectives of the Act. This assessment will be made in light of recent and on-going developments in technology, the strengthening of competitive market forces, the evolution of new media services and other pertinent factors. Third, for those policies which are considered to meet the stated objectives, we have been tasked with considering whether other, less intrusive or burdensome regulatory mechanisms might be employed to achieve the same objective.

In a manner similar to the approach taken in the 2006 *Report of the Telecom Policy Review Panel*, we have also been asked to consider the extent to which market forces can be relied upon to achieve the Canadian broadcasting policy objectives.

This mandate was summarized by the Chair of the CRTC, in an address on May 10, 2007 to the Annual Conference of the British Columbia Association of Broadcasters. Chairman von Finckenstein stated that we have been asked to consider, in respect of each CRTC regulation or policy:

- First, what was its original purpose;
- Second, what is its relevance and effectiveness with respect to present and future needs; and
- Third, should it be retained, improved, streamlined or eliminated in order to serve the purposes of the *Broadcasting Act* most efficiently and economically?

He went on to explain that "…the study will make recommendations to maximize the reliance on market forces, always keeping in mind the overriding twin objectives of Canadian content and access to the system."

The general approach described by the Chair is consistent with the principles set forth in *Smart Regulations: A Regulatory Strategy for Canada*.[1] Those principles, which were also adopted by the Telecommunications Policy Review Panel in its Final Report, provide as follows:

- regulation, where required, should be clearly directed at achieving the intended policy objectives

- regulators should strive for the least costly and intrusive means to achieve policy objectives, avoiding overlap, duplication and inconsistency, minimizing the potential risks of unintended consequences and providing for enforcement that is commensurate with the risks and problems involved.

It is important for the reader to appreciate that the terms of reference for our review of CRTC regulations and policies, as broad as those terms may appear to be, do <u>not</u> include recommending amendments to the mandate of the Canadian

[1] External Advisory Committee on *Smart Regulation, Smart Regulation: A Regulatory Strategy for Canada* (Ottawa: the Committee, September 20, 2004). Available online at: http://www.pco-bcp.gc.ca/smartreg-regint/en/08/rpt_fnl.pdf

Broadcasting Corporation which is contained in the *Broadcasting Act*. All other policies and regulations however, fall within the scope of this review.

Given this very broad mandate and the four month time-frame specified for its completion, the CRTC requested that we focus on what the Chair has referred to as the "overriding twin objectives of Canadian content and access to the system." While not discounting the potential need to satisfy other policy objectives in the Act, we have focused in particular on regulatory measures that have been enacted in furtherance of these two broad objectives.

With this in mind, we have reviewed the seven sets of separate CRTC regulations that are currently in force, and will also review the major broadcasting policies that are applicable to various classes of licensees today. We will not, however, attempt to delve into particular conditions of licence that may apply to individual licensees, except insofar as the discussion of major broadcasting policies addresses those policies that have been implemented through conditions of licence.

Organization

The report starts out with a discussion of the objectives of the *Broadcasting Act* (Chapter 2) and the "regulatory toolbox" provided to the Commission to regulate the Canadian broadcasting system (Chapter 3). Those two chapters are followed by a discussion of the principles of "smart regulation" adopted by the Canadian Government and the application of these principles to our analysis of the existing regulatory framework for broadcasting (Chapter 4).

In the next five chapters (5-9) we discuss at a relatively high level five important topics that have relevance across all elements of the broadcasting system. These include the three key issues that we were asked by the Chairman of the CRTC to focus on – namely: the role of competition in the broadcasting sector (Chapter 5); Canadian content (Chapter 6); and access (Chapter 7). We then discuss two important extraneous forces that impact the Canadian broadcasting sector: the relationship between copyright and broadcasting regulation (Chapter 8); and the impact of "new media" and the Internet in general on the regulatory environment (Chapter 9).

Following these higher level discussions, we start to focus our analysis on the specific regulations and policies applied by the Commission.

Chapter 10 discusses in turn the regulations applicable to the different elements of the Canadian broadcasting system. This includes the regulations applicable to private conventional and community television undertakings, pay television, specialty services, pay per view and video on demand, broadcasting distribution undertakings, and commercial and community radio.

Chapter 11 addresses major Commission policies applicable to the broadcasting sector. These include the Commission's policies on ownership, benefits, aboriginal broadcasting, ethnic broadcasting, cultural diversity, educational broadcasting, services for persons with disabilities and religious broadcasting.

Finally, Chapter 12 addresses broadcasting procedures, including the application and licensing process, the *CRTC Rules of Procedure*, and information returns and licence fees.

Appendix A contains a compendium of the recommendations made in the report.

2. BROADCASTING AND REGULATORY POLICY OBJECTIVES

Although the CRTC does not have the responsibility or power to amend the *Broadcasting Act*, it does have the clear authority under that Act to both enact regulations and to formulate policies that are applicable to the broadcasting undertakings the Commission regulates and supervises.

In the exercise of its regulation-making power and its policy-making function the Commission is both guided and circumscribed by the clear requirement in subsection 5(1) of the *Broadcasting Act* "… to implement the objectives of the broadcasting policy set out in subsection 3(1)" of the *Broadcasting Act*, and also "… to have regard to the regulatory policy" which is set out in subsection 5(2) of the Act.

The importance of these statutory policy objectives cannot be overstated in any review of the regulatory jurisdiction and powers of the CRTC in respect of broadcasting. To appreciate the significance of these policy objectives it helps to understand how and why these two separate but related sets of policy objectives came to be incorporated into the *Broadcasting Act*.

The current *Broadcasting Act* was enacted in 1991. It is essentially an amended and expanded version of the 1968 *Broadcasting Act*, which established the Canadian Radio and Television Commission ("CRTC") as the "… single independent public authority" with responsibility for regulation and supervision of the Canadian broadcasting system.

When Parliament enacted the 1968 *Broadcasting Act*, its core objective was to establish an independent, quasi-judicial, regulatory agency responsible for broadcasting that would operate at "arm's length" from the government of the day.

At that time many believed the CRTC's predecessor regulatory agency, the Board of Broadcast Governors, had been insufficiently insulated by its constating legislation from political pressures.[2]

Parliament intended therefore to ensure that the newly-created CRTC would be sheltered from such pressures. But Parliament also considered it appropriate to include at the beginning of the *Broadcasting Act* a set of policy objectives which it called the *Broadcasting Policy for Canada*. Those policy objectives were intended to inform and guide the newly-created independent broadcasting regulatory agency in the exercise of all of its core regulatory functions.[3]

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[2] Report of the Committee on Broadcasting 1965, (Fowler Committee Report) Chapter 4.

[3] In 1968 federal regulatory jurisdiction in respect of telecommunications services was exercised by the Telecommunications Committee of the Canadian Transportation Commission, pursuant to certain provisions of the *Railway Act*, the *Telegraphs Act*, and the *National Transportation Act*. That situation remained until 1976 when the regulatory jurisdiction of the CRTC was expanded to include telecommunications, and the CRTC was renamed as the Canadian Radio-television and Telecommunications Commission. With that clever bit of linguistic sophistry the agency could continue to be known to the public simply as "the CRTC".

All of the separate objectives of the 1968 *Broadcasting Policy for Canada* were continued in the *Broadcasting Act* when it was amended in 1991, and at that time a number of additional broadcasting policy objectives were added in subsection 3(1) of the Act.[4]

Also, in the 1991 amendments to the *Broadcasting Act*, a new set of regulatory policy objectives, which are found at subsection 5(2) of the Act, were enacted. Those regulatory objectives are intended to supplement the broadcasting policy objectives in subsection 3(1), and in some instances they overlap with them.

For ease of reference, the *Broadcasting Policy for Canada*, as found at subsection 3(1) of the Act, is reproduced below, as is the regulatory policy, as found in subsection 5(2) of the Act.

Broadcasting Policy for Canada

3. (1) It is hereby declared as the broadcasting policy for Canada that

(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

(b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

(c) English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements;

(d) the Canadian broadcasting system should

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[4] A number of additional broadcasting policy objectives were included in the 1991 updating of the *Broadcasting Act*. The additional objectives include: the recognition that English and French language broadcasting operate under different conditions and requirements (s. 3(1)(c)); the encouragement and development of Canadian talent (s. 3(1)(ii)); the concern that employment opportunities arising out of the operation of broadcasting undertakings comply with employment equity standards (s. 3(1)(d)(iii); a broadcasting system that contributes to the creation and presentation of Canadian programming (s. 3(1)(e)); use of Canadian creative and other resources (s. 3(1)(f)); programming that reflects the multicultural and multiracial nature of Canada (s. 3(1)(m)(viii)); programming that reflects the aboriginal cultures of Canada (s. 3(1)(o)); programming accessible by disabled Canadians (s. 3(1)(p)); alternative television programming services in English and French when necessary (s. 3(1)(q)); innovative alternative television programming that caters to diverse tastes and is made available in a cost-efficient manner (s. 3(1)(r)); the financial assistance of private networks in the creation and presentation of Canadian programming (s. 3(1)(s)); and, the ability to establish conditions regarding the carriage of programming services by distribution undertakings (s. 3(1)(t)).

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(iv) be readily adaptable to scientific and technological change;

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(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;

(g) the programming originated by broadcasting undertakings should be of high standard;

(h) all persons who are licensed to carry on broadcasting undertakings have a responsibility for the programs they broadcast;

(i) the programming provided by the Canadian broadcasting system should

(i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,

(ii) be drawn from local, regional, national and international sources,

(iii) include educational and community programs,

(iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and

(v) include a significant contribution from the Canadian independent production sector;

(j) educational programming, particularly where provided through the facilities of an independent educational authority, is an integral part of the Canadian broadcasting system;

(k) a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available;

(l) the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;

(m) the programming provided by the Corporation should

(i) be predominantly and distinctively Canadian,

(ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,

(iii) actively contribute to the flow and exchange of cultural expression,

(iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,

(v) strive to be of equivalent quality in English and in French,

(vi) contribute to shared national consciousness and identity,

(vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and

(viii) reflect the multicultural and multiracial nature of Canada;

(n) where any conflict arises between the objectives of the Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m);

(o) programming that reflects the aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose;

(p) programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose; (q) without limiting any obligation of a broadcasting undertaking to provide the programming contemplated by paragraph (i), alternative television programming services in English and in French should be provided where necessary to ensure that the full range of programming contemplated by that paragraph is made available through the Canadian broadcasting system;

(r) the programming provided by alternative television programming services should

> (i) be innovative and be complementary to the programming provided for mass audiences,
>
> (ii) cater to tastes and interests not adequately provided for by the programming provided for mass audiences, and include programming devoted to culture and the arts,
>
> (iii) reflect Canada's regions and multicultural nature,
>
> (iv) as far as possible, be acquired rather than produced by those services, and
>
> (v) be made available throughout Canada by the most cost-efficient means;

(s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,

> (i) contribute significantly to the creation and presentation of Canadian programming, and
>
> (ii) be responsive to the evolving demands of the public; and

(t) distribution undertakings

> (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
>
> (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,
>
> (iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

Regulatory Policy

5. (2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that

(a) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate;

(b) takes into account regional needs and concerns;

(c) is readily adaptable to scientific and technological change;

(d) facilitates the provision of broadcasting to Canadians;

(e) facilitates the provision of Canadian programs to Canadians;

(f) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and

(g) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.

As a matter of law, each of those separate policy objectives has equal weight. As noted above, the Commission is obliged by its statutory objects to implement the broadcasting policy set out in subsection 3(1) and, in so doing, to also have regard to the regulatory policy set out in subsection 5(2). Therefore the Commission cannot ignore any of these policy objectives when it enacts regulations or formulates policies. In case of conflict (which rarely happens) the Act states that the broadcasting objectives in subsection 3(1) are to be given priority status over the objectives of the regulatory policy.

The number of objectives identified by Parliament, and the lack of any express prioritization, places the regulator in a difficult situation. The CRTC is directed to implement <u>all</u> of these diverse objectives without any guidance from Parliament as to where to place its emphasis.

Notwithstanding this lack of direction, it is possible to classify the objectives of the *Broadcasting Act* very broadly into four primary policy objectives and several subsidiary ones. The four primary policy objectives are:

(i) Canadian Ownership and Control

Paragraph 3(1)(a) requires that the Canadian broadcasting system "shall be effectively owned and controlled by Canadians." This requirement is unequivocal and in our view forms one of the cornerstones of Canadian broadcasting policy.

(ii) Languages of the Canadian Broadcasting System

Paragraph 3(1)(b) describes the Canadian broadcasting system as operating "primarily in the English and French languages" thereby reflecting the special status of Canada's two official languages. Paragraph 3(1)(c) recognizes that while sharing common aspects, English and French language broadcasting operate under different conditions and have different requirements. Paragraph 3(1)(k) also requires that a range of broadcasting services in English and French be extended to all Canadians as resources become available. It is therefore clear that English and French language programming is to be presented to Canadians in all regions of the country.

Paragraph 5(2)(a) of the regulatory policy states that the Canadian broadcasting system should be regulated and supervised in a flexible manner that is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate.

Subparagraph 3(1)(d)(iii) specifies that the system should also reflect the linguistic duality and multi-cultural and multi-racial nature of Canadian society and the special place of aboriginal peoples in that society. Paragraph 3(1)(t) provides that, when the Commission considers it appropriate, distribution undertakings may provide access to underserved linguistic and cultural minority communities.

(iii) Canadian Content Programming

Many of the policy objectives in subsection 3(1) address the content of Canadian programming. These include paragraphs 3(1) (a), (d), (e), (f), (i), (j), (o), (q), (r) and (s). These provisions require each element of the Canadian broadcasting system to contribute in an appropriate manner to the creation and presentation of Canadian programming. They address programming diversity, multi-culturalism, multi-racialism, educational programming, and the need to be reflective of Canadian society including men, women and children. They also address the involvement of public and private sector broadcasters, the use of independent production and talent resources. These provisions are discussed at length in other chapters of this report.

With one or two exceptions, which contain the caveat that the particular policy objective is subject to the availability of resources,[5] the *Broadcasting Policy for Canada* in subsection 3(1) is both prescriptive and very detailed in its requirements.

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[5] For example, paragraphs 3(1)(k) and (o).

(iv) **Access by Canadians**

While the policy objective of ensuring a right of access to the Canadian broadcasting system is not as well-articulated in the Act, it is nonetheless referred to in a number of places, and is certainly implied by many of the other policy objectives in subsection 3(1).

For example, paragraph 3(1)(e) requires each element of the Canadian broadcasting system to contribute in an appropriate manner (*inter alia*) to the "presentation" of Canadian programming; subparagraph (t)(i) requires distribution undertakings to give priority to the carriage of Canadian programming services, and in particular, to the carriage of local Canadian stations; subparagraph t(iii) requires BDUs to provide reasonable terms for the carriage, packaging and retailing of programming services; subparagraph t(iv) requires the provision of access for underserved linguistic and cultural groups to broadcasting distribution undertaking (BDU) programming services; and paragraph 3(1)(p) requires programming to be accessible by disabled persons, as resources become available.

In addition, the regulatory policy prescribed in subsection 5(2) requires the Canadian broadcasting system to be regulated and supervised in a flexible manner that: (d) facilitates the provision of broadcasting to Canadians, (e) facilitates the provision of Canadian programs to Canadians and (f) does not inhibit the delivery of information services to Canadians.

When read together, the policy objectives speak broadly of access by Canadians to Canadian programs and Canadian content, reasonable access by broadcasting services to distribution undertakings, and access by various minorities to the broadcasting system and programming in their preferred language.

This is clearly the corollary to the requirements relating to Canadian content and Canadian programming. Without access to this content, the comprehensive objectives relating to programming would not be fulfilled.

(v) **Other Policy Objectives**

The four preceding broad categories do not encompass all of the specific policy objectives in subsection 3(1). There are other objectives of broad application, including the requirements in paragraph 3(1)(g) that programming be of a high standard, in paragraph 3(1)(h) for all persons who are licensed to carry on broadcasting undertakings to have responsibility for the programs they broadcast, in subparagraph 3(1)(d)(iii) for employment equity, and in subparagraph 3(1)(d)(iv) for the system to be readily adaptable to scientific and technological change.

The regulatory policy also provides in paragraph 5(2)(g) that the Canadian broadcasting system be regulated in a flexible manner that is "sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings."

Given this statutory framework, and the importance of the statutory policy and regulatory objectives, one can easily appreciate why it is difficult for the Commission to withdraw completely from areas of regulatory activity, or to forbear from regulating a particular broadcasting activity or service. Stakeholders in the system are typically quick to seize on the wording of a policy objective in either subsection 3(1) or 5(2) of the Act that addresses their particular interests, and then to insist that the Commission continue to regulate in such a manner as to ensure that specific policy objectives are fulfilled. The authors of this report are cognizant of that constraint on the regulatory discretion of the Commission. We appreciate that it would be of little value for us to make broad sweeping recommendations for forbearance or deregulation if such forbearance or deregulation would lead to the non-fulfillment of one or more of the policy objectives of subsections 3(1) or 5(2).

Notwithstanding these statutory limitations, there are regulations, policies and procedures of the Commission which we believe should be streamlined, or even eliminated, in order to foster more light-handed and efficient regulation and greater reliance on market forces in a manner that will comply more fully with the regulatory policy in subsection 5(2) and still implement the *Broadcasting Policy for Canada*. Those regulations and policies are clearly identified and reviewed in this report.

In considering the opportunities that exist for regulatory reform, one must acknowledge that the Commission does regular housekeeping of its own with regard to updating and eliminating outdated regulatory policies and regulations. For example, with regard to the commercial radio broadcasting sector, the Commission announced in December 2006 the findings of its 2006 Review of Commercial Radio Policy[6]. That comprehensive review of the policies and regulations that pertain to private commercial radio broadcasters was the fourth Commission review of commercial radio policies and regulations over the past sixteen years. Similarly, on May 17, 2007 the Commission published Broadcasting Public Notice CRTC 2007-43 outlining its determinations regarding certain aspects of the regulatory framework for over-the-air (OTA) television. That Commission policy review included a lengthy public hearing in November 2006 which painstakingly reviewed the effectiveness of the Commission's 1999 *Television Policy*.[7]

On the other hand, in January 2008 the Commission will conduct a public hearing to review its policies and regulations as they affect the discretionary programming services – specialty, pay and video-on-demand services – as well as the regulation of broadcasting distribution undertakings (BDUs).[8] This will be the first comprehensive review of the *Broadcasting Distribution Regulations (BDU Regulations)* since 1997.

In September the Commission also announced that it will be convoking a public hearing to review policy and regulatory issues related to diversity of voices in broadcasting, and the related subject of broadcasting ownership policy. [9]

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[6] Broadcasting Public Notice CRTC 2006-158.
[7] Broadcasting Public Notice CRTC 1999-97.
[8] Broadcasting Notice of Public Hearing CRTC 2007-10.
[9] Broadcasting Notice of Public Hearing CRTC 2007-5.

This means that some regulations and policies are more up-to-date than others and may be in less need of a thorough overhaul. However, our review of the Commission's policies and regulations is not restricted to one or more of the different regulated sectors of the Canadian broadcasting system. We have been given a mandate to provide an unobstructed and candid outsiders' view of all existing CRTC regulations and policies as they relate to private broadcasting. Nonetheless, in drafting this report we have remained very conscious of the fact that reform by the Commission itself of its own policies and regulations is very much an ongoing "work in progress."

3. HOW THE CRTC REGULATES BROADCASTING – "THE REGULATORY TOOLBOX"

The CRTC is a quasi-judicial, independent regulatory agency with the statutory responsibility to regulate and supervise all aspects of the Canadian broadcasting system.

In order to implement the *Broadcasting Policy for Canada* through its licensing and other regulatory activities, the Commission has been given a number of statutory regulatory powers that are set forth in the *Broadcasting Act* and have not changed significantly since 1968.

(i) Licensing

The most important of these powers is, of course, the power to grant licences, for terms of up to seven years, to operate broadcasting undertakings. Subject to certain statutory safeguards and conditions, the Commission may also amend, and/or suspend, or even revoke a broadcasting licence. It may also approve, or deny, the transfer of ownership or control of a broadcasting undertaking.

(ii) Regulations

Before the Commission considers issuing a licence to operate a broadcasting undertaking it first decides whether it would belong to an existing class or whether there is likely to be, over time, a sufficient number of similar broadcasting undertakings to justify establishing a new class of broadcasting licensees. If there is, that new class is defined and established by the Commission. The CRTC typically promulgates a set of regulations to apply to all licensees of a given class.

The CRTC has, pursuant to section 10 of the *Broadcasting Act*, promulgated five sets of sector or class specific regulations that apply to:

(i) commercial radio broadcasting undertakings (*Radio Regulations*, 1986, as amended);[10]

(ii) conventional over-the-air television broadcasting undertakings (*Television Broadcasting Regulations*, 1987, as amended);[11]

(iii) specialty programming television undertakings (*Specialty Services Regulations*, 1990, as amended);[12]

(iv) subscription pay television broadcasting undertakings (*Pay Television Regulations*, 1990, as amended),[13] and

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[10] *Radio Regulations*, 1986, SOR/86-982.
[11] *Television Broadcasting Regulations*, 1987, SOR/87-49.
[12] *Specialty Services Regulations*, 1990, SOR/90-106.
[13] *Pay Television Regulations*, 1990, SOR/90-105.

(v) broadcasting distribution undertakings (*BDU Regulations*, as amended).[14]

In addition to those five sets of regulations that apply to the respective five classes of broadcasting undertakings, the Commission has also enacted two additional sets of regulations that apply to all broadcasting licensees. Those are:

(vi) *Broadcasting Information Regulations*, 1993[15] and
(vii) *Broadcasting Licence Fee Regulations*, 1997.[16]

(iii) Conditions of Licence

The Commission also has the statutory power to attach specific conditions to a given broadcasting licence. Such conditions must be, in the words of section 9 of the *Broadcasting Act*, "… related to the circumstances of the licensee". Through specific conditions attached to individual licences, the Commission is able to "fine tune" the regulatory requirements that pertain to a particular licensee under the *Broadcasting Act*.

(iv) **Licence Exemptions**

A fourth and correlative power to the Commission's licensing authority is the obligation imposed on the Commission by subsection 9(4) of the *Broadcasting Act* which requires the Commission to:

> by order, and on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order [from licensing and regulations] where the Commission is satisfied the compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

In 1996 the CRTC undertook a public process to explore the issue of exemptions and to determine whether a more expeditious regulatory process could be devised to deal with certain classes of undertakings. That public process culminated in the *Policy Regarding the Use of Exemption Orders*.[17]

As part of that policy, the CRTC noted that the prescriptive wording of subsection 9(4) of the Act obliges it to consider the appropriateness of exemption whenever it examines new classes of network, programming or distribution undertakings and, where appropriate, existing classes of such undertakings. The CRTC emphasized that, given the wording of subsection 9(4), it is not the size or importance of the class of undertaking to be exempted that is determinative. Instead, the test consists of assessing whether it is necessary for the class to comply

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[14] *Broadcasting Distribution Regulations*, SOR/97-555.
[15] SOR/93-420.
[16] SOR/97-144.
[17] Public Notice CRTC 1996-59.

with Part II of the Act or relevant regulations in order to further the implementation of the policy set out in subsection 3(1) of the Act.

In Public Notice CRTC 1996-59, the Commission set out its policy to exempt classes of programming undertakings only where:

a) it is evident to the Commission that the licensing and regulation of the class of undertaking will not result in a significantly greater contribution to the Canadian broadcasting system, whether with respect to the Canadian programming carried by undertakings of that class, or the expenditures on Canadian programming made by such undertakings; and

b) it is evident to the Commission that undertakings operating under the exemption order will not have an undue impact on the ability of licensed undertakings to fulfill their regulatory requirements.

The ability to impose conditions of exemption allows the Commission to exempt whole classes of undertakings from licensing and other regulatory requirements, while still ensuring that members of the exempt class continue to contribute appropriately to the implementation of the broadcasting policy set out in subsection 3(1).

The CRTC has issued a large number of exemption orders which are listed in Appendix B to this report. Some of the more significant orders, including the *New Media Exemption Order*, the *Exemption Order for Small Cable Undertakings* and the *Exemption Order for Mobile Television Broadcasting Undertakings*, are discussed in detail in later chapters.

(v) **Policy Guidelines and Statements**

In addition, the Commission has the power, under section 6 of the Act, to issue policy guidelines and statements with respect to any matter within the jurisdiction of the Commission. Policy guidelines and statements are not binding, as a matter of law. They become binding when implemented through regulations or conditions of licence, or on a case-by-case basis when dealing with requests for the issuance, renewal or amendment of broadcasting licences or for the approval of the transfer of ownership of a broadcasting licence. Examples of Commission policy guidelines and statements are frequently found in public notices and circulars.

(vi) **Expectations**

The Commission also implements its policies through “expectations” expressed in licensing decisions. Although such expectations are not legally binding on licensees as are regulations and conditions of licence, most licensees take careful note that they may be called to account on their fulfillment on the occasion of their next licence renewal.

(vii) **Inquiries**

The Commission also has the statutory power, under section 12 of the Act, to conduct inquiries into matters under its jurisdiction, and to issue mandatory orders requiring the performance of any act required to comply with, or forbidding any act that is contrary to, the *Broadcasting Act* or regulations, decisions or orders made by the Commission.

(viii) **Industry Self-Regulation**

The Commission has also implemented various industry self-regulatory mechanisms through conditions of licence. The Commission has, for example, imposed conditions of licence that require licensees to comply with specific industry codes on issues such as gender portrayal, violence in television programming, or advertising directed to children.

The CRTC has relied for many years on industry compliance with voluntary codes of conduct of various types. In this area of regulation there has always been a commendable level of consultation and co-operation between the Commission and certain industry associations, notably the Canadian Association of Broadcasters (CAB), the former Canadian Cable Telecommunications Association (CCTA), and Advertising Standards Canada (ASC).

The Commission over the years has encouraged those industry associations to develop, in consultation with their members and the Commission, various self-regulating codes of conduct and standards pertaining to broadcasting.[18] Examples include the CAB *Voluntary Code Regarding Violence in Television Programming*, CAB *Sex Role Portrayal Code for Television and Radio Programming*, *Advertising Standards Canada General Portrayal Guidelines for Advertising*, CAB *Broadcast Code for Advertising to Children*, and the *Code for Broadcast Advertising of Alcoholic Beverages*.

The Commission is able, through the flexible regulatory tool of suspending conditions of licence as long as licensees adhere to such codes, to ensure that broadcasting licensees comply with the provisions of the relevant codes. The Commission has been able, therefore, to effectively delegate regulatory responsibility to the particular industry-created organization that is responsible for the administration and enforcement of the respective codes. Such organizations include the CAB itself, ASC, and the Canadian Broadcast Standards Council (CBSC).

The CBSC was originally established in 1990, under the aegis of the CAB, to assist the industry in responding to complaints arising from so-called “controversial programming.” Over the past seventeen years, the CBSC has earned the respect of those involved in the Canadian broadcasting industry, including the CRTC, and the

[18] A list of those various codes and standards that are currently applicable are identified in Appendix D of this report.

Canadian public. The CBSC has assumed increasing responsibility over the years for the administration of several self-regulatory codes.

It goes beyond the scope of this study to comment in detail on the operations of the CBSC, or on the substance of the several self-regulatory codes that have been developed by industry associations. However, we would be remiss if we did not note that initiatives at industry self-regulation, particularly in those instances when the CRTC has been an active participant in the developmental process, and is able through the suspension of condition of licence regulatory mechanism to ensure that the codes and standards are adhered to, has been a great success. It has relieved the Commission from the need to directly regulate, on a day-to-day basis, such time-consuming matters such as advertising of alcoholic beverages, controversial programming, gender portrayal, and violence in television programming.

Industry self-regulation, when properly implemented and administered, can result in achievement of policy objectives with less regulatory burden for both the regulator and the regulated undertakings. However, it can result in the substitution of private interests for public interests if it is not properly structured.

(ix) **Enforcement Powers**

The Commission can address non-compliance with its regulations and conditions of licence through the issuance of a mandatory order. A mandatory order can be made an order of the Federal Court or a provincial superior court and can be enforced as an order of that court through contempt proceedings.[19]

The Commission can also address non-compliance with a condition of licence by revoking or amending a licence during its term, or imposing more stringent conditions of licence at licence renewal, or in an extreme situation, refusing to renew a licence.

While the Commission can and does consider non-compliance with "expectations" at licence renewal proceedings, there are no direct sanctions prescribed under the *Broadcasting Act* for non-compliance with an expectation.

Operating a broadcasting undertaking without a licence, breach of a regulation, or of a condition of licence or a mandatory order are also punishable as summary conviction offences.[20] The *Broadcasting Act* and *Criminal Code* set out maximum fines which vary depending on the nature of the offence (operating without

[19] *Broadcasting Act*, sections 12 and 13.
[20] *Broadcasting Act*, sections 32 and 33.

a licence, breach of a regulation or order, breach of a condition of licence).[21] Any such offences would be prosecuted by the Attorney-General of Canada.

[21] The maximum fine for an individual operating an undertaking without a licence is $20,000 per day and for a corporation is $200,000 per day. The maximum fine for contravention of a regulation or order is, in the case of an individual, $25,000 for the first offence and $50,000 for each subsequent offence and in the case of a corporation is $200,000 for the first offence and $500,000 for each subsequent offence. Penalties for non-compliance with a condition of licence are the penalties for summary conviction in the Criminal Code of $2000 and/or 6 months imprisonment for individuals and $100,000 for corporations. (*Broadcasting Act*, section 32 and *Criminal Code* sections 735(1)(b) and 787(1)).

4. FRAMEWORK FOR EVALUATING REGULATION

Notwithstanding the large number of statutory policy objectives in subsection 3(1) and their specificity, the *Broadcasting Act* confers a significant amount of discretion on the CRTC with respect to how it goes about the job of regulating and supervising the Canadian broadcasting system.

For example, the general powers conferred on the Commission in subsection 9(1) to establish classes of licences, to establish conditions of licence, to issue, renew and revoke licences, and to require BDUs to carry program services are all discretionary. The same is true of the power in section 6 to issue policy guidelines and statements, the very broad power to make regulations in sections 10 and 11, and the Commission's remedial powers in section 12.

Where the Act limits the Commission's discretion is in the pursuit of the policy objectives in subsection 3(1), the regulatory policy in subsection 5(2), the power to issue exemption orders in subsection 9(4), and the circumstances in which a public hearing is required.

This means that the *Broadcasting Act* itself provides few restrictions on the scope for regulatory reform as long the Commission continues to regulate and supervise all aspects of the broadcasting system with a view to implementing the policy objectives in subsection 3(1), while having regard to the regulatory policy set out in subsection 5(2).

Although the Act imposes a licensing regime on broadcasting undertakings by virtue of the criminal sanctions contained in section 32, it creates an exception for those broadcasting undertakings that are subject to an exemption order. As noted above, the wording of subsection 9(4) is mandatory insofar as it compels the Commission to issue an exemption order (on such terms and conditions as it deems appropriate) to any class of licensee specified, in respect of any or all of the requirements of Part II of the Act, or of a regulation made under Part II, where the Commission is satisfied that compliance with those requirements "will not contribute in a material manner to the implementation of the broadcasting policy set forth in subsection 3(1)."

This statutory framework established in the *Broadcasting Act* therefore does not foreclose regulatory reform, nor does it mandate regulation when it is not required to implement the policy objectives in subsection 3(1). Rather it empowers the Commission to apply a test of materiality to the issue of whether regulation is required to achieve the statutory policy objectives, and it empowers the Commission to define the extent of regulation, as well as the nature of regulation required to implement those objectives when a blanket exemption is not justified on the facts. Where no exemption is justified, the Act gives the Commission significant latitude to determine the extent of regulation required for various classes of licence, and the Commission has the discretion to define which classes to regulate.

In considering the issue of regulatory reform in the broadcasting sector, it is also important to note that paragraph 5(2)(g) states that the Canadian broadcasting

system should be regulated and supervised in a flexible manner that "is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings."

The Government of Canada has expended considerable resources and effort in the past few years studying ways to improve and modernize the regulatory system in Canada in light of evolving needs, demands and challenges of the 21st century. To this end, the External Advisory Committee on Smart Regulation was established in May 2003; it was tasked *inter alia* with developing a set of principles to guide government departments and governmental agencies engaged in the regulatory process. The Committee's report *Smart Regulation: A Regulatory Strategy for Canada*, which was issued on September 20th, 2004, contains numerous recommendations. The concept of "smart regulation" was defined by the Committee in the following terms:

> Smart Regulation is about finding better, more effective ways to provide a high level of protection to Canadians, promote the transition to sustainable development and foster an economic climate that is dynamic and conducive to innovation and investment. It must exist in a system that sets clear policy objectives and is transparent and predictable – one that builds public trust in the quality of Canadian regulation and the integrity of the process. The recommendations contained in Smart Regulation: A Regulatory Strategy for Canada provide guidance on how to achieve these goals.[22]

Smart Regulation: A Regulatory Strategy for Canada sets out five principles which should govern regulatory measures and procedures. These five principles, which are reproduced below, are animated by a vision of instilling trust, supporting innovation, investment and competitiveness, and demonstrating to Canadians that the public interest is being protected. The five principles of smart regulation are:

> EFFECTIVENESS – Regulation must achieve its intended policy objectives and must advance national priorities. It should be based primarily on standards and performance targets, rather than on how those targets are achieved, in order to provide flexibility while serving the public interest. Regulation should be supported by evidence and should reflect the latest knowledge. Regulatory measures must be regularly and systematically reviewed and, where necessary, eliminated or modified; and new measures must be created to take into account changing consumer preferences and expectations, scientific and technological advances and changing business environments.
>
> COST-EFFICIENCY – Regulatory analytical requirements, measures and enforcement should be commensurate with the risks and problems involved. The appropriate instrument mix should be designed and implemented in the least costly manner possible to achieve the desired policy objectives. Single windows between departments and jurisdictions should be offered.

[22] EASCSR Backgrounder, 23 September, 2004.

> Regulators must understand the cumulative impact of regulation and seek to avoid overlap, duplication, inconsistency and unintended consequences.
>
> TIMELINESS – Regulatory decisions and government services must be provided in a manner that reflects the pace at which new knowledge develops, consumer needs evolve and business now operates. Timeframes and standards for decision making should be developed and enforced.
>
> TRANSPARENCY – The accessibility and transparency of the regulatory system must be maximized to promote learning and information sharing and to build public trust at home and abroad in the quality of Canadian regulation and the integrity of the process. Policy objectives should be clearly defined. Regulators must explain their priorities and decisions, show why and how these decisions are in the public interest, and be subject to public scrutiny. Information on regulatory programs and compliance requirements should be readily available in print and electronic formats. The regulatory system should be more predictable and provide certainty to those regulated. Citizens and business should participate through active consultation and engagement.
>
> ACCOUNTABILITY AND PERFORMANCE – Regulators must account for their performance. They need to announce their intended results and demonstrate their progress in achieving them. Performance should be monitored, measured and reported on publicly. Results should be used to modify regulatory programs and should be systematically reported to the public. Regulatory systems must be fair and consistent. Complaints and appeals procedures should also be established, well publicized, accessible, fair and effective.[23]

To be effective, regulation must be directed at achieving policy objectives, it must be achievable in the sense that compliance is within the control of the regulated entity, and it must be enforceable. It should also, to the extent possible, reflect performance-based standards, rather than dictating the means to achieve those standards.

The costs of regulation include the direct costs of complying with the regulation that must be borne by the regulated undertaking and the ongoing supervisory and enforcement costs of the regulator, as well as market costs and inefficiencies caused by regulatory intervention. In general, the least costly or intrusive regulatory measure necessary to achieve the policy objective is preferable to more intrusive or costly measures. Inconsistency between regulations should also be avoided, since inconsistent regulation introduces unnecessary costs and undermines the effectiveness and transparency of the regime.

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[23] *Smart Regulation: A Regulatory Strategy for Canada*, Report to the Government of Canada by the External Advisory Committee on Smart Regulation (September 2004), Executive Summary, p.7. Available at: http://www.pco-bcp.gc.ca/smartreg-regint/en/08/rpt_fnl.pdf.

It is with these principles in mind that we have reviewed the CRTC's regulations and policies with respect to broadcasting.[24]

Before delving into the specifics of regulatory measures applicable to broadcasting undertakings, some general comments on the relationship between the various regulatory tools available to the Commission and the five principles of smart regulation are worth noting.

For example, licensing is a relatively intensive and costly form of regulation. In comparison, conditional exemption orders significantly reduce the regulatory burden on licensees and the Commission. The reduced costs of exemption orders must be balanced against their effectiveness in terms of achieving policy objectives. If conditions of exemption can be enforced effectively, the use of exemption orders may be preferable to licensing. When licensing does not contribute materially to the advancement of a statutory policy objective, an exemption order should be issued.

In addition, since regulations are generally applicable to all undertakings in a given class, they are somewhat more transparent than regulatory obligations imposed by condition of licence. However, conditions of licence permit fine-tuning across undertakings and more targeted performance standards. If regulatory objectives can be achieved more effectively through targeted obligations, conditions of licence may be preferable to regulations of general application, but this is subject to the assurance that competing undertakings are equally affected by regulation, and the relative competitiveness of individual undertakings is not artificially enhanced or reduced by targeted regulatory measures.

"Expectations" imposed on licensees are less intrusive than conditions of licence or obligations imposed by regulation, but only in the sense that sanctions for non-compliance are more limited. Expectations are more flexible, but also may be less effective than regulations and conditions of licence. Expectations are also less transparent and predictable than regulations or conditions of licence.

In its report, the External Advisory Committee on Smart Regulation also expressed a preference for assessing alternative instruments for meeting policy objectives, including voluntary measures and performance-based approaches where possible.

> Where specific Canadian regulatory requirements are adopted, the federal government should reduce or minimize the cumulative impact of regulatory differences on trade and investment by:
>
> - assessing alternative instruments for meeting policy objectives (e.g. voluntary measures, information strategies);

[24] We have also had regard to the Cabinet Direction on *Streamlining Regulation, 2007*, which contain, some of the same principles.

- promoting the use of performance-based approaches where possible; and

- establishing the appropriate accountability structures to review requirements regularly to ensure that policy objectives are being met and eliminate those regulations that are no longer necessary.[25]

Incentive regulation may be an effective means of inducing desired conduct by regulated entities – but it will only be effective if there is a direct causal connection between the incentive and the desired conduct. The target goals of incentive regulation need to be established at the outset, they must be monitored and the results compared with the target goals in order to gauge their success.

Care should also be taken to guard against the "belt and suspenders" approach to regulation by which the licensee is not only required to satisfy a performance target – but is also told precisely what it must or must not do to achieve the target. As discussed within the substantive subsections of this report, Canadian broadcasting regulation has at times suffered from this tendency to micromanage.

Smart regulation requires the regulator to engage in a very disciplined approach to regulation; it requires the regulator to clearly identify the policy objective being pursued, and it requires an assessment of whether the policy objective in question can be adequately addressed in the absence of regulatory intervention (whether by market forces or by the regulated entity's own self-interest). This analysis requires a detailed understanding of the industry and market conditions. The mandate established by the Commission for this review of its regulatory framework is consistent with the principles of smart regulation.

If it is determined that regulatory intervention will materially advance a statutory policy objective when compared with the option of no intervention, then the regulator should use a regulatory mechanism that will fulfill the policy objective in the least intrusive manner possible, having regard to possible unintended effects of regulatory intervention. Where licensees compete with each other, there is also the need to maintain competitive neutrality among them by applying uniform rules to comparable undertakings.

These principles are not new to the Commission. They were recently articulated by the Telecom Policy Review Panel in its 2006 *Report to the Government of Canada*[26] and they were codified in the Policy Direction to the CRTC issued the Governor in Council pursuant to section 8 of the *Telecommunications Act*.[27] While the circumstances of the telecommunications and broadcasting industries regulated by the Commission may be very different, these principles of smart regulation are equally applicable and adaptable.

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[25] *Ibid*. Recommendation 4 at page 20.
[26] Telecommunications Policy Review Panel, Final Report, March 2006.
[27] Direction to the CRTC – Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, 2007-01-02.

In this report we have sought to evaluate CRTC regulations and regulatory policies with these principles in mind. We recommend that the Commission adopt this approach starting with its pending reviews of the BDU Specialty *and Pay Television Regulations*, and its "Diversity of Voices" review.

Recommendation 4-1

We recommend that the Commission apply the following approach to regulating the Canadian broadcasting sector:

(a) clearly identify the policy objective being pursued;

(b) assess whether the policy objective in question can be adequately addressed in the absence of regulatory intervention – whether by market forces or the regulated undertaking's own self-interest;

(c) if regulatory intervention is required, select a regulatory mechanism that will adequately fulfill the policy objective in the least intrusive manner possible having regard to distortionary effects on competitive markets, the regulatory burden associated with the mechanisms considered and other unintended impacts of the regulatory intervention.

Recommendation 4-2

We recommend that the Commission move more towards a regulatory model in which it sets performance-based standards for the industry to meet and enforces those standards. In our view, the Commission should move away from detailed regulatory measures that dictate precisely how licensees are required to comply with the standards set and should leave it more up to the regulated entities to decide on the best way to satisfy the requirements.

Recommendation 4-3

Where incentive-based regulatory measures are prescribed, care should be taken to ensure that the incentives will in fact motivate the desired response and results should be monitored in order to judge the effectiveness of the measure.

Recommendation 4-4

In general, regulatory measures should be applied in a uniform manner to regulated undertakings that compete with each other. This is more likely to be accomplished through regulations or policies of general application rather than through conditions of licence. Where deviation from this principle is necessary, care should be taken to ensure that the

measure adopted does not harm the ability of the regulated entity in question to compete in the market.

Coordination of Regulatory Action

While the CRTC plays a pivotal role in the regulation of the Canadian broadcasting system, it is not the only governmental agency with responsibilities that affect this sector.

The Governor in Council also has a number of important powers conferred on it, including the power pursuant to section 7 of the *Broadcasting Act* to issue policy directions of general application on broad policy matters with respect to the policy objectives in subsection 3(1) or the regulatory policy in subsection 5(2), the power to issue directions to the CRTC concerning classes of eligible licensees in section 26, and the power to set aside or refer broadcasting licensing decisions back to the Commission for reconsideration pursuant to section 28.

Heritage Canada also plays an important role as the department responsible for broadcasting policy and Canadian culture. Many of that Department's programs play an integral role in the regulation of the broadcasting sector in Canada.

Industry Canada also plays an extremely important role in the management and licensing of spectrum, and both it and Heritage Canada are involved in the development of copyright policy and legislation.

The Department of Finance's fiscal policies can also play an important role in the system, as was the case with respect to Bill C-58 respecting non-deductibility of advertising expenses related to advertising placed on non-Canadian broadcasting undertakings. The Department of Foreign Affairs and International Trade also plays a role in trans-border broadcasting issues.

As the broadcasting sector faces new challenges posed by the Internet and digital media, it will be important for all of these governmental departments and agencies to continue to coordinate their activities in a manner that best achieves the policy objectives being pursued.

The External Advisory Committee on Smart Regulation addressed this issue in its report. It recommended the establishment of a mechanism to support inter-departmental discussions to foster the development of government-wide positions on regulatory issues and to ensure that departments take appropriate action to design regulations with national priorities. The goal is to ensure that policy objectives are clearly spelled out and that regulatory action is coherent and integrated.

While it is beyond the scope of our mandate to comment on policies posed by governmental agencies other than the CRTC, we have at certain junctures in our report noted where coordinated action might be beneficial.

Recommendation 4-5

Given the importance of the Canadian broadcasting system to Canada's cultural identity, and given the fact that our broadcasting system is affected by externalities beyond the jurisdiction of the CRTC (such as copyright laws, cultural policies and fiscal and trade policies), we recommend that the Commission explore the creation of a multi-disciplinary committee to address important issues of common concern and to bring to bear in a coordinated manner all the levers of government and regulation.

5. THE ROLE OF COMPETITION IN THE BROADCASTING SECTOR

The original rationale for regulating commercial broadcasting activity was the notion that radio spectrum was a scarce public resource that should be allocated for the highest and best use. Canadian broadcasting legislation has refined what that use should be by setting forth both a comprehensive set of policy objectives and guidelines on how the CRTC should regulate. Many of these policy objectives relate to the content of programming broadcast on the system, as discussed in detail in chapter 2.

Therefore, in one sense, competition has been supplanted to a significant degree by regulation in accordance with the wishes of Parliament.

However, even in this regulated environment, competitive market forces have always had an important role to play.

Within local television and radio markets, while the regulator has historically limited the number of licensees, those licensees compete with each other for program rights, audience share and advertising revenues.

However, even with respect to these areas of competition, regulatory limits have been placed on the licensees' activities. For example, allowable minutes of advertising have been restricted, program content has been heavily regulated, and in many cases programming formats have been prescribed to prevent direct competition between licensees in order to preserve their "financial viability".

While some of these regulatory prescriptions have been relaxed over the years, this has rarely been done on a consistent basis, and numerous other prescriptions have been added, creating an increasing number of regulatory layers.

For example, in 1990 the CRTC removed the requirement for AM radio stations to conform to a licensed format, and in 1995 it permitted FM radio stations to deviate from their prescribed programming formats without regulatory approval – yet when the Commission hears applications for new FM stations, it still scrutinizes each new applicant's proposed format to gauge how the new application may fill a hole in the market and contribute to the diversity of voices available. If the new licensee is at liberty to change its format following the issuance of a licence, why is the proposed format still scrutinized at the time of licensing?

Even where there is ample spectrum available for a radio or television broadcasting within a given market, the CRTC may and does still limit new entry. In such cases, spectrum scarcity is obviously not the principal rationale for limiting new entry. Rather it is the perceived need to protect the existing licensees in that market from revenue erosion from a new competing service. The apparent goal is to ensure that the incumbent licensees retain the financial health necessary to continue to meet their respective licence obligations.

If one were to rely on market forces, one would allow new entry to occur and leave it to consumers to determine which licensees survived on the basis of their

ability to attract viewers and advertising. One would presumably auction the scarce radio frequencies to ensure an economically efficient allocation of spectrum, as is now done with wireless mobile spectrum. The reason that this has not historically happened is that the CRTC is concerned that competition may erode an existing licensee's ability to fulfill its regulatory obligations, including its Canadian content obligations, and a competitive market might not produce the variety of programming choices and the diversity of language and expression called for by Parliament in the *Broadcasting Act*.

In the realm of pay television, policies are also in place that limit both competition between pay television services and competition with other services (such as OTA television and specialty services).

When pay television services were first licensed in 1983, they were subject to restrictions on both formats and advertising. They were required to be one hundred percent subscription-based in order to preserve OTA television's continued access to television advertising revenues, and they were restricted to movie or performing arts formats. A number of competitive pay television services were licensed and several new entrants failed financially shortly thereafter.

After the pay television industry was restructured in the mid-1980s, and for the next two decades, the Commission followed a policy of awarding one licence per pay television genre in the same area of service. This policy was originally designed to stabilize the financial position of the pay television industry in Canada following the financial failure of several pay television licensees after the initial licensing process in 1983. Again the Commission's concern about financial viability was tied to its desire to ensure that licensees could meet their regulatory obligations. The policy was also designed to ensure programming diversity in the broadcasting sector.

This form of genre protection was recently departed from with the Commission's licensing of Allarcom to launch a new pay television service with first run movies that will compete directly with the two regional pay television services in Eastern and Western Canada.[28] Rather than abandon its policy of genre protection, the Commission characterized this as an "exception" to its general policy, and grounded its decision on the sound financial health of the pay television industry and its ability to absorb another competitor with a similar movie format.

When the Commission licensed Canadian specialty television programming services, it put in place regulatory mechanisms that restrict competition between specialty channels and conventional OTA television, as well as between specialty channels and pay television services and other specialty channels – both Canadian and non-Canadian.

Specialty channels are by definition "narrow-cast" services that are not supposed to compete directly with OTA television services. They are also distinguished from pay television services by their narrow programming focus –

[28] *Applications for new pay television services,* Broadcasting Decision 2006-193.

although they are allowed to exhibit some movies that fit their particular genre. Unlike pay television services, they are permitted to advertise – and in most cases they also receive a fee for carriage.

With the exception of Category 2 digital services, Canadian specialty services are protected from competition from other Canadian specialty services by a form of genre protection that purports to allow only one specialty service per programming genre. They are also protected from competition from foreign specialty channels by a policy that prohibits the carriage by BDUs of foreign specialty channels of the same genre as Canadian specialty channels.

However, this system of genre protection is not nearly as tight as the policies suggest. Over time, cracks have appeared in the system. This is partly the result of the proliferation of specialty channels which have pushed the CRTC to define increasingly narrow genres, and partly because of a lack of sufficiently good programming to go around.

For example, Canada now has more than one specialty sports channel, based on the fiction that one is regional and one is national. These same specialty channels compete with each other for program rights, as well as with the conventional OTA television services, as evidenced by the sale of Blue Jay rights and the Olympic Games to specialty sports channels, or to consortia involving specialty channels.

Canada also has more than one specialty news service, based on a finer "slicing" of genres in respect of coverage of Canadian news – a distinction that has gradually lost meaning. We also have CNN, HN, Fox News and BBC World providing competing foreign news services.

The Commission also issues licences to "pay-per-view" networks that exhibit movies unsupported by advertising. In recent years, these networks have also provided access to sporting events on a subscription basis. NFL Sunday Ticket and NHL Ticket are two examples. While these networks compete to a certain extent with pay television and specialty sports channels, restrictions remain in place to try to differentiate them for regulatory purposes.

Canadian BDUs have also been very successful in recent years in developing video-on-demand (VOD) services that provide access to movies and other programming on a pay-per-view basis. While the pay-per-program requirement was intended to distinguish these services from pay television services, the boundary lines between VOD services, pay-per-view services, pay television services and some specialty services is also becoming blurred.

VOD services are now offering program series such as the Sopranos or "24" that originally aired on OTA television or on pay television services. The Sopranos can now be viewed on at least three types of broadcasting licences (or exhibition "windows") that were originally intended to be distinct.

To blur these distinctions even further, pay television licensees are now offering access to many of the same movies and services that they offer on a scheduled format in a non-linear, “on demand” format. This non-linear format further erodes the original distinction between pay television, pay-per-view and VOD as far as format is concerned.

To complicate things further, broadcasters are starting to use the Internet as a means of making their linear programming available on a non-linear basis. Popular television shows can now be viewed the day after airing on many network websites, as can playoff hockey games and other types of programming.

In a competitive market one would also expect BDUs to be able to package their programming services in a manner that is most appealing to the public in order to capture more market share. However, while the Commission has taken great strides to open the BDU market up to competing delivery systems using a variety of technologies, it has put in place a very complex regime of tiering and linkage rules that severely restrict the composition of programming packages available to Canadians, and hence restrict the ability of BDUs to market their services to satisfy consumer demand. These include linkage rules designed to force subscribers to take services they might not want in order to obtain those they do want.

Again, there are understandable reasons why consumer choice has been limited in this matter. These include the policy objectives in the *Broadcasting Act*, which call for the Canadian broadcasting system to give priority to the carriage of Canadian programming, and for each element of the system to contribute in an appropriate manner to the creation and presentation of Canadian programming.

It is very unlikely that competitive market forces can be relied on to achieve all of the objectives in subsection 3(1) of the *Broadcasting Act*. This means that regulation continues to have an important role to play. The question is rather whether competitive market forces can be relied on to a greater extent than they are today to fulfillment broadcasting policy objectives. Can broadcasters and BDUs be given more flexibility to achieve the targets set for them by the regulator? Can consumers be given more power to select “discretionary” services of their choice?

These are not rhetorical questions. As discussed below in the chapter on New Media and the Internet, new digital distribution platforms, some of which are unregulated, are beginning to provide Canadians with significant new choices for programming services. While new media outlets for programming services and the demand for these services is still developing, there appears to be little doubt that this demand is growing and will continue to do so.

In this environment, the Canadian broadcasting system needs to remain relevant to consumers. It needs to adapt to changing market conditions that cater to consumer demand for “anything anytime.” This process must start now if we wish to avoid the degradation of our regulated Canadian broadcasting system through loss of viewership. We believe that a more flexible and transparent regulatory system now will produce a stronger broadcasting system in the longer term.

In this environment there is a need to step back and consider whether the regulatory framework for broadcasting would look the same as it does today, if we were starting out in this new environment. It is difficult to conceive that it would.

There are obviously numerous points at which competitive market forces could be permitted to play a larger role in the Canadian broadcasting system if regulation were relaxed. In assessing the extent of this role, the CRTC must consider whether competitive market forces would adequately satisfy the policy objectives in subsection 3(1) of the Act, and whether the cost of those required regulatory mechanisms outweigh the benefits. It must also consider the extent to which regulatory mechanisms relied on in the past can be relied on in the future to achieve the policy objectives pursued. If the Commission considers that market forces can be relied upon to a greater extent than has been the case in the past, then it may also have to consider transitional provisions to ease the transition from one regulatory model to another.

Possible Increased Role for Competition

Less Genre Protection

As discussed above, genre protection is intended to limit competition between Canadian pay and specialty services, as well as from non-Canadian programming services. The current rules are not applied in a consistent manner, and sometimes rely on regulatory fictions concerning genre definition in order to accommodate new services and viewer demand.

On the other hand, the objectives in subsection 3(1) of the Act clearly call for predominantly Canadian programming, and a diversity of voices.

One solution would be to maintain genre protection against non-Canadian programming services, while relaxing or eliminating it within Canada. This would protect Canadian programming services from foreign competition, while allowing market forces within the Canadian market to determine which Canadian services succeed.[29]

This approach of deregulating programming formats or genres has already been tried by the CRTC with respect to AM and FM radio, and Category 2 digital specialty services. The CRTC's recent licensing of a second generic pay television licensee also represents a relaxation of genre protection for pay television services.

Letting consumer preference dictate which programming services succeed or fail is not a novel idea. It is a fact of life in most sectors of the Canadian economy. Relying on the competitive market to develop a variety of programming services that address the diverse interest of Canadians is not a radical idea either. In a digital world, with hundreds of channels, it is unlikely in the extreme that all programmers

[29] We note that the Commission has in fact gone beyond this in the case of third language services, as it allows foreign third language services to compete with Category 2 specialty services subject to certain buy-through and other marketing restrictions.

would choose to provide the same type of programming. Rather, one would expect them to identify niche markets and to strive to provide better programming options than their competitors.

In this new environment, there may still be services that the Commission might consider need special protection because they are of importance to achieving a particular objective of the *Broadcasting Act,* and because of the limited available audience. However, these services should be identified on a case-by-case basis in accordance with clear guidelines that can be well-understood by the industry.

Recommendation 5-1

We recommend that the Commission stop enforcing genre protection among Canadian programming services, unless there is reason to believe that competition in respect of specific genres would not advance the policy objectives in subsection 3(1) of the Act, and also that it allow market forces to play a greater role in responding to consumer demand for discretionary programming services.

Recommendation 5-2

We recommend that genre protection be maintained with respect to non-Canadian services except in specific genres, such as third language ethnic services, in respect of which the Commission has already taken steps to allow competitive entry.

Collapsing Licence Classes

Much of the existing regulatory framework addresses criteria for distinguishing various classes or categories of broadcasting licences from each other. This regime has been designed to insulate licensees from inter-licence class competition, and to ensure diverse voices.

With the blurring of old distinctions between providers of linear and non-linear programming, and with different classes of licensee often competing with each other for programming, the utility of maintaining all of these regulatory distinctions is questionable.

In our view, the CRTC should consider collapsing some of these licence categories and letting the market decide whether it wants more subscription-based specialty or VOD services, more pay-per-view services, or more advertising-based services.

Obviously, if genre protection were relaxed, and if one or more categories of broadcasting licences were collapsed, the rules of engagement would also have to be equalized so that one licensee would not have an unfair competitive advantage over another. This would require imposing the same Canadian content rules and regulatory obligations on all licensees in the same collapsed category of licensee.

This topic is discussed further in the chapters that follow on Canadian content and access.

Recommendation 5-3

We recommend that the Commission consider the feasibility of collapsing some of the existing licence classes that are starting to exhibit similar characteristics and permit the market to decide whether it wants more subscription-based specialty or VOD services, more pay-per-view services, or more advertising-based services. Any such changes in licence classes should be accompanied by a new set of regulatory obligations that apply evenly within the class.

Removal of Limits on Advertising

Different classes of broadcasting undertakings are subject to different rules respecting access to local and national advertising revenues, as well as differing restrictions on the amount of advertising they can broadcast. OTA private conventional television licensees are permitted to sell local advertising, provided they offer local programming, as well as national advertising. Specialty television services are generally restricted to selling national advertising services, while pay, pay-per-view and VOD services are generally not permitted to sell advertising at all. There are varying restrictions on the ability of community television services to offer advertising services.

In terms of advertising time limits, the current 12 minutes per hour cap on advertising by OTA television licensees is to be eliminated in two steps by September, 2009. Specialty television services remain subject to a limit of 12 minutes per hour of advertising. As noted above, pay, pay-per-view and VOD services are generally not permitted to solicit or accept advertising.

In the case of radio, the Commission lifted time limits on advertising in 1993. In general, however, FM licensees must devote at least one-third of their broadcast week to local programming in order to be permitted to solicit or accept local advertising. This policy is applied on a case-by-case basis to AM licensees.

There is certainly logic to linking the ability to offer local advertising to the provision of local programming. We note however that at least in the case of national television services, there would appear to be a natural market incentive to focus on national rather than local advertising. By definition, national (or regional) specialty and pay television services as well as pay-per-view and VOD services do not have the ability to provide targeted local advertising. It is not clear, therefore, whether regulatory restrictions on the provision of local advertising by national specialty television services are necessary, or that relaxation of these restrictions would have a significant effect on the marketplace.

In our view, consideration should also be given to removing the cap on advertising minutes for conventional OTA television services immediately, and to eliminating the time limit on advertising by specialty services. As indicated above,

time limits on advertising by radio licensees were eliminated over a decade ago; since then, the amount of advertising broadcast by radio licensees has been dictated by market forces. Data provided by the Commission in its 2006 *Broadcasting Policy Monitoring Report* also indicate that a very significant portion of the advertising incentive minutes available to English and French-language conventional OTA and specialty television broadcasters were not in fact used by these broadcasters. This suggests not only that these minutes had little or no incentive value, but also that market forces limit the amount of advertising that is broadcast.

More generally, we also think that the time has come for a detailed assessment and rationalization of the sources of revenues available for private conventional OTA television, pay television, specialty services, pay-per-view and VOD services, including access to advertising revenues and subscription fees. More or less, advertising, subscription fees and pay-per-view could in theory all become areas for broadcasters to compete in making their services attractive to consumers. It is not at all clear that the mandated regulatory distinctions on access to revenues are workable in the long term, or that they will maximize the contributions of Canadian commercial television services as a whole to the Canadian broadcasting system.

Recommendation 5-4

We recommend that the Commission reassess the current restrictions on advertising that apply to various classes of television services, in light of the realities of the market and new trends in narrowcast advertising, and consider whether the existing restrictions limit the revenues available to the broadcasting system. It should then consider the feasibility of removing the restrictions and allowing broadcasting undertakings to decide how best to offer their services to the public – whether through an advertising-based model, a subscription service, or on a transactional basis.

Rationalizing the Categories of Specialty Services

There are currently five categories of specialty programming television services with varying rights of carriage and various regulatory obligations. These include three original types of analog specialty channels (“dual status”, “modified dual status” and discretionary services), and Category 1 and 2 digital services. These services vary in terms of carriage rights, access rights, access rules and wholesale fees they may charge for carriage.

Many of the rights and obligations attaching to these licences appear to depend on when the specialty licence was issued, and not on any clear regulatory criteria. The different rights attaching to these types of licences limit competition between these services, as some are carried as of right at a prescribed rate, some are carried at negotiated rates, and some do not have to be carried at all.

While the Commission has signaled its intent to rationalize this regulatory framework in a purely digital environment, in our view, consideration should be given to moving more quickly to a simpler framework that is governed more by consumer demand and market-based subscriber fees.

This is not to say that all specialty services should necessarily be treated equally. The CRTC may still wish to ensure specific carriage requirements and regulate the rates for certain services that it might consider to be of vital importance to achievement of a particular objective in the *Broadcasting Act* or that might fulfill a public interest function, such as public safety. However, any such decision should be made as an exception to the general rule and should only be taken following a determination that the service in question is required in order to fulfill a specific objective of the *Broadcasting Act* and that the competitive market is unlikely to support the service in question without regulatory intervention. If such a determination is made, the Commission should select the least intrusive regulatory mechanism capable of achieving the desired policy objective.

The current system continues to reward discretionary services with carriage rights based more on the launch date of the service in question than on its merits. As discussed further in Chapter 6, we recommend that the Commission consider incenting Canadian discretionary programming services to create more Canadian content by rewarding higher levels of Canadian content, or services with higher quality Canadian production values, with more favourable access rights.

Recommendation 5-5

We recommend that the Commission consider rationalizing the regulatory structure for specialty services in advance of the completion of digital migration in the 2010 to 2013 time period. We recommend that consideration be given to moving to a new system that rewards services that make significant contributions to furthering the objectives of the Act (through higher levels of Canadian content, significant Canadian programming expenditures or public safety initiatives), with greater carriage and access rights, and that relies more on consumer demand for discretionary services, and less on tiering and linkage rules, to govern the distribution and packaging of discretionary services.

Relaxing restrictions on In-house Production

Over-the-air ("OTA") television broadcasters, pay, pay-per-view and some specialty television services currently face varying requirements to source a minimum percentage of the Canadian programming they exhibit from independent producers. In some cases, such as in the case of pay television services, 100% of Canadian programming must be obtained from third parties, while in the case of conventional OTA television services, at least 75% of priority Canadian programming must be obtained from independent producers.

While these requirements are directly linked to the broadcasting policy objective of ensuring that the Canadian broadcasting system includes a "significant" contribution from the Canadian independent production sector, as discussed more fully in Chapter 6 below, we believe that it may be possible to reduce the current requirements to use independent production without jeopardizing this objective and permit greater scope for market forces to determine the most effective and efficient means of producing Canadian content.

Liberalizing Over-the-Air Entry

Another way of introducing greater reliance on market forces and competition into the current regulatory framework is to loosen the rules that currently govern the licensing of OTA broadcasting undertakings. At present, applications for new radio and over-the-air television services are scrutinized to ensure that the market can support an additional service provider. This approach is intended to ensure that new entry does not undercut the ability of existing service providers to fulfill their regulatory obligations, including their Canadian content requirements.

While we understand the rationale for this approach, the limitations on entry may come at a fairly high cost. In effect, the approach protects inefficient competitors and can serve to preclude entry by new players that might operate more efficiently than existing service providers, respond better to consumer demand, offer more Canadian content and more high-quality programming to consumers.

We note that there has in fact been a considerable amount of new entry into commercial OTA radio in recent years. In the period between 2003 and 2006, the Commission licensed 233 new OTA radio stations, including 76 new stations in 2006 alone.[30] This has resulted in more competition for advertising revenues and greater choice for consumers. At the same time, overall PBIT margins have remained stable (up slightly from 19.3% in 2003 to 20.1%)[31] in 2006. In contrast, the Commission appears to be much more reticent towards allowing more entry in the OTA television market.

Recommendation 5-6

We recommend that consideration be given to allowing competitive entry into OTA broadcasting markets where spectrum is available (particularly by new entrants who are unaffiliated with incumbent broadcasters in the same local market). In our view, less weight should be given to economic arguments in favour of protecting the incumbent broadcaster's market share and more weight should be given to letting market forces decide which broadcasters respond best to consumers' needs.

[30] *2007 Broadcasting Policy Monitoring Report*, p. 8.
[31] *2007 Broadcasting Policy Monitoring Report*, p. 16.

Packaging of services by BDUs

At present, BDUs are heavily restricted in their ability to package programming services for retail sale. These rules prevent BDUs from competing with one another by offering innovative service packages that are responsive to consumer demand. Although the Commission is proposing to relax some of these requirements in a fully digital environment, by 2010 or 2013, depending on digital penetration, this is a long time to continue to operate under a more restrictive regime.

This is another area where there appears to be scope for greater reliance on market forces. As discussed in more detail in Chapter 6 below, we believe that if rules are adopted to establish a strongly Canadian basic service package with a buy-through requirement, it may be possible to allow market forces and consumer demand to dictate remaining packaging issues.

Recommendation 5-7

We recommend that the Commission give greater flexibility to BDUs to market discretionary services to the public in order to better respond to consumer demand.

Specific recommendations on each of these issues is contained in the various chapters of this study dealing with the regulations or policy in question.

6. CANADIAN CONTENT

> "The only thing that matters in broadcasting is program content; all the rest is housekeeping. The provision of varied, well-balanced, and excellent program services by both publicly and privately owned radio and television stations is the primary task of all broadcasters who have been assigned the use of scarce public assets in the form of radio frequencies and television channels."[32]

Those words written in the opening two sentences of the Fowler Committee Report in 1965 are as valid0020today as they were in 1965. While technology and the face of Canadian broadcasting has changed significantly in the interim, our preoccupation with the content exhibited on our broadcasting system remains constant.

As discussed in Chapter 2 of this report, many of the objectives of the *Broadcasting Policy for Canada* set forth in subsection 3(1) of the *Broadcasting Act*, address programming content.

Canadian content regulation has been part of the regulation of Canadian broadcasting for at least 50 years. Prior to the creation of the CRTC in 1968, the Board of Broadcast Governors had found it necessary to promulgate a regulation concerning the Canadian content of television programs. That regulation required at least 55% of all broadcasting time to be reserved for programs basically Canadian in content and inspiration. It was enacted to give effect to section 11 of the 1959 *Broadcasting Act*, which required a broadcasting service to be "basically Canadian in content and character" and to promote and ensure "the greater use of Canadian talent by broadcasting stations."

Although the current version of the *Broadcasting Act* contains many more specific policy objectives relating to program content – it nonetheless maintains the same core principle of Canadian content and character, supplemented by principles of multi-culturalism and multi-racialism. It also continues to endorse the use of Canadian creative resources in the production of Canadian programs and makes specific reference to the use of the Canadian production sector.

With the advent of new technologies giving rise to a number of different distribution platforms and many new forms of programming services, such as pay television, pay-per-view, VOD and specialty channels, we have moved away from a "one size fits all" approach to Canadian content, to one that recognizes that the nature of the programming service may temper the amount of Canadian content required. This principle, which is embodied in paragraph 3(1)(f) provides as follows:

> 3(1)(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

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[32] Fowler Commission: Report of the Committee on Broadcasting, 1965, p. 1.

> 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;

The resultant regulatory system is characterized by a myriad of different Canadian content requirements that are specific to the class of licence issued, and in some cases to the sub-class of licence or specific broadcasting service in question. In some cases, the contribution is by way of financial transfers to funds which support production of Canadian content (as in the case of BDUs), in others it is by way of program production and exhibition requirements, and in others it is by way of support for independent production. The applicable rules are embodied in the regulations and policies applicable to the various elements of the Canadian broadcasting system, as well as in conditions of licence, and are discussed in detail in the following chapters of this study. In this chapter, the authors have attempted to pull some of these disparate elements together in one place to discuss the extent to which the existing rules appear to be advancing the objectives in subsection 3(1) of the Act, and to highlight possible areas for reform.

Before commencing that discussion, it is useful to recount why it has been found that regulations and policies are required to ensure that Canadian programs, reflective of the Canadian experience in all of its diversity, will be produced and broadcast. Why wouldn't this happen in the absence of regulation?

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 theU.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.[33] 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.

When one considers that it can cost approximately $3.2 million (Can) to produce a one-hour prime time drama program in the United States[34] – but only $200,000 to purchase Canadian rights to the same programs, and $1.5 million (Can) to produce a one-hour drama in Canada, one can easily see why there is a very strong economic incentive to purchase Canadian rights to American drama programming. When one considers the extent of the marketing resources that are expended to promote popular American television productions, and the spill-over advertising on American talk shows, entertainment programs, and the print media

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[33] Peter S. Grant and Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Vancouver, Douglas & McIntyre, 2004).
[34] Variety, "When Less is More" October, 2004.

that inevitably revolves around these entertainment products, the allure of American productions is even greater.

Again, this is not new phenomena. In 1965, the Fowler Committee made the following observation:

> "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."[35]

The situation in the French-speaking market is different in that television viewers there are fond of French-speaking shows and have their own "star system." French-speaking dramas, for instance, are extremely popular in Québec because viewers can "recognize" themselves in these shows, which often have strong local content of a sociological and philosophical nature. What is more, the artists and writers responsible for these dramas are true local stars, thus providing even further attraction for viewers and buoying the shows' ratings. One might therefore surmise that, even without regulation, Canadian content objectives would be met in such a market. It would be unwise, however, to think that this situation will remain stable in years to come, which is why we believe that the same regulations governing such things as Canadian content should remain in force in the French-speaking markets, including Québec. With the possibilities of the Internet, the multiculturalism of our society and a general philosophy that favours the "global" over the "local", Québec drama series are facing increased competition from foreign dramas, especially those from the U.S. The appeal of American television series (translated into French), even in a French-speaking market, should not be underestimated. One convincing example of this occurred in the summer of 2006 when the shows that earned the highest audience ratings on Société Radio-Canada (the French-speaking branch of the CBC), other than the Fête Nationale show, were two American series translated into French: "Perdus" (the French version of "Lost") and "Beautés désespérées" (the French version of "Desperate Housewives"). At the time of writing, everything points to a possible repeat of this situation in the summer of 2007. These two shows were in fact ranked 18th and 20th, respectively, on the list of the most-watched television shows in the summer of 2006.[36]

This phenomenon, in and of itself, is nothing new. But the situation is all the more worrisome given the current context. The same economic incentives described above (namely the purchase of rights to U.S. television series) exists in the French-speaking market, where the difference in the cost of purchasing rights to a U.S. series for French translation and producing a Canadian television show may be even greater than in the English-speaking market.

For these reasons, the French-speaking market should continue to be governed by the same Canadian content regulations, even though achieving these

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[35] *Ibid.*, p. 45.
[36] BBM, Québec-France, Lu-Di, 2a-2a, TVA, CBC, TQS.

content objectives will be easier in light of the demand in this market for French-speaking and local productions.

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. We do however question whether all of the existing regulations and policies are working in a manner that directly and effectively achieves these objectives.

The table below summarizes the regulations governing exhibition and expenditures on Canadian content by the various classes of private television undertakings. The requirements vary significantly across and within classes of undertakings. For example, only commercial private OTA television services have peak viewing/priority programming requirements. While other classes of services generally have expenditure requirements and private commercial OTA television services do not, many OTA licensees do have expenditure requirements as a result of benefits commitments. The resulting “patchwork quilt” of regulatory obligations lacks transparency and creates inconsistent regulatory obligations for competing services.

	Private Conventional OTA	Community	Pay	Specialty			PPV and VOD
				Analog	Category 1	Category 2	
Exhibition - Predominance	60% of broadcast year and 50% of evening broadcast period must be dedicated to exhibition of Canadian programs	Generally, 100% Canadian content; 80% on newer services	30% of period from 6 to 11 pm and 25% of the remainder of the time the service is in operation must be dedicated to Canadian programs	Varies significantly depending on the nature of the service	Generally, 50% of broadcast year and 50% of evening broadcast period must be dedicated to exhibition of Canadian programs	Generally, 35% of broadcast year and 35% of evening broadcast period must be dedicated to exhibition of Canadian programs	PPV licences impose obligations to make available a minimum number and ratio of Canadian feature films and events in each broadcast year VOD licences impose obligations relating to a minimum percentage of Canadian films and other programming in inventory
Exhibition - Peak Viewing/Priority Programming	Large multi-station groups required to broadcast an average of 8 hours per week of priority programs between 7 and 11 pm over the broadcast year						
Expenditure	Not generally required but may be imposed by condition of licence to implement benefits commitments		Percen-tage of revenues must be spent on Canadian program-ming; percent-tage varies across licensees	Percentage of revenues must be spent on Canadian program-ming; percentage varies across licensees	Percentage of revenues must be spent on Canadian programming; percentage varies across licensees	No	Generally required to spend 5% of gross revenues plus additional obligations to fund Canadian programming
Drama Incentives	Peak programming and advertising minute incentives			Advertising minute incentives	Advertising incentive minutes	Advertising incentive minutes	

The complexity and inconsistency of requirements also makes it very difficult, if not impossible, to assess the effectiveness of the various Canadian content requirements.

Although OTA television services are typically considered to be the preeminent contributors to Canadian content development and exhibition, it is significant that total expenditures by Canadian pay and specialty services on Canadian programming now exceed, by a significant amount, total expenditures by private conventional OTA television services on Canadian programming. In 2006, for example, private conventional OTA licensees spent $623.7 million on Canadian

programming, while specialty and pay services spent in excess of $890 million.[37] Specialty and pay services are also spending considerably more on drama programming than private conventional OTA television services.

Significantly, also, while CPE as a percentage of revenues has remained relatively flat for private conventional television services, expenditures by OTA television services on non-Canadian programming has increased as a percentage of total revenues. This appears to be due to the increasing allocation by English-language OTA services of their program budgets to non-Canadian programming. The percentage of programming expenditures spent on Canadian content by English-language OTA services has declined from 50% in 1999 to 40% in 2006. French-language OTA television broadcasters in contrast continue to spend approximately 90% of their programming budgets on Canadian content.

Significantly also the percentage of revenues spent by English-language specialty and pay television services on Canadian programming is only marginally below the percentage of revenues spent by French-language specialty and pay television services on Canadian programming and, in both cases, specialty and pay television services spent a significantly higher portion of their revenues on Canadian content than private conventional OTA television services.

	2006[38]	
	Private Conventional OTA	Specialty and Pay
All Services		
Revenues	$2,195,000,000	$2,013,486,000
Total CPE (% revenues)	623,747,000 (28%)	890,497,000 (44%)
Can. Drama Exp.	73,857,000 (3%)	169,942,000 (8%)
English-Language Services		
Revenues	1,756,000,000	1,593,894,000
Total CPE	(25%)	700,307,000 (44%)
Can. Drama Exp.	40,000,000 (2%)	138,310,000 (8.7%)
French-Language Service		
Revenues	439,000,000	352,834,000
Total CPE	(36%)	173,881,000 (49%)
Can. Drama Exp.	33,000,000 (7.5%)	30,275,000 (8.6%)

Viewing trends are also interesting. While individual private conventional OTA television services attract a bigger audience share than individual specialty services, overall the viewing share of specialty and pay services (36.2%) now

[37] In PN 2007-53, the Commission refers to OTA television as the largest contributor to Canadian programming, with expenditures in 05/06 of around $1.2 billion out of a total of $2.1 billion. (para 10). The $1.2 billion includes the expenditures by the CBC of around $531 million in the period. In this analysis, we have focused on the relative contributions of private television broadcasters to Canadian programming.

[38] Numbers are from *2007 Broadcasting Policy Monitoring Report* and PN 2007-53.

exceeds the viewing share of private conventional OTA television services (31.3%).[39]

The table below shows the percentage of viewing of Canadian programming by genre and class of licence. Canadian viewing of news on all services is very high. However, in English-language markets, specialty and pay services are garnering a higher percentage of viewing than Canadian programming in individual categories like drama, as well as over-all.

PERCENTAGE VIEWING OF CANADIAN PROGRAMS, BY PROGRAM TYPE

	2004-2005				2005-2006			
	News	Long-form Documentary	Drama/ Comedy	Total	News	Long-form Documentary	Drama/ Comedy	Total
All English-language Television Services	97%	60%	21%	48%	96%	50-60%	20%	48%
English-language OTA Private Conventional	97%	100%	10%	33%	98%	100%	8%	33%
English-language Specialty and Pay	97%	58%	29%	58%	95%	54%	30%	59%
All French-language television services	98%	56%	35%	65%	99%	54%	35%	66%
French-language OTA Private Conventional	100%	100%	26%	69%	100%	100%	25%	71%
French-language specialty and pay	85%	50%	34%	49%	88%	47%	35%	53%

These data suggest that as between private conventional and specialty and pay television services, more and more specialty and pay television services are taking the lead in terms of both expenditures on and exhibition of Canadian content, at least in the case of English-language services.

The available information also strongly suggests that the existing regulatory incentives and obligations with respect to English-language Canadian drama programming are not effective. While we do not have the information necessary to conduct a comprehensive assessment of the amount of Canadian drama scheduled during peak viewing periods by private conventional OTA television and other television services, 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 private conventional OTA television services is very limited. (See sample schedules attached as Appendix C) Priority programming obligations appear to be largely satisfied by the broadcasting of entertainment magazines and

[39] 2007 *Broadcasting Policy Monitoring Report*.

reality television programming, and by scheduling priority programming during lower viewing periods, such as Friday and Saturday nights and the summer period.

On their face, the existing drama incentives are also problematic. The incentives which permit OTA services to gross up Canadian drama programming broadcast during peak viewing periods effectively reduces the amount of Canadian programming that these services must broadcast during such peak periods. The advertising minute incentives, at least in the case of OTA television services, will have no value once the limits on advertising minutes are lifted for this class of licensee and, in any event, they do not appear to have been effective. Many of the advertising incentive minutes available to conventional and specialty services have not been utilized, suggesting that these minutes have little or no incentive value.

As discussed more fully below, there is also an inherent tension between simultaneous substitution requirements and the exhibition of Canadian programming during peak viewing periods. Simultaneous substitution appears to dictate, to a very large extent, the peak period program schedules of private conventional English language OTA television broadcasters, ensuring that foreign content is predominantly displayed during peak viewing periods.

These factors suggest that existing measures to promote the production and exhibition of Canadian content need to be reexamined to determine the extent to which they are actually succeeding in achieving the objectives of the Act with respect to Canadian program content.

We believe it is imperative to develop more targeted and effective measures to incent the exhibition of Canadian content during peak viewing periods where market forces will not achieve this goal. As part of this analysis, the definition of priority programming and peak viewing periods should be revisited. Priority programming is currently defined to include a mixed bag of programs i.e. Canadian drama, music and dance; Canadian long-form documentaries; Canadian entertainment magazines; and regionally-produced programming in all categories except news, information and sports. It is not at all apparent that the economics of producing Canadian entertainment magazine or reality television programming suffers from the same challenges as Canadian drama programming, or that this type of programming merits specific regulatory incentives. Consideration should therefore be given to targeting peak programming obligations to a narrow class of services, which will not be supported by the marketplace, and imposing targeted exhibition obligations which require television services to broadcast a minimum number of hours of these types of Canadian programs between 7 and 11 pm during the regular television viewing season when most Canadians are watching television.

Recommendation 6-1

We believe it is imperative to develop more targeted and effective measures to incent the exhibition of Canadian content during peak viewing periods where market forces will not achieve this goal. Consideration should be given to targeting peak programming obligations to a narrow class of programs, such as drama, which are

not adequately supported by the marketplace, and imposing targeted exhibition obligations which require television services to broadcast a minimum number of hours of these types of Canadian programs between 7 and 11 pm during each six month period over the course of a licensee's broadcast year to ensure that they will be exhibited during months when Canadians are watching significant amounts of television.

The selection of programming with priority status should depend, in part, on a detailed assessment of the economics of producing different types of Canadian content as well as the Canadian demand for this content during peak viewing periods. As noted above, it is not apparent that it is not economical to produce Canadian entertainment magazine programming, reality or game show programming or that the Canadian market will not, on its own, drive demand for this programming during peak viewing periods. With regard to costs, we note Guy Fournier's statement in his report on French-language drama:

> The production-cost gap between French-language drama and English-language drama is so large that it would be well worthwhile to create a task force of a few qualified people to analyze this specific issue. Some questions it might examine: What costs cause this gap? How might it be reduced to a more reasonable size? Would English-language dramas that cost, say, half as much as those being produced today actually reach fewer viewers?

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.[40] 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. As discussed above, some licensees have a combination of requirements both to exhibit specified quantities of Canadian programming and to spend specified amounts on Canadian programming production. Due to application of the Commission's benefits policy, there is no consistency in application of these requirements to licensees, particularly in the OTA television and specialty services markets. It is not clear why a similar approach should not be adopted generally with respect to private commercial television services.[41]

Recommendation 6-2

We recommend that consideration be given to rationalizing exhibition and expenditure requirements both within and across different categories of television services.

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[40] We note, for example, the conclusion of Guy Fournier in "What About Tomorrow: A report on Canadian French-language drama" that "the economical production culture" in Quebec is disappearing as a result of government assistance to the television industry. (p.15)

[41] The analysis of expenditure obligations should also take into account any revisions to the Commission's current benefits policies. Specific recommendations on these policies are set out in Chapter 11(g).

Simultaneous Substitution

Simultaneous program substitution has long been thought of as an important mechanism to increase the value of acquired Canadian rights in American television programs. By requiring cable networks to substitute the Canadian signal and related advertising for the American signal and related advertising of a simultaneously scheduled program, Canadian broadcasters can maximize the value of their American acquired programs. In theory, they can then use this extra revenue to help subsidize the production of Canadian programming.[42]

In our view, it is time to re-examine this proposition. If one looks at the examples of program schedules for the CTV and Global Television networks during the regular season peak viewing period (in Appendix C) one can see that, with very few exceptions, they are filled with American programs scheduled at the same time that the American networks have scheduled the same programs.

In a very real sense, simultaneous substitution appears to be dictating the scheduling of Canadian English-language OTA television networks – almost to the exclusion of Canadian programs in peak viewing periods. This approach may be producing extra revenues to help finance the production of Canadian programs – but it is also discouraging the scheduling of those Canadian programs in a time slot in which most Canadians watch television. Simultaneous substitution is very clearly a two-edged sword. It pushes Canadian content into less popular time slots, or into the summer months when new American shows are not being aired and fewer people are watching television. In other words, simultaneous substitution pushes Canadian content out of the time slots on OTA television services when the greatest number of Canadians are watching and which have the greatest revenue potential.

By increasing the value of non-Canadian program rights, simultaneous substitution also tends to increase the costs of these rights. As discussed above, English-language private conventional OTA television licensees have been spending an increasing percentage of their revenues on foreign content. To the extent that simultaneous substitution pushes up the costs of foreign content, it reduces the net benefit of simultaneous substitution to the Canadian broadcasting system.

We do not have the data to make specific recommendations to change the current approach to simultaneous substitution – but we do question the net benefit that simultaneous substitution provides to the system and whether there might not be other more direct and effective means of retaining the revenues associated with simultaneous substitution. The aim of such measures would be to repatriate the scheduling of both Canadian and American television programs in a manner that is more conducive to achievement of the objectives of the *Broadcasting Policy for Canada*.

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[42] As discussed more fully later in this report, broadcasting distribution undertakings must perform simultaneous substitution for local OTA television broadcasters. BDUs are permitted to perform simultaneous substitution for specialty television services but in practice this almost never occurs.

Recommendation 6-3

We recommend that the Commission reassess the net impact that simultaneous substitution has on the Canadian broadcasting system and assess whether there are other regulatory mechanisms that might break the very strong economic incentives for Canadian broadcasters to schedule American television programs in peak viewing periods, to the detriment of Canadian programming.

Independent Television Production

As discussed in Chapter 2, sub-paragraph 3(1)(i)(v) of the *Broadcasting Policy for Canada* states that the programming provided by the Canadian broadcasting system should "include a significant contribution from the Canadian independent production sector."

As shown in the table below, this objective is addressed in a number of different ways for different categories of television services.

Private conventional OTA	Community	Pay	Specialty			VOD and PPV
			Analog	Cat. 1	Cat. 2	
Expectation that at least 75% of priority programming to be produced by unrelated companies		Generally prohibited from distributing programming produced by the licensee or a related company		At least 25% of Canadian programming, other than news, sports and current affairs, must be produced by unrelated companies		Generally prohibited from distributing programming produced by the licensee or a related company (other than filler programming); some recent exceptions granted provided related programming does not exceed 10% of hours in broadcast year

These requirements have the effect of pushing production of Canadian programs to the independent production sector and out of the broadcasters' own production facilities.

There are signs that this policy may not be working in a manner that is most conducive to the production of Canadian content in the current economic and technological environment.

Some private broadcasters have stated publicly that the current model is inhibiting them from producing more Canadian content and from exploiting the

ancillary rights associated with the productions they help to finance. As rights management becomes increasingly important in the "new media" environment, and as the costs of production continue to escalate, they say it is time to reexamine whether the current model enables the industry to respond in the best way possible to the new environment.[43]

Outside Canada, we are increasingly witnessing the combination of the production and distribution functions in large, well-financed, companies that are then better able to finance production and manage distribution and rights in an increasingly complex environment.

This is not to say that the Canadian independent productions should not continue to be licensed by Canadian broadcasters. Independent production is important from the perspective of diversity, regional expression, and the employment of creative Canadian talent.

We simply question whether the pendulum has swung too far in one direction in a way that may impede the ability of the Canadian broadcasting system to respond in an adequate manner to the new environment, and in a manner that produces more high-quality Canadian programming.

The current "expectation" that 75% of priority programming broadcast by OTA television services be produced by unrelated persons is clearly more than a "significant" portion of priority programming. It is even more than "preponderant." Similarly, the requirement for pay, PPV and VOD to source all or virtually all programming from unrelated producers is clearly more than "significant".

In the French market, as stated previously, the fact that the market is smaller represents an added challenge in producing high-quality dramas based on the current model of independent production. The CRTC should therefore consider the possible advantage of allowing the broadcaster's internal production organization to contribute to that broadcaster's Canadian content and production of dramas. This may prove to be more economical and it would help to address the rights management issues that Canadian broadcasters currently face in exploiting the full economic value of Canadian production.

Recommendation 6-4

We recommend that the Commission study the pros and cons of reducing the requirements on broadcasting undertakings to use high percentages of independently produced programming. This review should include consideration of economies of scale and scope in production, rights management issues, and incentives to maximize returns from Canadian programming. At the same time, the Commission should consider rationalizing the independent production

[43] Peter S. Grant and Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Vancouver, Douglas & McIntyre, 2004).

requirements of different classes of television undertakings and, in the absence of clear regulatory distinctions, imposing common obligations on these services. This would improve the transparency and competitive neutrality of the regulatory regime. We recommend that this be done in a staged manner and that following any such reduction or rationalization, the CRTC should carefully monitor the impact of the changes on Canadian content production and independent producers.[44]

[44] If the CRTC decides to vary the requirements to source programming from independent producers, commensurate changes should be made to the manner in which the Canadian Television Fund (CTF) is administered. We note that such changes are beyond the CRTC's jurisdiction since the CTF is under the jurisdiction of Heritage Canada. It is also beyond the scope of our mandate to make recommendations to Heritage Canada. We simply note that these types of reforms must involve a coordinated approach by all of the governmental agencies and departments involved in regulating the sector.

7. ACCESS

As discussed in Chapter 2, without access by Canadians to Canadian programs and Canadian content, the comprehensive objectives in subsection 3(1) of the Act relating to such content would not be fulfilled.

In recent years, much of the debate relating to "access" has focused on access to carriage by BDUs. Concerns about this form of access have increased since the fairly recent evolution of BDUs into the role of both distributors and significant content providers. This dual role of BDUs has raised concerns about the non-discriminatory treatment of competing programming services offered by the BDUs' competitors. As the BDUs' video-on-demand subscription services start looking more like the pay television and pay-per-view services offered by other licensees, and as the CRTC moves towards adopting a regime that entails fewer carriage rights for specialty services, BDUs have an increasing opportunity to afford preferential treatment to affiliated programming services.

The CRTC has broad powers to regulate access to BDUs by programming services, including the power to mandate carriage of specific programming services, to regulate terms and conditions of carriage, to arbitrate disputes over access, and to regulate the use of the BDUs' networks to promote programming services.

In the past, the Commission has tended to micro-manage access to BDUs. This was considered necessary at a time when analog channel capacity was relatively scarce. Advances in digital and other technologies have alleviated many of the concerns related to access and carriage – but the proliferation of new programming services has not allowed the access issue to disappear.

The fact that we are at a cross-roads from a technology perspective also tends to complicate the issue, as we still have an analog cable television service with limited capacity, and digital cable service with abundant channel capacity – but only a sub-set of total subscribers – and HDTV services that are still in their infancy – but will inevitably require a lot of channel capacity. In this environment, regulatory oversight is still required.

However, we believe that it is possible to simplify the existing regulatory framework and to introduce a greater role for market forces and of consumer choice.

Access Rights

As discussed later on in this report, we believe that the priority carriage rules in section 17 of the *BDU Regulations*, and the power conferred on the Commission in paragraph 9(1)(h) of the *Broadcasting Act* to designate other programming services for compulsory carriage by BDUs, are important tools at the Commission's disposal to ensure that Canadians have access to specific programming services that the Commission considers are important to achieving the policy objectives in subsection 3(1) of the Act.

We favour the maintenance of a basic service that exhibits a high-level of Canadian programming, and we favour the continuation of a "buy-through" requirement that requires Canadians to subscribe to this basic service before buying other discretionary services. We see this as an important part of the equation if the Commission is going to consider increasing the options available to consumers to purchase discretionary services in a more consumer-friendly environment.

We suggest that consideration be given to further enhancing the visibility of discretionary services that provide high-levels of Canadian content, significant Canadian program expenditures or perform a public interest function by tying access rights to the contribution that a service makes toward furthering the objectives of the *Broadcasting Act*. Under this kind of model, for example, carriage rights would vary depending on the level of Canadian content or Canadian program expenditures a licence achieves. The Commission could consider establishing tiers designating the carriage rights attached to different levels of content required. This type of model might also be used to encourage the exhibition of certain types of Canadian content, such as drama, that are considered to be in short supply. This type of model might incent licensees to increase their Canadian content and expenditure commitments, in order to gain better access rights.

Incentives might include such benefits as compulsory carriage, subscription fees, inclusion in the basic service or even channel placement. We consider that this approach would have merit over the existing framework that has rewarded discretionary services with carriage rights based more on their launch date than on their merits.

Recommendation 7-1

We recommend that the Commission consider supplementing its access and carriage rules with a new regime that incents broadcasters to increase their Canadian content levels in discretionary services, to invest in certain types of Canadian content, such as drama, or to provide a service that fulfills a public interest function, such as public safety, in order to achieve more favourable access and carriage rights.

Channel Placement

There appear to be divergent views on the importance of channel placement. We recommend that this issue be assessed. If it is determined that channel placement is still important to the success of programming services, consideration should be given to requiring that Canadian services, particularly those that satisfy high Canadian content thresholds, receive better placement on the BDU dial than non-Canadian services. In assessing this issue, consideration will also have to be given to the impact of channel placement on the overall demand for Canadian programming services and the ability of BDUs to differentiate themselves from other BDUs in a competitive marketplace.

Recommendation 7-2

The Commission should assess the importance of channel placement to the success of programming services. If it is determined that channel placement is still important to the success of programming services, consideration should be given to requiring that Canadian services, particularly those that satisfy high Canadian content thresholds, receive better placement in the BDU channel line-up than other services.

Carriage Fees

The requirement to regulate carriage or wholesale fees should be investigated in light of the relative bargaining power of parties. A must-carry obligation appears on its face to enhance the bargaining power of a programming service, provided that the service is entitled to seek carriage fees. We note, in this regard, that the U.S. has implemented a regime whereby OTA television broadcasters in a local market may elect, each year, whether they wish to: (i) have must-carry status and no fee for carriage; or (ii) negotiate retransmission consent agreements. While this regime would appear to introduce a measure of flexibility into the system, and more scope for market forces to play a role in determining access fees and carriage, it is not clear that this approach is likely to be effective where there is an imbalance of bargaining power between a programming undertaking and a distributor. Further investigation of this issue is required to assess and establish principles for when *ex ante* regulation of wholesale fees is required and when *ex poste* dispute resolution procedures will be sufficient to address an impasse in negotiations.

We have also recommended in Chapter 6 that the Commission conduct an additional assessment of revenue sources available to different classes of private television undertakings including OTA television services. This could include an analysis of fees for carriage of private conventional OTA television services that satisfy significant Canadian content thresholds and assessment of the issue of fee for carriage of private conventional OTA television services that satisfy key Canadian content criteria, including local programming.

Carriage of Related Services

We would also propose eliminating some of the existing requirements that inhibit BDUs from carrying affiliated programming services. For example, the current rules require the BDU to carry five specialty services for each related specialty service that they carry. In our view, this type of rule may inhibit carriage of new Canadian programming services without necessarily addressing the issue of discriminatory conduct.

In order to offset the ability of BDUs to engage in anti-competitive conduct in respect of their own or related programming services, we recommend that the Commission strengthen both its test of discriminatory conduct and its enforcement mechanisms, as discussed further below.

Preponderance

As already discussed, "access" in the context of the *Broadcasting Act* implies more than access by programming services to BDUs. It also implies access to Canadian content by Canadians.

There has been considerable debate over the past few years as to whether BDUs should have to offer Canadians a "preponderance" of Canadian programming services – or ensure that a preponderance of the services actually subscribed to by a given subscriber consist of Canadian programming services.

At the present time, the *BDU Regulations* prohibit BDUs from offering a non-Canadian specialty service unless it is "linked" to a Canadian service. Another rule prohibits the offering of non-Canadian tiers.

In *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, the CRTC proposed a new rule that would require BDUs to ensure that customers receive a simple preponderance (51%) of Canadian programming services (based on all services received).[45]

We agree that the CRTC's proposal would provide for a simpler form of regulatory prescription.

In our view, consumer demand should play a greater role in the Canadian broadcasting system, as it does in other sectors of the economy. Forcing Canadians to subscribe to truly "discretionary" services that they do not want, in order to get one they do want, is precisely the type of regulation that may drive consumers to the Internet, pay-per-view and on-demand types of services. If the Canadian broadcasting system is to remain relevant and attractive to viewers in an age of watching "anything, anytime," it needs to adapt to the new environment.

If some of the other measures we have recommended were adopted, we could see a strong "Canadian" basic service emerging that would consist of programming services that satisfy significant Canadian content thresholds. If that type of basic service were offered, and a "basic buy-through" were required, we would be less concerned about which of the discretionary services customers select. We would permit more competition between Canadian programming services to develop while continuing to limit access by non-Canadian services to the Canadian market.

[45] Broadcasting Notice of Public Hearing CRTC 2007-10.

Recommendation 7-3

We recommend that the Commission move to a simple preponderance rule (51%) for Canadian programming services subscribed to by consumers and that it eliminate many of the additional tiering and linkage rules that are currently in place. Detailed recommendations on the application of these principles are provided in other chapters of this report.

Dispute Resolution and Enforcement

Consistent with the recommendations of the Telecommunications Policy Review Panel in the telecommunications context, we believe that a shift to greater reliance on market forces in the broadcasting sector must be accompanied by enhanced dispute resolution mechanisms that address, efficiently and effectively, competitive disputes and include credible sanctions on anti-competitive conduct.

While BDUs are already subject to an undue preference prohibition in section 9 of the *BDU Regulations*, the onus lies on a complainant to demonstrate on a balance of probabilities that the BDU has engaged in discriminatory conduct that results in an "undue" preference or disadvantage to any person, including the BDU itself. In many cases, a complainant will not have access to the evidence necessary to satisfy this requirement because relevant examples of the BDU's conduct with respect to third party or self-dealing will not be publicly available. Accordingly, we recommend that, consistent with the test found in subsection 27(4) of the *Telecommunications Act*, the onus of demonstrating that the BDU has not conferred an "undue" or unreasonable preference or disadvantage be shifted to the BDU, once an allegation of discriminatory conduct has been established.

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.

Recommendation 7-4

We recommend that the existing undue preference rules be amended to provide that once an allegation of discriminatory conduct has been substantiated, the onus shifts to the BDU that is alleged to have engaged in the discriminatory conduct to establish that any preference or disadvantage is not "undue."

Recommendation 7-5

We recommend that consideration be given to requesting that the Department of Canadian Heritage propose revisions to the *Broadcasting Act* establishing administrative monetary penalties for breach of the undue preference requirement and other regulatory obligations.

8. RELATIONSHIP BETWEEN COPYRIGHT AND BROADCASTING REGULATIONS

A functioning, orderly market for program rights is one of the essential foundations of a viable television broadcasting industry. Broadcasters need to be able to secure exclusive rights to programs in order to build audiences and earn advertising and (in the case of specialty and pay services) subscription revenue. Program producers need to fully exploit the rights to their programs in order to maximize their economic return and to invest in future productions.

Rights to television programs are generally licensed within specific geographic areas and across specific distribution platforms. New episodes of a weekly hour-long drama are typically licensed for exhibition by an over-the-air broadcaster in each local market. Where a network acquires the rights to a program, it might acquire the national rights covering all of the markets in which it operates over-the-air broadcast stations. Past seasons of the same drama may also be licensed on a national basis to a specialty service. In each case, the ability of the broadcaster to earn revenue from the program is based on the assumption that the same episodes of the same program are not available on a competing platform or from a competing broadcaster.[46]

Program rights are a matter of contract between the program producer (or distributor) and the programming undertakings that acquire the rights to exhibit the program. The rights being licensed through these agreements are created by the *Copyright Act*[47] which provides for both civil and criminal sanctions where those rights are infringed. While the Commission's mandate under the *Broadcasting Act* does not directly relate to the protection of copyright in television programs, there are many instances where issues pertaining to broadcast regulation have overlapped or had an impact on issues relating to copyright in programming.

As can be seen from the cases described later in this chapter, the Commission has sometimes used its regulatory powers to explicitly protect programming rights while in other circumstances it has declined to act when it viewed a particular issue as being an issue of copyright law or policy and therefore outside its mandate. As these examples demonstrate, there is a case for the Commission paying closer attention to issues relating to copyright and copyright policy when it is exercising its authority to regulate the broadcasting system, and for the Commission to coordinate its efforts with those government bodies that are responsible for copyright where there is an overlap between broadcasting regulation and copyright policy or enforcement as it relates to broadcast undertakings.

An obvious example of the Commission's use of its regulatory powers to protect programming rights is its requirement for BDUs to perform simultaneous substitution when the same program is being shown on both a distant television

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[46] For a more complete description, see *An Overview of the Canadian Program Rights Market*, July 5, 2007, prepared for the Commission by Peter H. Miller.
[47] R.S.C. 1985, c. C-42.

signal and local television signal.[48] The simultaneous and advanced substitution regime is described in greater detail in the chapter that reviews the *BDU Regulations*. Its objective is to protect the value of the local rights to television programming acquired by over-the-air broadcasters in that market. Under the traditional rights market, once a broadcaster has acquired the exclusive rights to broadcast a particular program in a local market, no competing broadcaster can acquire the rights to that same program in that same local market during the same period. However, where a BDU serving that local market distributes distant signals (over-the-air signals that originate in other markets), it is possible that one of the distant signals might be carrying the same program for which the local broadcaster has acquired the local rights. Without regulatory intervention, the result would be that the program would be shown twice in the local market by two different broadcasters – the local broadcaster that has the rights to broadcast the program in the local market and the distant broadcaster that has the rights to broadcast the program in its home market, but does not have the rights to broadcast the program in the local market.

To address this situation, the Commission has, since 1971, required larger cable systems to replace the signal of the distant broadcaster with the signal of the local broadcaster where the program is being broadcast simultaneously on both signals.[49] The result is that, while the program is being broadcast, the signal of the local broadcaster occupies two channel spots available to subscribers, and the distant signal is not available at all. This substitution preserves the exclusive program rights acquired by the local broadcaster, which enables the broadcaster to maximize the economic value of the advertising time sold in the program.

The other copyright interest that is implicated by the distribution of television programs on distant signals by BDUs is the rights of the owners of the copyright in the programming. In 1988, the *Copyright Act* was amended to provide a right to communicate works to the public by telecommunication.[50] The retransmission of television programs in local and distant signals by BDUs, implicates the right to communicate to the public by telecommunication. Concomitant to the creation of this right, the *Copyright Act* was also amended to create a statutory license to facilitate the ability of BDUs to clear the rights in the programming on the local and distant signals that they distribute to subscribers. This obviates the exorbitant transactional costs and administrative burden of each BDU trying to individually licence the right to communicate to the public by telecommunication each television program carried on each over-the-signal retransmitted by the BDU.[51]

The statutory licence sets the conditions that a BDU must satisfy in order for the communication to the public by telecommunication of television programs on retransmitted signals not to be an infringement of copyright. There are five such conditions:

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[48] *Broadcasting Distribution Regulations,* section 30.
[49] See Public Notice CRTC 1997-7.
[50] *Copyright Act*, paragraph 3(1)(f).
[51] *Copyright Act*, section 31.

1. The communication is a retransmission of a local or distant signal;
2. The retransmission is lawful under the *Broadcasting Act*;
3. The signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;
4. In the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions fixed under this Act; and
5. The retransmitter complies with any applicable conditions that may be prescribed by regulation.

The statutory licence clears the rights to programs carried on both the local and the distant signals carried by BDUs, although royalties are only payable with respect to the programs on distant signals.

The royalties referred to in the fourth condition are set by the Copyright Board through a tariff-setting process established in the *Copyright Act*.[52] The Board last certified the distant signal retransmission tariff for the years 2001 to 2003.[53] Pursuant to that tariff, a BDU with more than 6,000 subscribers pays royalties in the amount of 70 cents per subscriber per month. The royalties are split among a number of collectives that represent those that own the rights to television programs, including Canadian and foreign producers, Canadian and U.S. broadcasters, and sports leagues. For the years 2004 to 2008, the collectives and the BDUs have reached an agreement to increase the rates payable in each of the years covered by the agreement. In 2008, the final year covered by the agreement, the rate for retransmission systems serving more than 6,000 subscribers will be 85 cents per subscriber per month. This payment of royalties, along with the other conditions, clears the rights necessary for the BDUs to retransmit all of the programs on all of the local and distant signals they carry.

The second condition to the section 31 statutory retransmission licence explicitly refers to the *Broadcasting Act* and establishes a direct link between the copyright regime and the Commission's regulatory authority over the broadcast system. As a result of this second condition, changes to the *Broadcasting Act* or to the regulations enacted by the Commission pursuant to the *Broadcasting Act* that effect the regulatory treatment of retransmitters (i.e. BDUs) also have the effect of changing the conditions required to satisfy the statutory retransmission copyright licence established in the *Copyright Act*. Therefore, changes in broadcast regulations can result in unintended consequences for the copyright system unless the copyright regulatory scheme is amended to react to the changes in the broadcast regulatory system.

A well-known example of a situation where the Commission's exercise of its jurisdiction over broadcast regulation had a direct impact on the copyright system

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[52] *Copyright Act*, s. 71.

[53] *Statement of Royalties to be Collected for the Retransmission of Distant Radio and Television Signals in Canada, in 2001, 2002 and 2003,* Supplement to the *Canada Gazette*, Part I, March 22, 2003.

that prompted the Government to amend the *Copyright Act* in response, involved the development of Internet retransmission of television signals by Canadian Internet sites iCrave TV and JumpTV.

In July 1998, the Commission announced a public proceeding under both the *Broadcasting Act* and the *Telecommunications Act* to examine the increasing availability of communications services delivered and accessed over the Internet referred to as "new media."[54] The Commission invited comments on:

1. the impact new media might have on existing broadcasting and telecommunications undertakings regulated by the Commission;
2. the extent to which new media services are either broadcasting or telecommunication services;
3. whether or not, and to what extent, the Commission should regulate new media services; and
4. whether new media raise any other broad policy issues of national interest.

In May 1999, the Commission issued a public notice in which it announced that it would not regulate new media activities on the Internet under the *Broadcasting Act*.[55] The rationale for that decision are discussed in the next chapter of this report.

On December 17, 1999 the Commission issued an exemption order for new media broadcasting undertakings in which it exempted persons who carry on new media broadcasting undertakings from any or all of the requirements of Part II of the *Broadcasting Act* or any of the regulations made pursuant to Part II of the Act.[56]

At about the same time that the Commission issued its *New Media Exemption Order*, a website called iCrave TV launched in Canada which provided Internet users with access to streams of the broadcast signals of seventeen U.S. and Canadian over-the-air broadcasters. In response to complaints from the broadcasters, and from the rights holders in the programs accessible from its website, iCrave TV claimed that its activities were not an infringement of copyright since it met the conditions necessary to benefit from the retransmission statutory licence established by section 31 of the *Copyright Act*. iCrave TV took the position that it was a new media broadcast undertaking covered by the Commission's *New Media Exemption Order*, and that its activities were therefore lawful under the *Broadcasting Act*. iCrave TV was sued in the U.S. under U.S. copyright law on the basis that its retransmissions were available to Internet users outside Canada.[57] iCraveTV's method of trying to block access to its retransmission service by people outside Canada was to ask users to input their telephone area code. Users who input a Canadian area code were granted access to the retransmission service while users who input a foreign area code were denied access. As U.S. Internet users were able to input Canadian area codes and access the retransmissions, the U.S. court issued

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[54] Broadcasting Public Notice CRTC 1998-82; Telecom Public Notice CRTC 98-20.
[55] Telecom Public Notice CRTC 99-14; Broadcasting Public Notice CRTC 1999-84.
[56] Public Notice CRTC 1999-197.
[57] *Twentieth Century Fox Film Corp v. iCrave TV*, U.S. Dist. Ct. W.D. Pa. No. CIV 00-121.

an injunction prohibiting iCrave TV from allowing U.S. viewers to access the signal. As part of an eventual settlement agreement with the rights holders, iCraveTV agreed to stop its retransmission activities approximately two months after it first launched its service.[58]

In early 2001, a year after the iCraveTV settlement, another Canadian company, called JumpTV, announced plans to offer a similar Internet-based retransmission service which would provide access to Canadian and U.S. over-the-air signals. Unlike iCraveTV, however, JumpTV did not immediately launch its Internet retransmission service. Instead, it filed an application with the Copyright Board asking the Board to set the royalties that would be payable to rights holders by JumpTV pursuant to the statutory retransmission licence. JumpTV argued that it could not pay under the existing retransmission tariff that applied to traditional BDUs since the royalties established by the tariff are determined by the number of subscribers the retransmitter serves. As JumpTV's business model was based on advertising revenues rather than subscriptions, it argued that it required a different method for calculating the retransmission royalties it would pay to the rights holders. JumpTV also claimed that, unlike iCraveTV, it could effectively block access to its service from Internet users outside Canada by deploying technology that could trace the origin of the IP address being used by the person seeking to access the service.[59]

In June 2001, the Industry Department and the Department of Canadian Heritage issued a discussion paper on application of the statutory retransmission licence to the Internet.[60] Shortly after the discussion paper was released, JumpTV withdrew its application to the Copyright Board for a retransmission tariff.

In December 2001, following the consultation process initiated by the June discussion paper, the Government introduced legislation to address the applicability of the statutory retransmission licence to the Internet. As originally introduced in the House of Commons, the bill would have permitted Internet retransmitters to benefit from the statutory licence so long as they satisfied certain conditions that would be established by regulation.[61] The regulations were not drafted at the time the bill was introduced, and the Government stated that no Internet retransmitters would be able to operate pursuant to the statutory licence until the regulations establishing the conditions had been enacted.

However, when the bill was referred to the Heritage Committee for hearings in May and June of 2002, the Committee heard from a number of witnesses representing broadcasters and rights holders who were very concerned about the impact Internet retransmission could have on traditional television programming rights markets. They argued that if signals were retransmitted from Canada and

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[58] S. Handa, *Copyright Law in Canada*, (Toronto: Butterworths, 2002), at page 332.
[59] Handa, *ibid*, at 332-333.
[60] *Consultation Paper on the Application of the Copyright Act's Compulsory Retransmission Licence to the Internet*, June 22, 2001, Issued by Copyright Policy Branch of Canadian Heritage and Intellectual Property Policy Directorate of Industry Canada.
[61] Introduced as Bill C-48 and reintroduced as Bill C-11.

were available over the Internet to viewers all over the world, the ability of rights holders to economically exploit the programs carried on those signals would be negatively affected. In response to these concerns, the Committee amended the bill to explicitly exclude from the statutory retransmission licence those undertakings whose operations were lawful under the *Broadcasting Act* only by virtue of the *New Media Exemption Order* that had been issued by the Commission in 1999.

The bill, as amended by the Heritage Committee, was passed by the House of Commons on June 18, 2002, effectively ending any further experiments with Internet retransmission of Canadian and U.S. over-the-air television signals by third parties in Canada.

Shortly before the legislation was passed by the House of Commons, the Government decided to involve the Commission in the examination of Internet retransmission by issuing an Order-in-Council directing the Commission to initiate a public process to seek comment with respect to:

1. The broadcasting regulatory framework for the retransmission over the Internet of over-the-air television and radio signals;
2. The appropriateness of amending the *New Media Exemption Order* regarding the retransmission over the Internet of over-the-air television and radio signals;
3. Any other measures the Commission considered appropriate in this regard.[62]

In July 2002, in response to the Order-in-Council, the Commission issued a call for comments concerning Internet retransmission of over-the-air signals.[63] In addition to the issues raised in the Order-in-Council, the Commission also asked for comments on the potential impact of Internet retransmission on the broadcast system, the measures available to restrict the territorial reach of Internet retransmissions to protect program rights, and whether the regulation of Internet retransmission undertakings would contribute to the objectives set out in section 3 of the *Broadcasting Act*.

The Commission issued its Report to the Governor in Council in January 2003.[64] It concluded that Internet retransmission could not be considered a substitute for the activities of existing broadcasting or distribution undertakings. However, the Commission relied on evidence that there was no completely workable method of ensuring that Internet retransmissions are geographically contained to conclude that Internet retransmission could have a serious negative effect on the existing rights market for television programming. It acknowledged the concern that if Internet retransmitters were to have access to the statutory retransmission licence established in the *Copyright Act*, foreign rights holders might be reluctant to licence

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[62] Order in Council P.C. 2002-1043.
[63] *Call for comments concerning Internet Retransmission (Order in Council P.C. 2002-1043)*, Broadcasting Public Notice CRTC 2002-38.
[64] *Internet Retransmission: Report to the Governor General in Council pursuant to Order in Council P.C. 2002-1043*, Broadcasting Public Notice CRTC 2003-2.

their programs to Canadian over-the-air broadcasters if those programs could then potentially be retransmitted over the Internet to viewers in markets around the world.[65]

However, the Commission concluded that because the Government had amended the section of the *Copyright Act* that established the statutory retransmission licence to explicitly exclude undertakings operating pursuant to the *New Media Exemption Order*, which would include Internet retransmitters, it would not be necessary for the Commission to amend the *New Media Exemption Order* or to require the licensing of Internet retransmitters in Canada. The Commission noted that there would be a full review of the *New Media Exemption Order* at the appropriate time.[66]

While the Internet retransmission case is arguably the best known example of Commission regulatory policies having an impact on the copyright system, it is not the only example. The Commission's implementation of regional licensing of cable undertakings and an exemption order for small cable systems also had a direct impact on the copyright system, which the Commission decided it could not address because copyright issues are outside the Commission's jurisdiction.

In 2001, following a review of some aspects of its approach to licensing and regulating cable distribution undertakings, the Commission proposed to implement two specific changes. First, it proposed to exempt from licensing and regulations cable systems in rural and small communities with fewer than 2,000 subscribers. Second, it proposed to implement a system of regional licensing to group cable undertakings under common ownership in the same region under one licence, as opposed to having a licence for each individual undertaking.[67]

During the consultation process on the regional licensing initiative, the Canadian Cable Television Association (CCTA), and the Canadian Cable Systems Alliance (CCSA) both raised with the Commission the concern that a change to regional licensing could increase the amount of copyright royalties payable by some cable systems. The source of this concern was the fact that copyright royalties payable pursuant to the distant signal retransmission tariff are based on the number of subscribers served by the cable retransmitter. Systems that serve fewer than 2,000 subscribers pay a flat fee of $100 per year; systems with between 2,001 and 6,000 subscribers pay according to a scale in which larger systems pay more per subscriber than smaller systems. Systems with more than 6,000 subs pay the maximum rate per subscriber. At the time the Commission was proposing to implement regional licensing, the level of payment was based on the number of subscribers "in a licensed area."

The CCTA and CCSA were concerned that once the Commission adopted regional licensing, the region and not the individual undertaking would be considered the "licensed area" so that undertakings under common ownership with less than

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[65] Broadcasting Public Notice CRTC 2003-2, at paragraphs 68-70.
[66] Broadcasting Public Notice CRTC 2003-2 at paragraphs 78-79.
[67] Public Notice CRTC 2001-59.

6,000 subscribers would be grouped together under a common regional licence and would have to pay more per subscriber than the applicable rate for each undertaking.

The cable associations expressed similar concerns with respect to the Commission's proposal to exempt cable systems with fewer than 2,000 subscribers from licensing. As noted above, these cable systems currently benefit from preferential copyright royalty rates as required by the *Copyright Act*.[68] The definition of "small system" is established by regulations made by the Governor-in-Council pursuant to the *Copyright Act*. At the time the Commission announced its intention to issue a small cable system exemption order, the *Definition of Small Retransmission Systems Regulations*[69] defined small systems by reference to the number of premises served in the same "licensed service area." The CCTA was concerned that if small cable systems were exempt from licensing, they would no longer have "licensed service areas" as required by the *Definition of Small Retransmission Systems Regulations*, and would therefore not qualify for the small system preferential royalty rates established by the Copyright Board.

In response to the cable companies' submissions on the effect of the small system exemption order on copyright liability, the Commission concluded that, because the exemption order would apply at the level of the individual cable system, subscriber levels would not be aggregated across several systems and therefore the order would not increase the level of retransmission royalties paid by the systems affected by the order. The Commission did not address the question of how systems that were exempt from licensing requirements could have a "licensed service area" as required by the copyright regulations.[70]

In response to the concerns raised about the regional licensing initiative, the Commission indicated that changes to the copyright system would have to be made in order to deal with any effect from regional licensing:

> The Commission notes that the concerns expressed by the cable industry appear to assume that the regulations governing copyright payments would not be amended. Given that copyright is not within the Commission's jurisdiction, it will be up to the copyright collectives to update their royalty payment regimes to reflect the new regional licensing model. The Commission notes that the purpose of regional licensing is simply to create administrative efficiencies and to recognize consolidation occurring within the industry. The territories served by cable licensees will not change as a result of regional licensing. The Commission notes that conversion to regional licensing will not begin until the licence renewals considered in 2002. This will provide an opportunity for changes to the regulations governing copyright payments to be made before regional licensing is in place.[71]

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[68] Section 68.1(4).
[69] SOR/89-255.
[70] Public Notice CRTC 2001-59 at paragraph 21.
[71] Public Notice CRTC 2001-59, at paragraph 36.

In 2003, the Commission adopted the changes to the *BDU Regulations* required to implement regional licensing.[72] In the notice adopting the amendments to the regulations, the Commission took note of its statement in Public Notice 2001-59 that it would be up to the copyright collectives to update their royalty payment regimes to reflect the regional licensing approach. It also noted that, in the more than two years from the date the Commission announced its intention to implement regional licensing until the changes to the regulations were announced, no changes had been made to the copyright system to reflect the change to regional licensing. As a result, the Commission indicated that it would delay the implementation of regional licensing until the changes to the copyright system had been made:

> Given that no such changes have yet been made, the Commission is concerned that immediate implementation of the regional licensing approach for existing cable BDUs could increase the copyright fees that licensees currently pay.
>
> In light of this concern, as a general rule, the Commission does not propose to issue regional licences to apply to existing cable BDUs until the necessary changes have been made to the various royalty payment regimes and the Commission is satisfied that the financial obligations of licensees related to copyright fees do not increase as a result of the implementation of the regional licensing model. The Commission would, however, be willing to issue regional licences in response to applications for such licences from affected cable BDUs.[73]

The *Definition of Small Retransmission Systems Regulations*[74] and the *Definition of "Small Cable Transmission System" Regulations*[75] were amended in May 2005 to reflect the changes to the Commission's approach to regulating small cable systems. The regulations were amended to repeal those sections of the *Regulations* that referred to "licence" and "licensed area" and replace them with a new definition of "service area" that would apply equally to licensed and exempt undertakings. Similar amendments were made to the *Local Signal and Distant Signal and Distant Signal Regulations*[76] in 2004. With these amendments to the various regulations, the copyright system had been adjusted to reflect the changes to the broadcast system initiated by the Commission.

It is clear that the broadcast regulatory system administered by the Commission is inextricably linked to copyright; both as it applies to the program rights acquired by programming undertakings and as it relates to the copyright royalties paid by broadcasters and by BDUs. As a result, the Commission can, in exercising it regulatory authority, have a direct impact on the copyright system. Other

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[72] Broadcasting Public Notice CRTC 2003-48.
[73] Broadcasting Public Notice CRTC 2003-48 at paragraph 49-51.
[74] SOR/89-255, amended by SOR/2005-147.
[75] SOR/94-775, amended by SOR/2005-148.
[76] SOR/89-254, amended by SOR/2004-33.

agencies, such as the Copyright Board, are then forced to react to these regulatory measures.

As will be discussed in greater detail in the next chapter of this report, the emergence of the Internet as a platform to deliver broadcast quality video will present significant new challenges to the broadcasting regulatory system. Many of the observations made by the Commission regarding New Media and Internet retransmission in 1999 and 2001 about the nature of the Internet are no longer valid and need to be re-assessed. For example, developments in geo-blocking technology mean that material made available over the Internet can now be restricted to a specific geographic territory. Effective geo-blocking means that content can now be licensed for exhibition over the Internet on a territory by territory basis, consistent with traditional broadcasting programming rights markets.

Therefore, a broadcaster who has acquired the broadcast rights for a particular program in Canada may now also be able to acquire the Canadian Internet rights to that same program so that past episodes of the program can be archived and be accessed by viewers in Canada from the broadcaster's website on an "on-demand" basis. Licensing television programs for parallel distribution over the Internet provides value to viewers, and it also increases the economic value that broadcasters are able to derive from their websites.

JumpTV of Toronto, which abandoned its plans to be an Internet retransmitter in 2001, has re-emerged as an Internet broadcast distributor and claims to be one of the largest authorized Internet distributors of international television signals in the world. JumpTV offers television signals from more than 75 countries, primarily on a subscription basis but with some video-on-demand and pay-per-view options as well.[77] JumpTV has acquired the rights to the content it offers by acquiring the appropriate Internet rights from the services that it offers.

The distribution of television programming over the Internet, whether by Canadian broadcasters or by entities such as JumpTV, is exempt from regulation by virtue of the *New Media Exemption Order*. Current contractual arrangements to license television programming for distribution over the Internet are taking place despite, or perhaps because of, the lack of any regulatory requirements, restrictions or protections.

Recommendation 8-1

We recommend that, to the extent that private licensing agreements among producers, distributors, and broadcasters continue to find ways to provide new business models and new platforms from which Internet users can access programming, the Commission be wary of interfering in this nascent market by attempting to introduce regulatory measures that could disrupt existing and developing business models.

[77] See www.jumptv.com.

9. NEW MEDIA

"New media" is the term used by the CRTC to describe broadcasting services delivered and accessed over the Internet. "Broadcasting" in this sense has the meaning ascribed to it in subsection 2(1) of the *Broadcasting Act*, which includes "…any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunications for reception by the public by means of broadcasting receiving apparatus." Since the definition of "program" in subsection 2(1) is extremely broad,[78] and the definition of "broadcasting receiving apparatus" includes any devices capable of being used for the reception of broadcasting,[79] most Internet content is subject to CRTC jurisdiction. Only "visual images, whether or not combined with sounds, that consist primarily of alphanumeric text" and significantly customized information services[80] are excluded by statute.

The *Broadcasting Act* therefore casts a very wide net. Activity falling within the definition of "broadcasting" is subject to the requirements of Part II of the *Act* unless an exemption order is issued pursuant to subsection 9(4). As discussed previously, in order to issue an exemption order, the Commission must be satisfied that compliance with the requirements in Part II of the *Act* "will not contribute in a material manner" to the implementation of the broadcasting policy set out in subsection 3(1).

New Media Exemption Order

In 1999, following a public consultation process,[81] the CRTC decided to exempt from licensing (without imposing any terms and conditions) new media services delivered and accessed over the Internet.

In deciding to issue an unconditional exemption order for new media services, the Commission noted that:

> …the circumstances that led to the need for regulation of Canadian content in traditional broadcasting do not currently exist in the Internet environment.

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[78] "program" means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.

[79] "broadcasting receiving apparatus" means a device, or combination of devices, intended for or capable of being used for the reception of broadcasting.

[80] The Commission was of the view that some significantly customizable content could not be said to be transmitted for reception by the public and thus would not constitute "broadcasting" within the meaning of the *Act*, *New Media*, Broadcasting Public Notice CRTC 1999-84 at para. 45.

[81] The *Exemption order for new media broadcasting undertakings* (the "New Media Exemption Order") was preceded by a public consultation process regarding the range of communication and information services referred to as "new media", culminating in a report entitled *New Media*, Broadcasting Public Notice CRTC 1999-84, May 17, 1999 (the "New Media Report"). Two months later, the Commission published the specific wording of its proposed New Media Exemption Order (Public Notice CRTC 1999-18, July 19, 1999). After consideration of the comments received, the Commission issued the final New Media Exemption Order as Appendix A to Public Notice 1999-197, December 17, 1999.

> Market forces are providing a Canadian presence on the Internet that is also supported by a strong demand for Canadian new media content.[82]

In making this determination, the Commission underscored the rapid change that had occurred in the industry within a short period of time and observed that this evolution was likely to continue, though not necessarily in a linear fashion, towards audio and video applications.

The Commission noted that while the new media industry was highly diversified, it consisted primarily of alphanumeric text. In this regard, the Commission commented that the ability to deliver long-form programming of an acceptable technical quality was emerging slowly, particularly with respect to video. In terms of new media content available in 1999, the Commission was of the view that it complemented the existing programming of Canadian broadcasting undertakings involved in new media, or provided a means for expressing diverse viewpoints to niche markets not adequately represented by traditional media.[83]

The Commission ultimately considered that licensing new media would not contribute in any way to its development or to the benefits that it had brought to Canadian users, consumers and businesses. In the Commission's view, the circumstances that created the need for regulation of Canadian content in traditional media did not yet exist in the Internet environment. The Commission opined that market forces were providing a Canadian presence on the Internet, with statistics indicating that Canadian websites represented about 5% of all Internet websites. Though the Commission admitted that there were difficulties in attempting to measure Canadian-based online content, it found that no convincing evidence had been submitted in the proceeding to suggest that visibility of Canadian content on the Internet was a problem. The Commission acknowledged that the likely reasons for the success of Canadian content on the Web were as follows:

a) the Internet was still primarily a text-based information medium with a strong appeal to local and regional interests;

b) this content had low production values;

c) it was relatively inexpensive to produce; and

d) it was in demand by Canadians who wanted access to local, regional and national information such as the weather, sports and news.[84]

Looking to the future, the Commission was not ready to accept that Internet programming would become a substitute for traditional broadcasting media. The Commission highlighted three reasons for this:

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[82] New Media, Broadcasting Public Notice CRTC 1999-84, at para. 386.
[83] *Ibid.*, at paras. 22-25.
[84] *Ibid.*, at paras. 74 and 75.

a) First, the Commission noted that it would be necessary for the Internet to deliver broadband content.

b) Second, the Commission noted that it was not clear whether the existing economic model - whereby Canadian broadcasters can acquire discrete Canadian rights for American programming - would exist on the Internet.

c) Third, the Internet access penetration rate was only at 20%; moreover, other technological barriers previously alluded to still needed to be addressed in order to transmit broadcast quality of audio and video services over the Internet.

Nor did the Commission express significant concern over the impact of new media on traditional broadcasting. In terms of advertising, the Commission found no evidence of a negative impact on advertising revenues of regulated broadcasters in television or in radio. The Commission observed that difficulties in accurately measuring audience sizes on the Internet meant that advertisers remained cautious in approaching new media.[85]

In our view, the Commission's approach to new media in 1999 was consistent with the legislative framework of the *Broadcasting Act* and with the policy objectives and regulatory policies in subsections 3(1) and 5(2) of the Act.

The Commission's test was fully consistent with the objective in subparagraph 3(1)(d)(iv), which specifies that the Canadian broadcasting system should be adaptable to scientific and technological change, as well as paragraphs (f) and (g) of subsection 5(2) which specify that the system should be regulated and supervised in a flexible manner that "…does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians"; and "…is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings."

As regards the other requirements of Part II of the Act, and in particular the policy objectives respecting Canadian ownership and control, Canadian content and use of our national languages, the Commission appears to have addressed the statutory test in section 9(4) in a responsible way based on the factual record of the proceeding and the state of Internet technology in 1999. It should be emphasized however that the Commission's determinations were very clearly based on a 1999 view of Internet technology and the Commission did not in any way discount the possibility that technological changes could alter its determinations. As discussed below, significant changes in Internet technology and services in the past eight years have in fact taken place, which raises the question of whether the conclusions reached by the Commission in 1999 remain valid today.

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[85] *Ibid*., at paras. 102 to 110.

Exemption Order For Mobile Television Broadcasting Undertakings

In *Regulatory framework for mobile television broadcasting services*,[86] the Commission announced that certain mobile television broadcasting services provided via cellular telephones by Bell Mobility, TELUS Mobility and Rogers Wireless were delivered and accessed over the Internet and thus fell within the scope of the *New Media Exemption Order*. At the same time, the Commission called for comments on a proposed exemption order relating to mobile television broadcasting undertakings providing mobile television services that were not delivered and accessed over the Internet and thus did not fall within the scope of the *New Media Exemption Order*.[87]

The Commission limited the scope of the new exemption order to undertakings using point-to-point technology, thus excluding the new broadcast-based mobile technologies using point-to-multipoint delivery. Point-to-point technology is telephony-based and can require considerable network bandwidth since each user requires a separate data stream, whereas point-to-multipoint technology has the potential to produce a higher quality signal and support a longer battery life. Given the limitations of point-to-point technology, the small size of the screen and the type and range of programming offered by mobile broadcasters, the Commission was of the view that the exempt services were unlikely to have a significant impact on traditional broadcasters and did not need to be made subject to the same obligations as BDUs.[88]

While the Commission noted that the delivery of content over closed networks did not raise the same territorial rights issues as were relevant to the exemption of Internet-delivered mobile television services, it held that it was nonetheless important for broadcasters to have control over whether or not to subject their signals to retransmission. This is because the delivery of broadcast signals via point-to-point technology and their reformatting for display on a small screen generally lead to a reduced quality signal. The consent of broadcasters to the retransmission of their signals is therefore a condition of the exemption order.

The Commission also expressed concern that, insofar as there are no ownership requirements for resellers, it might be possible for non-Canadian companies to offer mobile television services in Canada. Accordingly, the Commission required that any exempt entity be eligible to hold a Canadian broadcasting licence.[89]

The criteria imposed on exempt undertakings are as follows:

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[86] Broadcasting Public Notice CRTC 2006-47.
[87] *Call for comments on a proposed exemption order for mobile television broadcasting undertakings*, Broadcasting Public Notice CRTC 2006-48.
[88] *Exemption order for mobile television broadcasting undertakings*, Broadcasting Public Notice CRTC 2007-13, at para. 42.
[89] *Ibid.*, at para. 40.

1. The Commission would not be prohibited from licensing the undertaking by virtue of any Act of Parliament or any direction to the Commission by the Governor in Council. In other words, the undertaking must meet the same Canadian ownership and control requirements as licensees.

2. The undertaking provides television broadcasting services that are received by way of mobile devices, including cellular telephones and personal digital assistants.

3. The undertaking uses point-to-point technology to deliver the service; that is, the undertaking transmits a separate stream of broadcast video and audio to each end-user.

4. The undertaking has obtained the prior consent of a broadcaster for the retransmission of its signal. As noted above, the consent of each program rights holder is not required.[90]

Evolution of New Media

Much has changed since the Commission first commented on the limitations of the Internet to deliver multi-media services:

- the Internet is no longer primarily a text-based information medium;
- while there are still limitations on bandwidth, significant advances have been made since 1999 in the development of high-speed Internet access services and Canadians have shown robust demand for these services;
- multiple platforms have developed for the delivery of digital media;
- while much of the video programming available on the Internet is in short-form format, conventional broadcasters and rights holders are increasingly making long-form programming available;
- advertisers are starting to devote more resources to Internet advertising and, in some cases, have diverted advertising dollars away from conventional television.

In this new environment, some stakeholders in the Canadian broadcasting system are voicing concerns about the suitability of our existing statutory and regulatory framework for addressing the impact of new media on the Canadian broadcasting industry.

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[90] *Exemption order for mobile television broadcasting undertakings*, Appendix to Broadcasting Public Notice CRTC 2007-13.

The upgrading of traditional uni-directional coaxial cable networks to support bi-directional broadband delivery of digital television services has led to the utilization of this network for the provision of high-speed Internet access services to the mass consumer market, with an estimated 95% of cable television subscribers now having access to high-speed Internet.[91]

The development of ADSL services by the telephone companies has provided an alternative source for high-speed Internet access, and advances in broadband mobile wireless services have led to a proliferation of new delivery technologies and devices capable of delivering broadband services to consumers. New WiFi networks are springing up in urban areas, providing broadband access to the Internet, and the mobile wireless networks are now providing 3-G services to consumers of cellular and PCS communications services. New satellite technology is also filling in the broadband coverage gaps in rural and remote parts of Canada.

While public acceptance of the Internet as a source of conventional programming content has been relatively slow to materialize, the widespread availability and popularity of broadband access to the Internet in Canada, North America and the rest of the world, coupled with advances in streaming and other communications technologies, has spurred mass audiences to try these new services. The new media environment is starting to change as new Internet-based programming services emerge that are much closer to conventional television in content, quality and delivery.

The sudden and unprecedented popularity of YouTube, with its audience-generated content, led to its sale in 2006 for $1.65 billion. Other “social content” Internet sites, such as Facebook, have resulted in over 34 million active members in just three years of operation.

Joost provides conventional television programming from such suppliers as MTV, Viacom and National Geographic. Unlike its predecessor, Joost is clearing program rights for its Internet service and is providing worldwide distribution of its service using a regional advertising model.

JumpTV provides access to over 240 broadcasters in more than 70 countries, providing direct competition with other third language services in Canada.

Apple TV is also providing conventional television content for display on its hand-held devices. However, this same service can be downloaded on a computer and displayed on conventional television sets that are computer-compatible.

Sling Shot can redistribute conventional programming recorded on personal video recording devices (PVRs) and can redistribute it via the Internet to other users, who can again display it on any number of devices, including computer-compatible television sets.

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[91] Statistics Canada, *Broadcasting and Telecommunications*, Catalogue 56-001-XIE, Number 36, Volume 4, November 2006.

Major American television networks have begun to make episodes of their conventional television shows available on the Internet the day after their initial broadcast. In Canada, broadcasters have also begun to experiment with Internet-based shows. The CBC and other Canadian networks have also begun to make some of their programs available on the Internet and more recently, some Internet-only programming has been exhibited – such as the post-game shows following NHL playoff games in 2007. The Internet also provides an important outlet for specialty channels – some of which have had difficulty obtaining carriage rights on conventional BDUs.

The surge in popularity of Internet-based programming services has also begun to attract significant advertising revenue. In 2006, Internet-based advertising amounted to approximately 6% of ad dollars in both Canada and the United states – breaking through the $1 billion barrier in Canada.[92] Moreover, it is predicted to continue to grow at a high rate over the next few years – possibly cutting into the revenues relied upon by conventional broadcasters to support their operations and their Canadian content obligations.

It is not yet clear exactly what this means for the Canadian broadcasting system. Obviously, if Canadians start watching more programming services on the Internet, and less on conventional television, advertising dollars will continue to follow the viewing audience and the underpinnings of Canadian content regulation in Canada will be threatened. The question arises whether there are measures that can be taken to decrease this threat, or whether the whole system needs to be rethought.

The Internet differs in certain respects from other previous technological threats to the Canadian broadcasting system insofar as it provides users access to worldwide content – not just content originating in Canada or south of the border. This makes the enforcement of other forms of protection, such as copyright laws, less effective than they might be in a North American context.

While “geoblocking” has proven to be effective in blocking access to American content when the owner of that content has an interest in maintaining a system of geographic licensing, it is not effective where programming rights are ignored and the site offering the content is operating outside of copyright laws. Therefore, while Joost and the American television networks may be blocking access by Canadians to content already licensed to Canadian broadcasters, not all sites are doing the same.

In addition, if American producers of television programs start selling Internet distribution rights separately from Canadian television distribution rights (which they have not yet started to do), Canadian broadcasters could face competition from the very programs that they purchase from U.S. distributors, without the benefit of simultaneous substitution. Similarly “genre protection” and tiering and linkage rules have no application to the Internet or to websites located outside of Canada.

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[92] Banff Green Paper 2007, *The Future of Television in Canada*, June 5, 1007.

Other than copyright laws, there are no protections currently in place to shield Canadian broadcasters from the effects of Internet-based programming. Even the income tax laws that protect Canadian broadcasters by denying Canadian advertisers deductions from advertising expenses incurred on U.S.-based broadcasting undertakings or in U.S. publications, do not extend to the Internet.

The television industry could be in for the same kind of revolution that the music industry has recently been through. Kids are listening to and purchasing more music than ever. However, they are not necessarily purchasing CDs from record stores. They are accessing a growing percentage of their digital music online. The large music producers were slow to respond to this change. Canadian broadcasters and Canadian regulators need to be better prepared.

The big question for the Canadian broadcasting system is how can we adapt our system to harness the power of the Internet to further our cultural objectives?

As discussed above, Canadian broadcasters are already starting to adapt by setting up their own Internet sites to cross-sell their programming services and to extend their brand awareness. The Commission has noted this development and has encouraged it. Moreover, the Commission has stated that it is open to considering specific incentive proposals designed to expand the scope or nature of such activities.[93]

The recent report by the CRTC Task Force on the Canadian Television Fund (CTF) has also recommended some changes designed to take advantage of the possibilities presented by the Internet for promotion of Canadian content. These measures include:

- Establishing a new media funding stream of up to $25 million from current CTF revenues;
- Allocating an appropriate portion of new sources of revenue to the new media funding stream; and
- Waiving the broadcast licence fee for projects destined for mobile platforms.
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The Task Force also recommended that the current log jam between broadcasters and independent producers respecting new media rights be broken by establishing a 50/50 sharing of net revenues from the exploitation of new media rights.[94]

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[93] *The Future Environment Facing the Canadian Broadcasting System*, A report Proposed to section 15 of the *Broadcasting Act*, December 14, 2006, at para. 399.
[94] *Report of the CRTC Task Force on the Canadian Television Fund*, 29 June 2007.

These are all steps in the right direction of encouraging the exploitation of Canadian programming on the Internet and other new media outlets. Even if it is not yet clear that conventional television viewing will decline, it is very clear that the viewing of programming on Internet-based new media outlets will increase. Recent statistics show that it is not just the youth that are viewing online programming. A December 2006 survey of the online activities of adult high-speed Internet users found that 4% download TV programs; 5% download movies; 6% watch TV on the Internet; 22% listen to the radio; and 29% watch videos. The percentage of high speed Internet users participating in these online activities all increased compared to December 2005.[95] An increasing percentage of the "boomer" segment of the population are now spending more time and money online, and advertisers will increasingly strive to reach this audience online. In addition, in the longer term, the Canadian broadcasting industry will have to prepare itself for the possibility of a new generation of Canadians who may not view television as the logical source of programming entertainment and news.

As discussed in chapters 4 and 8, the CRTC is not the only governmental agency with responsibility in the broadcasting sector and it ought not to be left alone to come up with solutions to the complex interaction between new media and the Canadian broadcasting system. In our view, this is an issue that requires a cooperative effort by all governmental agencies that have responsibility in this sector. Canada needs a national policy for electronic media, and needs to have available all of the tools of government to give effect to it. This likely includes copyright, fiscal measures, and new programs to incent Canadian participation in new media ventures.

Principles of smart regulation require Canada to develop a policy response that is implemented across different elements of the Government acting in a concerted fashion.

It is no longer possible to separate out the issues of Canadian content and new media. The two are inextricably linked, as recognized in the recent *CTF Task Force Report*. The model used to fund Canadian programming content, predominantly through independent production, and exclusively for television presentation, may no longer be the appropriate model for encouraging the type of multi-pronged initiative that will be needed to address conventional broadcasting, New Media and a variety of new digital distribution outlets.

In our view, the solutions to this issue lie not in imposing new regulatory restrictions on Canadian companies – but rather in encouraging them to stake out territory on the Internet, and in facilitating the production of Canadian new media content for the Internet. In our view trying to regulate Canadian content on the Internet will simply hold Canadian companies back from exploiting the opportunities presented to them to maximize Canadian content and Canadian revenues on the Internet. To regulate Canadians, while the rest of the world competes in an open

[95] CyberTRENDS, BBM Analytics, December 2006 edition. *Broadcasting Policy Monitoring Report 2007*, Chart 6.4, page 128.

market, would in our view be counterproductive and would not achieve the objectives of the *Broadcasting Policy for Canada*.

In our view, the answer also lies in ensuring that the Canadian broadcasting system adapts to some of the trends that the Internet has spawned in order to remain relevant. These trends include a desire on the part of many consumers for content "anywhere, anytime," the desire of younger consumers to have an interactive experience with digital media, the desire of advertisers to be able to target relevant audiences with interactive media, and the development of new "communities of interest" that are not necessarily tied to local or regional geographic areas.

Recommendation 9-1

Canada is in need of a national policy for electronic media, and needs to have available all of the tools of government to give effect to it. This likely includes copyright, fiscal measures, and new programs to incent Canadian participation in new media ventures. While it is beyond the jurisdiction of the CRTC to implement this national policy on its own, we urge the Commission to consult with other Governmental agencies and departments to begin such a process.

Recommendation 9-2

Consideration should be given by the Government of Canada to establishing restrictions on deductibility of advertising expenses on non-Canadian Internet sites in order to encourage more investment in Canadian sites in a manner similar to Bill C-58. Again, this recommendation cannot be implemented by the CRTC. It needs the involvement of other government departments.

Recommendation 9-3

The Commission should continue to apply its exemption order to New Media services.

Recommendation 9-4

We recommend that, rather than regulate Internet content, the Commission should explore ways of ensuring that the Canadian broadcasting system adapts to some of the new trends that the Internet has spawned in order to remain relevant and also to respond to consumer demand. These trends include a desire on the part of many consumers for content "anywhere, anytime", the desire of younger consumers to have an interactive experience with digital media, the desire of advertisers to be able to target relevant audiences with interactive media, and the development of new "communities of interest" that are not necessarily tied to local or regional geographic areas.

10. CLASSES OF BROADCASTING UNDERTAKINGS – AND THEIR REGULATIONS

10(a) Regulation of Private Conventional English and French-language Over-the-Air (OTA) Television Services

Television broadcasting has been regulated in Canada since its introduction in the early 1950s, first by the CBC, and from 1958 until 1968 by the Board of Broadcast Governors (BBG). The centerpiece of television broadcasting since its inception was, and continues to be, minimum Canadian content requirements.

The BBG promulgated the *Radio (TV) Broadcasting Regulations* in 1959, setting out general obligations of television licensees, including minimum levels of Canadian content.[96] In 1970 the newly-created CRTC announced new Canadian content regulations[97] for radio and television, and promulgated new *Television Broadcasting Regulations.*[98] Those regulations tightened considerably the Canadian content requirements for television broadcasters.

Over the next fifteen years minor amendments were made to those regulations, and in 1986 the CRTC commenced a detailed review of the regulations which culminated in the issuance of the *Television Broadcasting Regulations*, 1987.[99] These regulations, as amended, continue, twenty years later, to incorporate the primary regulatory obligations of private conventional English and French-language OTA television services. The requirements imposed by the Regulations are supplemented by other Commission policies that are implemented through conditions of licence and expectations and in decisions approving the issuance, renewal or transfer of ownership or control of private conventional OTA television licensees. The primary regulatory obligations applicable to private conventional OTA television services are described below. Generally applicable policies, relating to matters such as ethnic broadcasting, aboriginal broadcasting, closed captioning, diversity and transfer of ownership and control, are described in other sections of this report.

In Public Notice CRTC 1999-97, *Building on Success – A Policy Framework for Canadian Television* (the "1999 *Television Policy*") the Commission announced a number of significant changes to the regulatory framework for OTA television services, including most notably, Canadian content obligations. Although the CRTC did not vary the basic preponderance requirements for private conventional English and French-language services - 60% overall and 50% in the evening broadcast period – it introduced peak period exhibition requirements, modified the definition of priority programming to include a number of additional program genres, and eliminated the general requirement for private commercial OTA television services to spend a percentage of their advertising revenues on Canadian programming in under-represented genres. In its 1999 *Television Policy* the CRTC also amended

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[96] SOR 59-456.
[97] CRTC Decision 70-99.
[98] Television Broadcasting Regulations SOR/70-257.
[99] Public Notice CRTC 1986-176 and Public Notice CRTC 1987-8.

the existing drama incentive regime and in a series of subsequent decisions, introduced a new incentive regime based on access to additional advertising minutes.

More recently, in *Determinations regarding certain aspects of the regulatory framework for over-the-air television*,[100] the CRTC addressed a number of critical issues facing this sector of the broadcasting industry. The Commission denied OTA broadcasters' request for fees for carriage, announced the elimination of the cap of twelve minutes per hour of advertising by OTA television services, and revised its policy on the transition to digital broadcasting. The CRTC indicated that it would address Canadian content exhibition and expenditure requirements of OTA television broadcasters, and the role of independent production, on a case-by-case basis at licence renewal.

Canadian Content Requirements

Canadian content regulations and policies fall broadly into three categories: obligations to broadcast a preponderance of Canadian content; obligations to broadcast Canadian content at peak viewing times; and genre incentive programs.

At present, there are no general obligations regarding expenditures on Canadian programming by conventional OTA television broadcasters. However, many OTA licences include expenditure obligations which implement benefits approved in respect of transfer of ownership requests or commitments made during licensing or renewal proceedings.

Prior to the 1999 *Television Policy*, private conventional English-language television services were generally subject to expenditure or exhibition requirements (and in some cases both) for Canadian content in under-represented genres. In general, broadcasters earning in excess of $10 million per year in advertising revenues were permitted to choose between a condition of licence specifying a minimum percentage of advertising revenues to be spent on Canadian programs or requiring a minimum level of exhibition of Canadian entertainment (excluding news programming) programs during the evening broadcast period. Some large broadcasters were subject to conditions of licence relating to both expenditures on and exhibition of Canadian content. Smaller English-language conventional television licensees were generally subject to expenditure requirements tied to revenues. The Commission eliminated these requirements in its 1999 *Television Policy* to streamline its regulations and give licensees more flexibility in the increasingly competitive environment for both viewers and advertising revenues, and to address concerns about the complexities and inequities associated with the expenditure requirements.

[100] Public Notice CRTC 2007-53.

Preponderance of Canadian Content

Section 4 of the *Television Broadcasting Regulations, 1987* specifies that, with the exception of ethnic and remote television services, private television licensees are required to devote:

- Not less than 60% of the broadcast year[101] to the broadcasting of Canadian programs;[102] and

- Not less than 50% of the evening broadcast period[103] to the broadcasting of Canadian programs.

These provisions were first introduced in CRTC regulations applicable to private conventional OTA television services in 1970. (Comparable regulations can be traced back to Canadian *Radio Broadcasting Regulations* promulgated in April 1933.) The purpose of these requirements was described by the CRTC in its notice announcing a review of these regulations in 1986 as follows:

> The central element in the existing and proposed regulations, and a major preoccupation of the Commission, concerns the provision of Canadian programs. Indeed, the distinctive character of the Canadian broadcasting system, especially with respect to television, is primarily associated with the Canadian component of television schedules.[104]

In its 1986 proceeding, the CRTC proposed to modify the regulations so as to permit a reduction in the 60% Canadian content requirement to 50% if a licensee maintained the percentage of its gross revenues allocated to Canadian programming expenditures (CPE) at a pre-determined level, based on historical levels. The purpose of this proposal was to address the increasing expenditures by OTA television licensees on non-Canadian content. However, the proposal was not well-received and was not implemented.

The predominance rules established by the Regulations continue, in our view, to effectively target the over-arching policy objective in paragraph 3(1)(f) of the Act of ensuring a predominance of Canadian content on private conventional OTA television services.

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[101] The broadcast year is defined as the total number of hours devoted to broadcasting over the one year period commencing September 1, using a broadcast day of up to 18 hours.
[102] For the definition of Canadian program, see Public Notice CRTC 2000-42, *Certification of Canadian Programs – A Revised Approach* (March 17, 2000) In order for a program to qualify as Canadian, the producer must be Canadian; the production must earn a minimum of 6 points based on Canadians filling key creative roles as follows: director – 2 points; screen writer – 2 points; lead performer – 1 point; second lead performer – 1 point; production designer – 1 point; director of photography – 1 point; music director – 1 point; picture editor – 1 point. In addition, the director or screenwriter and at least one of the two lead performers must be Canadian and 75% of services costs associated with the production must be paid to Canadians.
[103] The evening broadcast period is defined as the period each evening from 6 pm to midnight.
[104] Public Notice 1986-176.

Canadian Content at Peak Times

The largest multi-station groups (CTV, Canwest Global, TQS and TVA)[105] are required by condition of licence to broadcast on average over the broadcast year at least eight hours per week of priority Canadian programs during the 7 pm to 11 pm peak viewing period. Priority Canadian programs are: Canadian drama, Canadian music and dance, Canadian long-form documentaries, Canadian regionally-produced programming in all categories except news and information and sports, and Canadian entertainment magazines.[106] Regionally produced programs are programs produced outside of Toronto, Montreal and Vancouver.

The purpose of these requirements is to "ensure that a range of diverse programming and a sufficient number of hours to attract audiences to Canadian programming will be available, especially given the high proportion of U.S. entertainment in the peak time schedules of private broadcasters."[107]

Prior to the 1999 *Television Policy*, the Commission required conventional broadcasters to implement strategies to develop under-represented program categories. These categories were primarily drama, music, children's and documentary, with increasing focus leading up to 1999 on drama, music and variety. In the 1999 *Television Policy*, the Commission expanded the definition of priority programming to include long-form documentaries, Canadian entertainment magazines and regionally-produced programming. The intent of the latter was to address "the need for the Canadian broadcasting system to better reflect, in its peak time programming, the different regions of the country."[108] Entertainment magazine shows were added to the list of priority programming as a mechanism to attract larger audiences for Canadian content. The Commission reasoned that "[a]udiences might be more attracted to Canadian programs if they were better informed through television programs about the Canadian entertainment industry and its performers."[109] With regard to long-form documentaries, the Commission indicated that their inclusion as priority programming would ensure the continued success of Canadian documentary production.

In its licence renewal decisions for large multi-station groups, the Commission further indicated that it "expects" these licensees to ensure a reasonable distribution of Canadian programming throughout their broadcast schedules and that Canadian programming is not disproportionately scheduled during lower viewing periods, such as the summer months and Saturday nights.

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[105] Although TVA does not qualify as a large multi-station group as initially defined by the Commission, it is also subject to this condition of licence.
[106] The various categories of priority Canadian programs are defined in Public Notices CRTC 1999-205 and 2000-42.
[107] 1999 *Television Policy*, para. 27.
[108] 1999 *Television Policy*, para. 35.
[109] 1999 *Television Policy*, para. 36.

While we do not question the requirement to broadcast certain types of Canadian content genres – perhaps because they are particularly important to telling Canadian stories and/or are underrepresented during peak viewing periods – we do question the effectiveness of the current rules.

It appears, for example, that these rules have been largely ineffective in ensuring the exhibition by private OTA broadcasters of Canadian drama and long form documentaries during peak viewing time in the regular broadcast season. A review of most broadcast schedules indicates that the peak viewing period requirements are largely satisfied by Canadian entertainment magazine type shows, and Canadian versions of American game and reality television programming. Moreover, the ability to average the amount of Canadian content broadcast during peak viewing periods over the broadcast year permits broadcasters to push Canadian content into lower viewing portions of the week (Friday and Saturday) and of the year.

As discussed in Chapter 6, there is also a clear tension between the simultaneous substitution rules and the peak viewing period requirements applicable to OTA television services. The simultaneous substitution rules provide an incentive for broadcasters to simulcast popular American content (rather than Canadian content) during the peak viewing period, when the American programs are also broadcast by American stations.

Recommendation 10(a)-1

We recommend that the Commission reassess the net benefit of simultaneous substitution to the Canadian broadcasting system. The Commission should seek to determine whether there are other more direct means that would permit Canada to retain the revenues associated with program substitution while at the same time regaining Canadian control over prime time schedules of Canadian OTA television broadcasters, as well as enhancing the prospect for exhibition of Canadian content when most Canadians are watching television and when the revenues are likely greatest.

Recommendation 10(a)-2

We recommend that the Commission revisit the definition of priority programming. Priority programming is currently defined to include a variety of types of programs – Canadian drama, music and dance, Canadian long-form documentaries, Canadian entertainment magazines, and regionally-produced programming in all categories except news, information and sports. It is not at all apparent that the economics of producing Canadian entertainment magazine or reality television programming suffers from the same challenges as Canadian drama programming, or that these types of programs merit regulatory incentives. Consideration should therefore be given to targeting peak programming obligations to a narrower genre of Canadian programming which will not be supported by the marketplace.

Recommendation 10(a)-3

We recommend that peak period priority programming requirements be expressed as a requirement to broadcast a minimum number of hours of Canadian priority content during each six month period to ensure that it is not broadcast primarily in lower viewing periods, such as summer months.

Genre Incentives

The Commission has established programs that are intended to incent the broadcasting of Canadian drama programming by OTA television licensees. The programs fall into two categories: time credits which facilitate satisfaction of peak viewing period Canadian content obligations; and advertising incentives.

(i) Time Credits

Canadian drama programming broadcast during the peak viewing period is subject to time credits which can be applied by stations controlled by the large multi-station groups to satisfy their obligations to broadcast Canadian content during the peak viewing period. They cannot be used by these stations to reduce the quantity of Canadian content otherwise required to be broadcast.[110]

A 150% time credit can be applied to a program that is a dramatic program[111] broadcast between 7 pm and 11 pm that is aired on television for the first time on or after September 1, 1998, has a duration of at least 30 minutes, is a recognized Canadian program that achieves 10 points for using Canadians in key creative positions, and contains a minimum of 90% dramatic content.

A 125% time credit can be applied to a program that is a dramatic program broadcast between 7 pm and 11 pm that is aired on television for the first time on or after September 1, 1998, is at least 30 minutes long, and is a recognized Canadian program.

The time credits can be claimed for up to three broadcasts by each licensee of a qualified program occurring during the two-year period following the date of the

[110] Prior to the 1999 *Television Policy*, the drama credit applied generally to Canadian content requirements. In the 1999 *Television Policy* the Commission determined that application of the drama credits by large multi-station groups should be limited to peak programming obligations. The Commission has since reconsidered this limitation on two occasions and concluded that the credit should not be available to reduce general Canadian content obligations as this could result in an overall decline in broadcast Canadian content.

[111] A drama program is an entertainment production of a fictional nature, including dramatizations of real events, that is an ongoing dramatic series, an ongoing comedy series, a special, a miniseries or a made-for-TV feature film, a theatrical feature film aired on television, an animated television program or film, a comedy or other drama.

first broadcast of the program by a conventional or specialty licensee in the same market. For a series, the two-year period commences on the date of airing of the first episode.

(ii) Advertising Incentives

To incent the production and exhibition of Canadian drama programs, the Commission permits OTA television licensees to broadcast additional advertising minutes if Canadian drama exhibition, expenditure and/or viewership targets are met or exceeded. The advertising incentive programs are different for English and French-language broadcasters due to the differences in viewing habits and expenditures of these services.

The advertising incentives available to English-language OTA broadcasters are intended to promote production and broadcast, viewing and expenditures on English-language Canadian drama. Accordingly, English-language services are permitted to broadcast additional advertising minutes when they exceed specific targets for broadcast hours, viewing and expenditures on original English-language Canadian drama. An original program is, subject to certain exceptions, a program that, at the time of its broadcast, has not previously been broadcast by a licensee.

In the case of French-language Canadian drama, advertising incentives have been established for the purpose of maintaining the level of original Canadian drama programming broadcast by French-language services during peak viewing periods. French-language stations are permitted to increase advertising minutes when they broadcast original French-language Canadian drama in excess of an eligibility threshold which is set at 65% of the average number of hours of drama programming broadcast by the licensee over the three broadcast years preceding announcement of the incentive program in 2005.

Until recently, total advertising per hour, inclusive of incentives, has been capped at 12 minutes. As discussed below, the Commission has announced that it will eliminate the time limits on advertising by OTA television broadcasters in stages over the next two years.

Claims for advertising incentives must be based on broadcast of, or expenditure on, Canadian drama programming that is incremental to any expenditure or broadcast benefits or licensing commitments.

In the 1999 *Television Policy*, the Commission expressed the view that the marketplace could be expected to ensure sufficient production and exhibition of children's and news programming, therefore specific incentives for these programming genres were not necessary. Children's drama programming is however eligible for the time credit incentives, if it is broadcast during the peak viewing periods. Children's drama programming is also eligible for the advertising incentives if it is broadcast at an appropriate time for its audience. Some licensees are also subject to conditions of licence specifying minimum exhibition requirements for children's programming based on benefits or licensing commitments.

The 2007 *Broadcasting Policy Monitoring Report* does not include a detailed analysis of the impact of the drama incentive programs. However, data in the 2006 Report suggested that these programs had not been very effective. For example, in the 2004-2005 broadcast year, average viewing of Canadian drama was down for both CTV and Global, and neither of these multi-station groups met their viewing target levels. In the same period, only Global met or exceeded its expenditure target; expenditures by both CTV and CHUM declined in the period and neither company met its target. Perhaps even more telling is the large number of advertising credit minutes that were not utilized by English and French-language broadcasters. The 2006 *Monitoring Report* did not break out the numbers for conventional and specialty television stations. Overall, however in the 2004-05 broadcast year, conventional and specialty television stations claimed 3 hours and 16 minutes of advertising incentive minutes, of which just under 2 hours were used. TVA and TQS claimed 125 minutes of advertising incentive minutes but only used 62.5 of these minutes. Accordingly, a very significant portion of advertising minutes were not used, indicating that there was little incentive value to these minutes.

In terms of overall viewing, Canadian content represented 67% of viewing of English-language conventional private television services in the 2006 broadcast year, the same level as in the previous year. Viewing of Canadian news programming remains high on English-language services, at 98%, while Canadian drama represents only 8% of drama viewing on these services, down from 10% in 2005. In the case of French-language conventional private television services, Canadian content represented 71% of content viewed on these services, up from 69% in 2004. Canadian content was 75% of drama viewed on these services, while 100% of news viewed on these services was Canadian.

Finally, total expenditures by private conventional television services on Canadian drama declined by 15% in 2006 relative to the previous year.

These data all suggest that the drama incentives, at least in the case of English-language OTA private conventional services, have not been effective. Moreover, advertising incentives will have no value when the limits on advertising are totally eliminated in 2009, and will have marginal incentive value, at best, over the transitional period to 2009.

Recommendation 10(a)-4

We recommend that the Commission undertake a detailed investigation of the requirement for incentives for specific genres of programming and of more effective mechanisms of incenting, if necessary, the exhibition and production of specific program genres. This analysis should consider the costs of producing various genres of programming, the availability of funds to support Canadian programming, and the likelihood that, if programming is available, market forces can be expected to ensure the programming is broadcast during peak viewing periods.

Independent Production

Major OTA television broadcast groups are expected to source 75% of the priority programming they broadcast from independent producers. (In some cases, specific quantitative requirements to source programming from independent producers have been imposed by condition of licence, but in general this requirement is imposed as an "expectation" and not a condition of licence.) A producer is "independent" for these purposes if the licensee and its related companies own less than 30% of the equity of the producer.

This expectation, which is monitored through detailed annual reporting requirements, implements the objective in subparagraph 3(1)(i)(v) of the *Broadcasting Act* that the programming provided by the Canadian broadcasting system should "include a significant contribution from the Canadian independent production sector."

As discussed in Chapter 6 of this report, we are recommending that the Commission study the pros and cons of reducing the requirements on broadcasting undertakings to use high percentages of independently produced programming. This review should include consideration of economies of scale and scope in production, rights management issues, and incentives to maximize returns from Canadian programming. At the same time, the Commission should consider rationalizing the independent production requirements of different classes of television undertakings and, in the absence of clear regulatory distinctions, imposing common obligations on these services. This would improve the transparency and competitive neutrality of the regulatory regime. We recommend that this be done in a staged manner and that following any such reduction or rationalization, the CRTC should carefully monitor the impact of the changes on Canadian content production and independent producers.

Recommendation 10(a)-5

We recommend that the Commission rationalize obligations to use independent production across television programming undertakings and consider lowering the 75% threshold as discussed in Chapter 6 of this report. There appears to be scope for a lower threshold while still respecting the objective of ensuring "significant" use of independent production. Any reductions in the use of independent production should be introduced in stages over a transitional period and the impact on the independent production sector, and on the level of Canadian content developed, should be closely monitored.

Local and Regional Programming

In the 1999 *Television Policy*, the Commission eliminated the general requirement for OTA licensees to make quantitative commitments to broadcast

specific amounts of news or other local programming. The following policies, however, remain in place to promote local and regional programming by licensees:

- Licensees that do not provide local programming are generally not permitted to access local advertising revenues;

- As discussed above, the definition of priority programming includes regionally-produced programming; and

- The Commission expressed the expectation in Public Notice CRTC 2004-93 that licensees commission priority programming from all regions of Canada. Licensees are required to demonstrate at licence renewal how they intend to meet the demands of local audiences, through local programming. In some cases, specific conditions of licence have been imposed in respect of local programming obligations.

These policies implement the objective expressed in subparagraph 3(1)(i)(ii) that "the programming provided by the Canadian broadcasting system should … be drawn from local, regional, national and international sources". The general policy against local advertising by private conventional OTA television licensees that do not produce local programming is also intended to provide some measure of protection to OTA television services that do produce local programming from revenue losses resulting from the distribution of out-of-market signals.

As indicated earlier, we believe there is logic to linking access to local advertising revenues to the provision of local programming services. We wonder, however, how much the market would naturally limit the ability of national services to tap into local advertising revenues. Also, while the requirement to source programs from various regions of the country is founded in an objective of Canadian broadcasting policy, we wonder if it makes sense to layer this requirement on top of peak viewing period priority programming obligations. Presumably, this issue would be addressed in the assessment which we have recommended of the existing definition of priority programming.

Common Ownership

The Commission's *Common Ownership Policy* generally limits a single party to owning no more than one conventional television station in one language in a given market. In addition to referencing paragraph 3(1)(i) of the Act, the Commission has also recognized that this policy serves to maintain competition in each market. Exceptions have been granted to sustain: (a) strong locally focused programming in smaller communities located adjacent to large urban centres or (b) the financial ability of the licensee to provide local programming. Where exceptions have been granted to the one station per market policy, the Commission has generally imposed conditions of licence requiring the provision of programming that is distinct from the

programming of the "sister" station. The *Common Ownership Policy* was recently enforced in the CTVglobemedia decision.[112]

The *Common Ownership Policy* addresses diversity objectives, as well as the subsidiary objective of preserving competition in relevant markets.

As discussed in more detail in Chapter 11(a), we believe that the case-by-case approach applied by the Commission to common ownership remains appropriate.

Cross-Media Ownership

Issues related to vertical integration and media cross-ownership have been addressed by the Commission on a case-by-case basis. The Commission has, for example, required all of the large multi-station groups that also own newspaper operations to abide by codes of conduct which require independent management of news departments and the maintenance of separate management structures for broadcasting and newspaper activities. (Common news gathering activities have been permitted in some, but not all, cases.) These licensees have also been required to establish a monitoring committee to handle complaints concerning compliance with the code of conduct and to file an annual report on compliance with the Commission.

The Commission has also, on a case-by-case basis, imposed conditions of licence restricting programming overlap and separate management of programming by station groups. (For example, in the recent CTV decision the Commission directed CTV to propose conditions of licence regarding program overlap in the event CTV decides to retain the CHUM A-channel stations, and indicated that a condition would be included in CTV's licence requiring there to be separate management of the CTV and A-channel station groups in the event that CTV decides to keep the A-channel stations.)

Given increasing levels of media concentration and the importance of ensuring a diversity of independent new voices, we do not recommend any changes to the case-by-case approach followed by the Commission.

Advertising

At present, conventional television station licensees are restricted, by regulation, to broadcasting 12 minutes of traditional advertising per hour (subject to the application of the drama credits discussed earlier).[113] However, in Public Notice

[112] *Transfer of effective control of CHUM Limited to CTVglobemedia Inc.*, Broadcasting Decision CRTC 2007-165, 8 June 2007.

[113] In addition to the 12 minutes of advertising, licensees may also broadcast a maximum of 30 seconds of advertising each hour that consists of unpaid service announcements. Licensees may also broadcast partisan political advertising during an election period in addition to the 12 minutes of other advertising material.

2007-53, the Commission announced that the hourly cap on advertising minutes will be gradually eliminated over the next 3 years as follows:

- Effective September 1, 2007, licensees will be permitted to broadcast up to 14 minutes of advertising per hour during the peak viewing period of 7 pm to 11 pm;
- Effective September 1, 2008, the limit will be increased to 15 minutes per hour during all viewing periods; and
- Time restrictions on advertising will be entirely lifted effective September 1, 2009 "unless significant contrary factors are brought to the Commission's attention".

Infomercials are not advertising for the purposes of the hourly limit on advertising minutes. Infomercials are permitted subject to several requirements: they must not be embedded in the body of a program, must not be directed to children, and must be clearly identified as paid commercial programming.

As discussed above, licensees are generally prohibited from accessing local advertising revenues, unless they provide local programming content. This requirement is enforced by condition of licence.

In addition to quantitative restrictions on advertising, the Commission also exercises jurisdiction over advertising content. Licensees are, by condition of licence, required to comply with applicable industry standards and codes, including the CAB *Broadcast Code for Advertising to Children* as well as other codes respecting programming content.

Also, the advertising of alcoholic beverages is expressly addressed in the *Television Broadcasting Regulations, 1987*, which provide that a licensee may only broadcast a commercial advertisement for an alcoholic beverage if the sponsor of the ad is not prohibited from advertising by provincial legislation, the ad is not designed to promote general consumption of alcoholic beverages, and the ad complies with the *Code for Broadcast Advertising of Alcoholic Beverages*. The Commission has directed broadcasters to ensure balance through the broadcasting of educational messages on the negative effects of inappropriate alcohol use. To enforce this requirement, licensees are required to report in their annual return educational initiatives that have been undertaken to address alcohol-related problems.

Regulations governing advertising by OTA television broadcasters appear to rest in the general objective expressed in paragraph 3(1)(g) of the Act that "the programming originated by broadcasting undertakings shall be of high standard." Restrictions on advertising also appear to be motivated by a desire to protect the revenue base of existing broadcasting licensees of various classes and are used as an incentive for the production and exhibition of local programming.

As a general matter, the content-based restrictions on advertising by commercial OTA television licensees going forward appear to be effective and

minimally intrusive.[114] We question, however, the need for a transitional period for the elimination of the current cap on advertising minutes. Given that these broadcasters have not used all of their drama advertising incentive minutes, market forces appear to impose effective incentives to limit advertising. This suggests that there is not a requirement for a transitional period to eliminate the cap on advertising minutes.

Recommendation 10(a)-6

We recommend that the Commission remove the cap on advertising minutes by OTA television licensees immediately.

Fees for Carriage

One of the most hotly-contested issues before the Commission in its most recent review of the regulatory framework for private conventional OTA licensees was the ability of these undertakings to seek fees for carriage of their respective signals from BDUs. At present, and in contrast to speciality television services, OTA television services receive no wholesale fees from BDUs for their signals.

In Public Notice 2007-53, the Commission declined to implement fees for carriage of OTA television services. In reaching this conclusion, the Commission noted first that it was not convinced that the OTA industry has experienced a permanent decline in profitability. The Commission went on to conclude that absent evidence that fees for carriage of OTA television services would not negatively affect the financial health of specialty services, it was not convinced the implementation of fees for carriage for OTA television services would yield a net benefit to the broadcasting system:

> 30. In the absence then of reliable and persuasive data that a fee for OTA television services would not adversely affect the financial health of specialty services, particularly the digital services, and their ability to fulfill their regulatory obligations, the Commission is not persuaded that there would be a net benefit to the broadcasting system, both in terms of increased expenditures on Canadian programming and the availability of Canadian programming services to viewers.
>
> 31. Accordingly, the Commission is not convinced that the case has been made for the making of such a fundamental change to the revenue structure of the broadcasting system at this time, or that the proposal would ultimately further the objectives of the Act.

In Chapters 5 and 6, we have proposed that the Commission conduct a detailed assessment and rationalization of the sources of revenue available for

[114] It is beyond the scope of this study to assess provincial regulation of advertising in general and of alcoholic beverages in particular to determine if there is duplication or overlap in this area.

private television services. If the Commission decides to take action on this, one of the issues it will have to consider is fees for carriage for OTA television services.

Quality and Balance in Programming

The *Television Broadcasting Regulations, 1987* prohibit licensees from broadcasting anything in contravention of the law, abusive comment or pictorial representation, obscene or abusive language or pictorial content, and false or misleading news.

Licensees are also required by the Regulations to allocate time for the broadcasting of partisan political broadcasts during an election period on an equitable basis to all accredited parties and candidates.

In addition to these regulations, the Commission has promulgated a series of policies related to controversial programming, open-line programming, gender portrayal, political broadcasts and violence. These policies address the requirement for balance in programming, as well as specific issues such as gender portrayal and violence. Licensees are required by condition of licence to adhere to the CAB *Sex-Role Portrayal Code for Television and Radio Programming* and CAB *Voluntary Code Regarding Violence in Television Programming*. This condition of licence is suspended as long as the licensee remains a member in good standing of the Canadian Broadcast Standards Council.

These requirements implement the objectives of broadcasting policy that relate to quality and balance in the programming provided by the Canadian broadcasting system (paragraphs 3(1)(g), (h) and (i)).

In our view, the rules governing quality and balance have been and remain effective and minimally intrusive. We do not propose changes in these requirements.

Transition to Digital/HD Programming

In Public Notice 2007-53, the Commission announced significant revisions to its policy on digital migration of OTA television services. The Commission had previously imposed no fixed deadline for the conversion to digital, preferring instead to rely on a market-driven approach. Noting that the pace of transition had been very slow, and that Canada was lagging considerably behind the U.S. in this area, the Commission determined that:

- A mandatory shut-down date of August 31, 2011 should be adopted for analog television transmission. OTA licences will only be authorized for digital transmission after that date. This policy may be subject to exception in northern and remote communities where no digital OTA will be provided.

- The construction of OTA digital facilities is at the discretion of licensees. However, privileges such as priority carriage and simultaneous substitution

will be retained in respect of digital services only, in order to encourage the provision of local and regional digital OTA services.

- OTA television broadcasters will be required to file digital roll-out plans in their licence renewal applications.

The following elements of the digital broadcasting policy announced in Public Notice CRTC 2002-31 remain in place:

- The Commission will continue to consider applications by new entrants for licences to provide digital-only service on a case-by-case basis in accordance with existing policies relating to market entry and the issuance of calls, where appropriate, for competing applications.

- Canadian content obligations applicable to analog services apply equally to digital services. Licensees of existing analog services granted transitional DTV licences are allowed to broadcast a maximum of 14 hours per week in HD programming that is not duplicated on the analog version of the service. A minimum of 50% of the unduplicated HD programming must be Canadian, and all unduplicated programming must be in HD format. Licensees are also encouraged to ensure that two-thirds of their schedule is available in HD format by the end of 2007.

- Applications by existing OTA broadcasters that accord with the transitional digital policy and are based on the Industry Canada allotment plan will receive fast track consideration. If existing analog licensees do not apply for a DTV licence within a reasonable period of time, or otherwise demonstrate that they are not ready to proceed on a timely basis to make use of the spectrum allotment, the Commission will consider applications by new entrants.

These policies seek to implement the objects that "the Canadian broadcasting system should … be readily adaptable to scientific and technological change (subparagraph 3(1)(d)(iv)) and that "private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them … be responsive to the evolving demands of the public" (subparagraph 3(1)(s)(ii)). In addition, subsection 5(2) specifies that the broadcasting system should be regulated and supervised in a flexible manner that "is readily adaptable to scientific and technological change."

We believe that it will be important to monitor the transition of OTA television services to digital distribution closely over the next few years to ensure that the transition is proceeding effectively and efficiently. We note that some stakeholders have suggested that the costs of implementing digital transmission technologies cannot be justified, given the relatively small segment of the population that continues to receive OTA television services directly off air.

Any changes to the CRTC's digital television policy must dovetail with Industry Canada spectrum decisions. We note also that any elimination of OTA services has implications for the status and treatment of local stations, and the treatment of disenfranchised customers that rely solely on OTA services. At 10% of listeners, this is not an insignificant segment of the population.

New Licenses

In Public Notice CRTC 1998-, *Additional National Television Networks – A Report to the Government Pursuant to Order in Council P.C. 1997-592*,[115] the Commission concluded that few if any markets in Canada could sustain the licensing of new local stations without "seriously impinging on the ability of existing licensees to fulfill their obligations under the Broadcasting Act." The Commission therefore concluded that it should not consider licensing a new English or French-language OTA television network.

The Commission has however signalled that it will consider applications for new digital television services in individual markets. Applicants for new OTA television licences must demonstrate that there is a demand and market for the proposed new service.

This policy is intended to ensure that new entry is viable and will not undermine the continued ability of existing licensees to meet their service obligations.

Effectively, this approach protects existing licensees from the full impact of market forces as new entry only occurs if the Commission determines that the market can bear further competition. However, once entry is permitted, all licensees effectively compete for both viewers and advertising revenues.

Recommendation 10(a)-7

We recommend that consideration be given to allowing competitive entry into OTA broadcasting markets where spectrum is available (particularly by new entrants who are unaffiliated with incumbent broadcasters in the same local market). In our view, less weight should be given to economic arguments in favour of protecting the incumbent broadcaster's market share and more weight should be given to letting market forces decide which broadcasters respond best to consumers' needs.

Logs and Records

Section 10 of the *Television Broadcasting Regulations*, 1987, requires television licensees to retain logs of all programs broadcast for a period of one year. The program log must be provided to the Commission within 30 days of the end of each month together with a certificate of accuracy. Licensees are also required to

[115] Public Notice CRTC 1998.

retain recordings of all programming for four weeks following the date of broadcast and, if the Commission receives a complaint during this period or otherwise wishes to investigate a matter, an additional four weeks on notice from the Commission within the initial four week period. This recording must be provided to the Commission on request.

All licensees are also required by section 12 of the Regulations to file an annual return to the Commission on or before November 30 of each year, and an annual program schedule for the following year on or before September 1. Finally, a licensee shall provide a response to any Commission request regarding its ownership, programming or any other issue within the Commission's jurisdiction that relates to the licensee's undertaking.

These obligations are directed at ensuring that the Commission is able to perform its monitoring, supervisory and enforcement powers. As discussed in Chapter 4 of this report, smart regulation dictates that regulation be based on the best possible information available. Logs and records provide this data. It is however essential that the information collected be relevant to achieving the specific policy objectives of the Commission. For this reason, the Commission should ensure that it is collecting the right sort of data.

We do not recommend any changes to the current logging and reporting requirements. However, to the extent that existing drama incentive programs are eliminated, or new regulatory measures enacted, the information required by the Commission will change over time.

Recommendation 10(a)-8

We recommend that the Commission undertake regular reviews of its data reporting requirements to eliminate reporting that is no longer necessary and to add data requirements in order to properly monitor the impact of new regulatory initiatives.

10(b) Community Broadcasting on Television

The *Broadcasting Act* specifically recognizes, in section 3(1)(b), that the broadcasting system is comprised of "public, private and community elements." The reference to a community element within the *Broadcasting Act* was added to section 3 in the 1991 *Broadcasting Act*.

The 1986 *Report of the Task Force on Broadcasting Policy* (*Caplan/Sauvageau Report*) had previously noted as follows:

> Community broadcasting, complementing the public and private sectors, must be seen as an essential third sector of broadcasting if we are to realize the objective of reasonable access to the system that is a central theme of this Report.[116]

CRTC policies on this issue predate, of course, by several years both the 1991 *Broadcasting Act* and the 1986 *Caplan/Sauvageau Report*.

Community broadcasting includes both television and radio broadcasting. The essential characteristics of community broadcasting which are consistently reflected in CRTC policies for both radio and television, are that such programming:

- is drawn directly from a local community and provides opportunities for access by that community,
- should be targeted to communities within localized areas, and
- should complement, rather than mirror, the type of programming that is available from mainstream commercial sources or the CBC.

The Commission's policies relating to community radio broadcasting are discussed in a separate section of this report.

Community Broadcasting on Television

Community broadcasting in the television sector has its origins with community channels on cable. Community over-the-air television has also developed in a few areas as a stand-alone, low-power, over-the-air service, but community channels on cable blazed the trail.

In its earliest policies on cable television, the CRTC identified the potential for that industry to provide local community-produced programming on a dedicated channel, complementing other available television programming. This was regarded as one of the key contributions cable television could make to the Canadian broadcasting system.[117] This view was repeated and amplified twenty years later when the Commission stated, "[t]he provision of adequate financial resources to

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[116] *Caplan/Sauvageau Report*, 1986, page 491.
[117] CRTC Policy on *Cable Television in Canada*, January 1971 at 12.

support the community channel remains the cable licensee's principal contribution to the public in exchange for the privilege of holding a cable television licence."[118]

The CRTC's 1976 *Cable Television Regulations* continued to serve as the model for existing community television regulations and policies – with some small modifications. The key requirements in the 1976 regulations were:

- all cable licensees were required to provide a community channel;
- the channel was permitted to broadcast only "community programming", meaning programming produced by the licensee or by members of the community served by that licensee, or complementary programming from other cable community channels and from licensed community programming networks;
- no advertising was permitted, but "advertising" was defined to exclude public service announcements, promotions of programs transmitted by Canadian stations, promotions of the cable operator's own services, and channel identification announcements;
- the cable licensee had to maintain programming logs and keep a logger tape of all programming on the community channel;
- all programming on community channels had to reflect the balance requirement with respect to the expression of views on matters of public concern; and
- if the community channel broadcast "partisan political" programming, it had to allocate time to all political parties and candidates on an equitable basis.

Notably, even though the CRTC required licensees to operate a community channel, it did not impose a specific minimum expenditure requirement on community programming, but it did expect cable television licensees to allocate a reasonable percentage of gross revenues to the community channel.

The most significant changes that have taken place since 1976 to the cable community channel policy have been removal of the mandatory requirement that all cable operators (except the very smallest) provide a community channel, and the broadening of the programming scope for community-based television services.

Removing the mandatory requirement for all Class 1 and Class 2 cable systems to provide a community channel arose directly from the introduction of competition in the mid-1990s to the BDU sector. In the context of reviewing all cable regulations to accommodate the new competitive framework (which is discussed in the BDU section of this report) the Commission noted its concern that new competitive entrants into a particular BDU market might face difficulties offering a

[118] Broadcasting Public Notice CRTC 1991-59.

competitive community channel, and also that a competitive channel could divide resources between the competitors, resulting in a lower quality programming product overall.[119]

Also, the Commission concluded that, after more than a quarter century of operation, cable community channels had reached "a level of maturity and success such that it no longer needs to be mandated." The Commission referred to the natural incentives cable operators have to maintain a community channel, including the fact that community channels provide "cable operators with a highly effective medium to establish a local presence and to promote a positive corporate image for themselves."

The Commission provided cable operators with a further incentive to fund their own community channel. It allowed larger cable operators (i.e. Class 1 systems serving more than 20,000 subscribers) to direct 2% of the 5% of gross subscription revenue that they are required to contribute to Canadian expression under the current *BDU Regulations* to finance the operation of their own community channels and, in the case of small cable operators, up to the entire 5%.[120]

In light of these incentives, the Commission concluded that cable operators would continue to provide community channels even without a regulatory requirement to do so.

The Commission may well have been correct in its determination. The 2007 *Broadcasting Policy Monitoring Report* shows, for example, sustained financial contributions by cable operators to community channels and minimal, if any, decline in the number of cable operators making a financial contribution to community channels.[121] At the same time, the total number of community channels reported by the CRTC in its report, *The Future Environment Facing the Canadian Broadcasting System* declined between 2002 and 2006 from 197 to 133. It may be that this decline in number is attributable in part to smaller cable systems being exempted from licensing in this period and, therefore, no longer being counted. It is also notable that some consolidation in community channel programming has been approved by the Commission, resulting in larger "communities," and more shared programming between communities.[122]

While the Commission has relieved cable operators from the mandatory requirement to offer a community channel, it has also "hedged its bets" in order to

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[119] *Review of Regulatory Framework for Broadcasting Distribution Undertakings*, Broadcasting Public Notice CRTC 1997-25.

[120] Class 1 and 2 licensees operating two community channels, one in English and one in French, in the same market may direct 2% to each such channel.

[121] CRTC, *Broadcasting Policy Monitoring Report*, 2006, p 108.

[122] See, for example, Broadcasting Decision CRTC 2006-679 approving sharing of community programming among certain communities in Nova Scotia and Prince Edward Island (but not, it should be noted, in between systems in Halifax and Dartmouth, which were considered large enough to support a full allotment of local community programming), and broadcasting Decision CRTC 2006-459 approving a zone-based approach to community programming in New Brunswick and Newfoundland and Labrador.

ensure that community programming, in one form or another, will continue to be provided.

In 2002, the Commission released a new combined policy for community media which, among other things, opened up the opportunity for licensing and required distribution and (in some cases funding) of new "community programming services" and "community-based television programming undertakings."[123]

Specifically, the Commission decided that in situations in which a Class 1 or Class 2 licensee elects not to provide a community channel, an independent "community programming service" could be licensed and also granted carriage rights as a mandatory basic service. A Class 1 or Class 2 licensee would also have to pay the entire amount of its contribution to Canadian expression for the community channel (i.e. 2% or 5%) to this independent community programming service. The service would need to be a non-profit organization with membership, management, operation and programming provided by, and reflecting, the community served.

Also, the Commission provided for licensing of new "community-based television programming undertakings" to be offered as digital-only services, or as low-power over-the-air services, which would be distributed by BDUs on a digital basis.

The Commission adopted a relatively "open-ended" and case-by-case licensing approach for these new undertakings which would allow it to evaluate the number of community-based services already licensed, the availability in the community of local OTA services, and of available channel capacity, and the potential impact of a new entrant on local radio and television services in small markets. To encourage innovation and diversity of voices and ownership, the Commission decided that these undertakings could be operated on a for-profit basis. One such service has subsequently been licensed and launched.[124]

In addition, therefore, to the natural incentives to offer community programming, cable licensees are also motivated by the possibility that if they do not make a community channel available, someone else will - and they will be required to fund it and distribute it![125] There is also the potential for new entrants in urban areas to launch a new community-based low-power OTA or digital cable service which, while it would not need to be funded by the cable licensee, it would be distributed on cable as a digital service.

Traditional cable community channels, and the new independent OTA community programming services are subject to substantially the same content rules. These rules reflect the original principles for community programming noted above – with refinements having been developed over the years. In particular:

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[123] *Policy Framework for Community-based Media*, Broadcasting Public Notice CRTC 2002-61.
[124] Broadcasting Decision CRTC 2003-413 (Télé-Mag inc. licensed to serve Quebec City).
[125] Current policy only requires digital distribution within the area that the BDU would otherwise have served with its community channel.

- All community television services must offer at least 60% local community television programming, which must be reflective of the community and produced by the licensee or members of the community in the licensed area;

- no non-Canadian programming is permitted;

- other than the 60% local community television programming, Class 1 and 2 licensees are limited to programming consisting of advertisements of broadcasting services they distribute (no more than two minutes per hour), promotional and sponsorship messages, still image programming accompanied by the audio feed of a radio station, government information programming, public service announcements, provincial legislative proceedings, and non-local community television programming;

- Class 3 licensees have greater latitude to offer complementary programming (including, for example, educational programs, children's programs, and alphanumeric content) and may offer up to 12 minutes of advertising if they operate in a market without a local television or radio station;

- at least 30% (and up to 50% in the case of Class 1 and 2 licensees, depending on demand) of all programming must be "access programming", which is programming actually produced by community members;

- in certain instances, particularly in the province of Quebec which has a separate policy regime for independent not-for-profit community television corporations, 20% of all programming must be made available to these "television corporations", with a minimum of four hours for each such corporation when there is more than one in a particular market

- cable licensees are required to actively promote citizen access to the community channel, and Class 1 and 2 licensees must distribute at least one billing insert per year promoting citizen access; and

- licensees must abide by logging and logger tape requirements.

The newer community-based OTA television programming undertakings are subject to somewhat less stringent programming requirements and are permitted to broadcast traditional advertising up to twelve minutes per hour. They are limited, however, to local ads.

It should be noted that while the CRTC's policy reflects a new framework for digital television services and low-power services in an urban setting, the new policy now also applies generally to all low-power OTA stations, including those in remote areas. In areas where the new policy was more precise or imposed greater

requirements – such as minimum levels of Canadian content, and a specified amount of local programming – the Commission has stated that it is willing to consider departures from the minimum requirements by condition of licence.

Assessment

The restrictions and limits on advertising on community programming services are motivated by two assumptions. The first is that advertising creates an incentive to avoid controversy, to avoid innovation and experimentation and to prefer high production values and mass appeal over citizenship participation and access. At least in the 1970s, it was also assumed that cable programming undertakings, with no CPE obligations, could make a direct contribution to the broadcasting system without relying on commercial advertising.

Over time, some flexibility was added to generate more revenue for community services through limited sponsorships, and also to promote other broadcasting services. The net effect of these changes has been to layer on rules respecting sponsorship in community programming that are somewhat arcane in detail.

We question the assumptions that underlie the existing restrictions on advertising on the cable-operated community channel. Advertising does not necessarily imply any particular value system or approach to programming and is not necessarily inconsistent with community access programming – no matter how radical or experimental. Community-based newspapers, for example, and many "radical" magazines – of all persuasions and viewpoints – provide regular community news, commentary and opportunities for expression, and are still supported to varying degrees by advertising dollars. They manage to survive, and sometimes prosper, while providing valuable community service and reflecting diverse voices.

We also note that many cable community channels already have community programming committees that make programming decisions for the cable companies so this could also mitigate against concerns of mediocrity.

Advertising sales could go a long way to dealing with the issues of cross-promotion of related brands and services which the Commission now regulates through restricting self-promotion opportunities to 25% of broadcasting services promotions. If the advertising time had commercial value, then self-promotion would be limited by the opportunity to generate actual revenue from ad sales – as it is now on commercial television stations.

The restriction on the sale of regional and national advertising on independently operated community channels is also questionable. In the commercial radio and television sectors, the Commission limits the sale of local advertising only to those stations that provide local programming. There is no reverse prohibition on the sale of national advertising. Why should there be such a restriction on community programming? Removal of these restrictions would be consistent with our general theme of trying to maximize revenue for the Canadian broadcasting system.

Recommendation 10(b)-1

We recommend that the Commission remove the advertising restrictions and limits on community broadcasting on television.

At present, there seems to be little interest on the part of entrepreneurs in establishing community based television undertakings. Just one application for a new digital-only cable service has been reviewed by the Commission (and turned down) since the policy change was announced in 2002,[126] and very few new applications for community-based low-power OTA television services have been approved.

Recommendation 10(b)-2

We recommend that the Commission monitor the development of cable community channels and third party community-based television services to determine how its new rules are working and whether removal of restrictions on regional and national advertising for independent stations stimulates more applications for community-based services.

Historically, DTH BDUs have not been permitted to provide a community channel because their satellite coverage was not limited to a "local community." Concern was expressed that if DTH BDUs provided programming that was more national in scope, it would compete with other regional and national services.[127]

In our view, if the DTH providers want to provide more Canadian programming and more outlets for "community" expression, they should not be discouraged. In our increasingly "narrow-cast" world and in the world of the Internet, communities are less frequently described in terms of geography and more often in terms of community of interest.

Since one of the objectives of the *Broadcasting Policy for Canada* is to "encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinion, ideas, values…" and "be drawn from local, regional, national … sources," and since the Canadian broadcasting system is required to be "readily adaptable to scientific and technological change," the time has come to reassess the role of DTH in providing an outlet for this expression. In our view it is conceivable that a format can be developed for regional expression on a national platform giving rise to an exchange of ideas across the country. This type of platform might make television more relevant in an environment where the Internet is currently providing a world stage for "local" expression. The regulatory system should be encouraging more Canadian outlets for this form of expression – not limiting it.

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[126] Broadcasting Decision CRTC 2007-219.
[127] Public Notice CRTC 1996-69.

Recommendation 10(b)-3

We recommend that the Commission consider authorizing DTH BDUs to create a form of "community" programming service that provides an outlet for the exchange of regional views and expression.

10(c) Pay Television

Brief History of *Pay Television Regulation*

The prohibition on broadcasting commercial messages, which is set out in paragraph 3(2)(d) of the *Pay Television Regulations*, is the distinguishing feature between pay television undertakings and specialty programming television undertakings. It has been a defining aspect of the regulation of pay television services in Canada since 1982. The restriction was established in order to limit the impact that this new type of programming undertaking would have on conventional OTA television stations that relied entirely on advertising revenues.

The pay television industry has been operating in Canada for almost twenty-five years. In March 1982 the Commission licensed five general interest pay television services, one multilingual pay television service and one specialty television service.[128]

In that Decision, two national pay television services were licensed (one French language, Premier Choix, and one English language, First Choice) that were to be operated by First Choice Canadian Communications Corporation ("First Choice") and three regional services, serving Alberta, Ontario and Atlantic Canada respectively.[129] In addition, C Channel was licensed to operate a performing arts pay television service, and World View Television was licensed to operate a multilingual pay television undertaking.

On the heels of that Decision, in November 1982 and in February 1983, the Commission licensed two additional regionally-based general interest pay television services.[130] Also in 1983, the Commission approved an application by Allarcom to extend its Alberta pay television service into Manitoba, Saskatchewan and the Northwest Territories.[131]

In these Decisions, the Commission established a highly competitive licensing framework for pay television by issuing licenses for more than one general interest pay television service in each market. As noted, in Decision CRTC 82-240 the stated rationale was to use pay television as a means to "maximize opportunities for Canadian program production."[132] At the same time, the Commission established

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[128] Decision CRTC 82-240.
[129] The Alberta regional service was to be operated by Allarco Broadcasting Limited ("Allarcom") under the business name Alberta Independent Pay Television. The Ontario service was to operate under the name Ontario Independent Pay Television ("Ontario Independent"). Finally, the Atlantic regional service was licensed to Star Channel Services Ltd. ("Star Channel").
[130] Decision CRTC 82-1023 and 83-115. In Eastern Canada (Quebec, Ontario and the Atlantic Region), the Commission issued a licence to Télévision de l'Est du Canada ("TVEC") to provide a regional French-language service. In British Columbia and the Yukon, the Commission authorized Aim Satellite Broadcasting Corporation ("Aim Broadcasting") to operate a regional English-language pay television service.
[131] Decision CRTC 83-576.
[132] Decision CRTC 82-240.

licensing conditions for each pay television service that, for the first time, required a broadcasting licensee to satisfy obligations that included both Canadian content exhibition requirements and Canadian programming expenditure (CPE) requirements.[133]

It did not take long for the early optimism that greeted the first licensing decisions to fade. By the end of 1983, the performing arts specialized pay television service (C Channel) and one of the regional pay television services (Star Channel) had already ceased operations. A merger of the two French-language services (creating Premier Choix:TVEC) and the acquisition of the regional undertaking serving British Columbia and the Yukon (Aim Broadcasting) by its Alberta counterpart (Allarcom) quickly followed in 1984. Finally, in July 1984, in response to the ongoing crisis in the pay television market, the Commission approved a fundamental restructuring of the industry which ended the experiment of competitive licensing by establishing two regional English-language services, and one French-language service. The non-competitive regional licensing policy for pay television services continued to apply until 2006.

In addition to the changes implemented in 1984, the Commission was subsequently forced by adverse market conditions in 1986 to alter a number of the licensing obligations that had been imposed on the pay television licensees. In particular, the Commission approved applications that significantly reduced the Canadian content and CPE requirements. While licensing obligations have subsequently increased as each license has been renewed, today the conditions imposed on Canada's three pay television licensees are considerably less onerous than those originally established in 1982.

Today, Canada's pay television industry is in a strong financial position. There are currently six services operating in Canada. All six are controlled either by Astral Broadcasting Group Inc. (Astral) or Corus Entertainment Inc. (Corus).[134]

An application to operate a seventh pay television service was approved in May 2006 when the Commission made an exception to its one service per genre licensing policy and authorized Allarco Entertainment Inc. (Allarco) to operate a

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[133] According to the *Caplan/Sauvageau Task Force on Broadcast Policy*, this was the first time the Commission had imposed Canadian content requirements both in terms of time and money: *Report of the Task Force on Broadcasting Policy 1986.*

[134] Astral operates two regional English-language general interest pay television services, known as TMN and MoviePix that provide service to Ontario, Quebec and the Atlantic provinces. Astral also operates Super Écran, a national French-language general interest pay television service. In addition, Astral owns The Family Channel, a national pay television service that provides programming for children, youth and teens. Corus controls two English-language general interest pay television services, known as Movie Central and Encore Avenue, that provide service to British Columbia, Alberta, Saskatchewan, Manitoba, the Yukon Territory, the Northwest Territories and Nunavut. Movie Central concentrates on the presentation of first-run pay television programming, while Encore Avenue presents movies copyrighted at least five years prior to the broadcast year in which they are distributed.

competitive national English-language general interest pay television programming undertaking.[135]

Current Pay Television Regulations and their Rationale

Programming Content

As with other types of programming undertakings, pay television undertakings are prohibited from broadcasting programming that contains certain types of content. Specifically, subsection 3(2) of the 1984 *Pay Television Regulations*, prohibits pay television undertakings from broadcasting programming: (a) that contains anything in contravention of the law; (b) that contains any abusive comment or abusive pictorial representation on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability; (c) that contains any false or misleading news; (d) that contains any commercial message; (e) and (f) programming that is produced by the licensee.

The first three content types that are prohibited in paragraph (a), (b) and (c) of subsection 3(2) are common to all programming undertakings and are designed to ensure that the programming broadcast by licensees is consistent with the "high standard" objective in paragraph 3(1)(g) of the *Broadcasting Act*. We recommend that they all be retained in order to ensure continued high standards of broadcasting in Canada.

As indicated above, the prohibition on broadcasting commercial messages, which is set out in paragraph 3(2)(d) of the *Pay Television Regulations*, is currently one of the key distinguishing features between pay television undertakings and specialty programming television undertakings. As discussed in Chapter 5, we are recommending that this prohibition on advertising be reviewed by the Commission.

Recommendation 10(c)-1

We recommend that the Commission review the advertising rules applicable to various classes of broadcasting licences, including pay television undertakings, and consider rationalizing them in a manner that maximizes the potential value of programming services to advertisers. As the traditional boundaries between licence classes breaks down, the rules designed to define them become less meaningful and possibly counter-productive.

The prohibition on broadcasting programming (other than filler programming) that is produced by the licensee, contained in paragraphs 3(2)(e) and (f), was introduced in the 1984 *Pay Television Regulations*. The rationale for this provision was to "ensure that, upon Astral's purchase of First Choice and SuperEcran, Astral would not be given an unfair advantage over other Canadian independent production companies due to its ownership interest." While the Commission's thinking on this

[135] Decision CRTC 2006-193.

has evolved somewhat since 1984, the objective of ensuring that independent producers are the source of Canadian programming for pay television undertakings continues to be the underlying rationale for the presence of this provision in the regulations.

As discussed in Chapter 6, we are of the view that requiring pay television licensees to acquire 100% from third parties is excessively restrictive and inhibits the creation of Canadian content by entities that might otherwise be able to contribute to the production of new Canadian content. We therefore recommend that the Commission start reducing this prohibition, initially by at least 25%, and begin monitoring the effect of doing so on both the production of Canadian content and on the independent production industry in Canada.

Recommendation 10(c)-2
We recommend that the Commission begin to reduce the prohibition on pay television licensees producing their own Canadian programs. We recommend that the Commission implement this recommendation in stages and that it carefully monitor the impact of this measure both on the independent production sector and on the level of Canadian content produced.

Logs and Records

The requirements relating to the maintenance of a program log or a machine readable record of programming have also been imposed on all pay television undertakings through the *Pay Television Regulations* since 1984. The current rules set out in section 4 require licensees to enter into the logs specific types of information and program codes, to retain the logs for a period of one year, and to furnish the logs to the Commission each month. In addition, under subsection 4(4) of the *Pay Television Regulations*, a licensee is required to retain a clear intelligible audiovisual recording of all of its programming for a period of four weeks, or for a longer period where there has been a complaint if the Commission wishes to investigate the programming.

As noted in Public Notice CRTC 1984-3, pay television licensees are required to maintain program logs and accounts in respect of programming expenditures "so that the conditions of licence governing Canadian program exhibition and expenditure may be effectively enforced." That rationale continues to apply today and for that reason no changes are proposed to this section of the regulations.

Request for Information

Under section 5 of the *Pay Television Regulations*, each licensee is required to file with the Commission an annual return that sets out its statement of accounts. In addition, each licensee is required to respond, at the Commission's request, to any complaint from any person and any inquiries relating compliance with self-regulatory codes. These requirements have been consistently imposed on pay television undertakings since 1982.

These requirements to furnish information to the Commission are necessary to the fulfillment of the Commission's mandate and should not be changed.

Undue Preference

Unlike the other provisions in the *Pay Television Regulations*, section 6.1, which prohibits a licensee from giving an undue preference to any person or subjecting a person to an undue disadvantage, was only recently added to those regulations in 2001. Subsection 6.1(2) further provides that a licensee shall be considered to give itself an undue preference if the licensee distributes a pay-per-view program for which the licensee has acquired exclusive or other preferential rights.

The impetus for including subsection 6.1(2) in the *Pay Television Regulations* was a dispute involving PPV rights for NFL Sunday Ticket programming that Rogers had acquired for distribution on terrestrial pay-per-view services, but which were not made available by the NFL to Bell ExpressVu for distribution on DTH PPV services.[136] In that case, Bell ExpressVu argued that Rogers' acquisition of those program rights for distribution on terrestrial PPV services breached the undue preference provision in section 9 of the *BDU Regulations*. While the Commission was not persuaded on the facts of that case that any preference Rogers may have obtained was "undue", the Commission noted that the circumstances of the complaint highlighted the absence of a regulation for pay television licensees that addresses the matter of pay-per-view licensees acquiring programming on an exclusive basis.

In addition to the restrictions on acquiring exclusive preferential PPV program rights, the Commission has also established, in subsection 6.1(1) of the *Pay Television Regulations*, a prohibition on granting undue preferences and disadvantages that mirrors the prohibition in the *BDU Regulations*. In Public Notice CRTC 2000-150, the Commission recognized that a licensee of multiple programming services could confer upon itself an undue preference in negotiating the terms of carriage for all its services, or that distributor-affiliated programming services could potentially confer an undue preference on the distributor to which they are affiliated. It therefore proposed amending both the *Pay Television Regulations* and the *Specialty Services Regulations* in a manner similar to the provision applicable to distributors.

To our knowledge, the Commission has not, to date, ruled on a dispute under section 6.1 of the *Pay Television Regulations* that involved a pay television undertaking.

At a time when concentration and consolidation of ownership is so prevalent in the Canadian broadcasting system and when distributors are becoming more and more involved in the ownership and operation of programming services, there is a

[136] Public Notice CRTC 1999-83.

continuing need for an undue preference provision in the *Pay Television Regulations*. The only change that we would recommend to this provision is to reverse the onus so that the licensee that is alleged to have granted the preference or disadvantage has the burden of demonstrating that its actions were not unduly preferential or disadvantageous.

Recommendation 10(c)-3

We recommend that section 6.1 of the *Pay Television Regulations* be amended to shift the onus onto the licensees to demonstrate that discriminatory conduct has not resulted in an "undue" preference or disadvantage to any person.

Nature of Service and One Licence per Genre

Each pay television undertaking is subject to a condition of licence relating to its nature of service. This condition of licence defines the geographic scope of the licence and the nature of the programming that can be offered on the pay television service. By identifying the nature of the service offered, the condition of licence also assists the Commission in applying its licensing policy for pay television that generally precludes the licensing of a directly competitive pay service.

As noted above, the one licence per genre policy has been a cornerstone of the Commission's regulatory framework for pay television undertakings for more than two decades. It was originally implemented in the mid-1980s to stabilize the pay television industry. The policy has ensured that each pay television service is financially able to meet its regulatory obligations. The policy is also designed to ensure diversity in the broadcasting system. The policy has succeeded. Today, the pay television industry has become robust and financially stable and able to make significant contributions to furthering the objectives of the *Broadcasting Act*. The latest statistics on the pay television industry issued by the Commission indicate that in 2006 the PBIT margin for the combined pay television, PPV and VOD industries was a very healthy 25.88%.[137] The combined revenue for these industries was just over $482 million in 2006, which represented an increase of 17.7% from 2005.[138]

When the Commission first implemented its non-compete model for licensing pay television undertakings in Decision CRTC 84-654, it recognized that the Canadian market could not support a competitive licensing model for Canadian pay television services. While the Commission maintained the view that a competitive market environment for pay television was desirable in theory, it emphasized that "approval of the proposed reorganization is now necessary for the survival of pay television."[139] The Commission also noted that the perceived similarity of the movie services offered by the general interest pay television undertakings, and the small number of dual subscriptions in the areas served by two pay television service

[137] *Pay, PPV, VOD and Specialty Services Statistical and Financial Summaries – 2002 to 2006.*
[138] *Ibid*.
[139] Decision CRTC 84-654.

providers was a clear indication that the competitive licensing model introduced in 1982 had not worked as originally planned.

The one service per genre licensing policy has been consistently applied for the past twenty-two years. An application to operate a pay television service known as The Family Channel was approved in November 1987.[140] That new service was to be fully discretionary and provide programming for children and youth audiences. The Commission concluded that its programming would complement the existing pay television services operated by First Choice and Allarcom, which offered more adult-oriented programming. It would not, therefore, compete directly with the existing pay television services. Similarly, the Commission approved applications to operate two new regionally-based pay television services, originally known as "The Classic Channel" and "MovieMax" in 1994.[141] In Decision CRTC 94-278, the Commission authorized Allarcom and First Choice to operate services consisting of Canadian and foreign feature films copyrighted at least five years prior to the broadcast year in which they are broadcast. Given the limitations placed on the programming to be broadcast by the two new services, the Commission did not consider them to be competitive with the existing pay television services. There was no suggestion therefore that the Commission was abandoning its regional non-competitive licensing model.

The only exception to the non-competitive policy occurred recently when the Commission authorized Allarco to operate a new national general interest pay television service.[142] In that Decision the Commission emphasized that the English-language general interest pay television industry had become financially stable, and that the introduction of a single competitive service would not have an undue negative impact on the existing English-language general interest pay television services:

> The Commission is further of the view that the English-language general interest pay television industry is robust, and that the introduction of a single competitive service would not have an undue negative impact on the existing English-language general interest pay television services operated by Astral and Corus, while permitting the new service to fulfill its business plan and its programming commitments, including those related to expenditures, exhibition and promotion of Canadian programming.
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> In light of the above, the Commission finds that the licensing of a new English-language general interest pay television service would be in the public interest and that an exception should be granted to its policy that generally precludes the licensing of new services that compete directly with existing pay and specialty services.[143]

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[140] Decision CRTC 87-905.
[141] The names of these services have changed over the years. Astral now operates MoviePix and Corus operates Encore Avenue.
[142] Broadcasting Decision CRTC 2006-193.
[143] Decision CRTC 2006-193.

The Commission's decision to approve only one of four competing pay television applications, and to thereby grant an exception to its general licensing policy for pay television, was based on its assessment of the financial strength of the pay television industry and the impact that the entry of another service provider would have on the existing licensees. At the same time, the Commission recognized that a decision to add multiple players to the industry would not likely enhance diversity and would, ultimately, weaken the ability of existing players to contribute to the production of Canadian programming and to otherwise meet their regulatory obligations.

Recommendation 10(c)-4

We recommend that genre protection between Canadian pay television services be removed (except in exceptional cases where the Commission wishes to protect a specific service that it considers to be essential to the attainment of one or more of the objectives in section 3(1) of the *Broadcasting Act*).

Exhibition of Canadian Programming

The Commission has imposed, by way of conditions of licence, obligations relating to the exhibition of Canadian programming on each of the seven pay television services. The two regional general interest English-language pay television undertakings, TMN (Astral) and Movie Central (Corus), the national French-language pay television undertaking Super Écran (Astral), the Family Channel (Astral) and the recently approved national pay television service operated by Allarco, are each required to devote to Canadian programming (a) 30% of the time between 6 pm and 11 pm to Canadian programs and (b) 25% of the remainder of the time during which the service is in operation. Given that MoviePix and Encore Avenue are generally prohibited from distributing copyrighted programming that is less than five years old, their Canadian content requirements are slightly less onerous. Each service is required to devote (a) 20% of the time between 6 pm and 11 pm to Canadian programs and (b) 20% of the remainder of the time during which the service is in operation to Canadian content programming.

While we are not equipped to comment on whether the current Canadian content percentage requirements should be adjusted, there is little doubt that the imposition of content requirements has ensured that there is shelf space available for Canadian programs on the pay television platform. As discussed in Chapter 6, we recommend that the Commission undertake a review of Canadian content rules applicable to all licensees with a view to simplifying and rationalizing the requirements across various licence classes. We also recommend that the Commission investigate collapsing some classes of licence in order to equalize obligations on competing services. The outcome of that review may necessitate amendments to the current requirements reviewed above.

Expenditures on Canadian Programming

The Commission has imposed a variety of CPE requirements on pay television licensees. Generally, these expenditure requirements represent a percentage of the revenues achieved by the service in the previous broadcast year. In the case of TMN, for example, if the average number of subscribers achieved by the service exceeds 820,000, it is required to expend on Canadian programming 32% of the previous year's revenue. In addition, with the exception of MoviePix and Encore Avenue, each pay television licensee is required to make contributions to script and concept development that range from $700,000 per year for Super Écran to $2 million per year for the new pay television undertaking operated by Allarco.

As with Canadian content requirements, these CPE requirements are, in most instances, significantly lower than those that were first imposed on pay television licensees between 1982 and 1984. In Decision CRTC 82-240, the CPE requirements ranged from 15% of the previous year's gross revenues for the short-lived Star Channel to 50% for the almost equally short-lived Ontario Independent Pay TV service.

Apart from these requirements, the applicants had also made numerous commitments to invest monies in certain funds or initiatives and/or to provide support to regional producers or genres of programs. First Choice, for example, committed to establish a fund of $1.5 million to stimulate the early production of Canadian programming and also agreed to contribute, during the last three years of its initial licence term, 5% of its gross annual revenues toward script and concept development. For its part, Allarcom committed to invest 100% of its profits from the pay television operations into independent Canadian production, projecting that this would amount to more than $20 million over the licence term. In addition, Allarcom indicated that 2% of its gross revenues would be contributed to script and concept development. Ontario Independent Pay TV made commitments that were similar to those of Allarcom, with the exception that 2.5% of its gross revenues would be devoted to script and concept development.

While the total expenditures that each pay television undertaking makes on Canadian programming have increased over the years, as a result of increasing gross revenues, the rationale for maintaining CPE requirements has not changed. In Decision CRTC 84-654, the Commission noted that the objective is to "ensure that its regulatory requirements with respect to Canadian content achieve the desired objectives of enhancing the quality and distinctiveness of Canadian programming, and generating new opportunities and revenue sources for the program production industry in Canada."

That objective remains at the centre of the Commission's CPE requirements, and is as valid today as it was in 1984 when the Commission approved a restructuring of the pay television industry.

However, as discussed in Chapter 6 of this report, we are recommending that the Commission undertake a thorough review of CPE and other Canadian content requirements both within classes of licence and between classes where traditional

class distinctions have eroded. This review may result in amendment of the policies discussed above.

10(d) Specialty Television Services

Brief History of Specialty Television

The current regulatory framework for specialty services has its roots in the 1983 proceeding that resulted in the issuance in 1984 of licensing decisions for MuchMusic, Action Canada Sports Network (now TSN) Telelatino and Chinavision (now Fairchild).

The Commission issued its first call for applications to operate new Canadian specialty programming services in 1983.[144] In its Notice, the Commission acknowledged the increasingly competitive nature of the broadcasting industry "brought about by the rapid expansion of a variety of technologies, and the consequent need for prompt action with regard to the introduction of new programming services to provide diversity and expand the range of discretionary services offered on cable systems." The Commission went on to point out that its objectives in licensing specialty services were to:

a) contribute to the realization of the objectives set out in the *Broadcasting Act* and strengthen the Canadian broadcasting system;
b) increase the diversity of programming available to Canadians; and
c) make available high-quality Canadian programming from new programming sources by providing new opportunities and revenue sources for Canadian producers currently unable to gain access to the broadcasting system.

In an introduction to its 1984 licensing decisions for the first specialty services, the Commission emphasized that it expected the discretionary services to be offered on a national user-pay basis, and to enhance the diversity of programming available and to complement, rather than duplicate, existing OTA television or pay television services. The Commission also expressed the expectation that these services would stimulate the Canadian independent television production industry, and that they could, through linkage requirements, facilitate the marketing of pay television services.[145]

When it had announced the hearing to consider these first specialty service applications, the Commission indicated that it would also be willing to allow the carriage of certain non-Canadian specialty services by cable distributors, provided that such services would "contribute to, and do not adversely affect, the development of the Canadian broadcasting system."[146] This was the genesis of the Commission's "genre protection" policy, whereby non-Canadian services that would compete with Canadian specialty services would not be authorized for distribution in Canada. This meant that competitive foreign superstations, premium pay services or other

[144] Public Notice CRTC 1983-93.
[145] Public Notice CRTC 1984-81.
[146] Public Notice CRTC 1983-244.

programming services that would be incompatible with the Commission's policy would not be authorized for distribution in Canada.

The Commission's policy in this respect was more fully articulated the next year when it introduced the licensing decisions for the four new Canadian specialty services and established tiering and linkage rules for cable:

> [T]he Commission has determined that it would not be in the interest of the Canadian broadcasting system to allow the carriage, at this time, of non-Canadian specialty programming services which, in the Commission's opinion, could be considered either totally or partially competitive with Canadian discretionary services. In addition, the Commission's view that non-Canadian superstations, premium pay, and any other services that would be incompatible with stated Commission policies should be excluded, remains unchanged.
>
> Moreover, should the Commission license, in the future, a Canadian service in a format competitive to an authorized non-Canadian service, the latter will be replaced by the Canadian service. If a non-Canadian service becomes competitive, by virtue of a change in its own format or by a change in format of a Canadian specialty service, the authority for its cable carriage will be terminated.[147]

The first two licence applications to operate specialty services were approved by the Commission in April 1984.[148] In one case, the Commission considered that there were two applicants (CHUM and Rogers Broadcasting) that could provide a well-financed music service,[149] but only issued a licence to CHUM on the grounds that it was not convinced, based on the size of the potential Canadian market, that more than one video music network should be licensed at that time.[150]

The two multilingual specialty service applications, to operate Telelatino and Chinavision, were approved the following month.[151] A year after that, the Commission approved the Life Channel application to provide a health and lifestyle specialty service.[152]

The Commission established for each of these new services conditions of licence that: (i) limited the nature of the programming that each could broadcast; (ii) set Canadian content requirements; and (iii) required specific expenditures on Canadian programming. In addition, the Commission established an expectation for each service that it would not distribute local advertising, and that it would not carry more than eight minutes of advertising material per hour.

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[147] Public Notice CRTC 1984-81.
[148] Decision CRTC 84-338 (MuchMusic) and Decision CRTC 84-339 (Action Canada Sports Network).
[149] Rogers Broadcasting Limited was the second.
[150] Decision CRTC 84-338.
[151] Decisions CRTC 84-444 and 84-445.
[152] Decision CRTC 85-141.

Shortly after the Life Channel decision, the Commission expressed concern that these three services, in particular, had experienced considerable difficulty in reaching network affiliation agreements with cable systems.[153] The Commission, therefore, called for comments on issues relating to access and the carriage of pay and specialty services.[154]

The Commission had also expressed concerns, in its earlier decisions, about the absence of French-language specialty services. In 1986, the Commission approved an application to amend the MuchMusic licence to permit the partial substitution of its English-language service by the French-language service, MusiquePlus, for distribution to affiliated cable undertakings serving francophone markets in eastern Canada.[155]

In August 1986, the Commission called for new applications to operate additional specialty services.[156] The Commission indicated that its consideration of these applications would be guided by the following general principles and objectives:

(i) contribution to the realization of the objectives set out in the *Broadcasting Act* and the strengthening of the Canadian broadcasting system;
(ii) increasing the diversity of high-quality programming available to Canadians and providing new opportunities and revenue sources for Canadians, in particular producers and artists.

In response to that call for applications, the Commission approved nine specialty services, and one pay television service (Family Channel). In approving these applications, the Commission outlined its approach to the regulation of the expanding specialty service industry in Canada.[157] It began by pointing out that in licensing new services it had sought to address its concerns about the lack of French-language services. The Commission therefore licensed five French-language services (Canal Famille, MétéoMédia, MusiquePlus, TV5, RDS). As for the concern about the potential negative impact on conventional OTA broadcasters, the Commission emphasized that the nature of specialty services, which are targeted to specialized audiences, would minimize any negative effects on OTA broadcasters. It also highlighted the fact that Canadian pay television and other discretionary services were by then enjoying considerably greater financial stability than in the past.

To help ensure the success of the French-language services, the Commission established a carriage model for these services in francophone markets called “take one, take all.” That meant that any Class 1 cable system that chose to

[153] Public Notice CRTC 1985-174.
[154] Decision CRTC 86-215. A little more than a year after this Notice was issued, Life Channel ceased operations.
[155] Decision CRTC 86-215.
[156] Public Notice CRTC 1986-199.
[157] Public Notice CRTC 1987-260.

carry one of those new services would have to carry all of them. They would also have to be distributed on basic cable.

The four new English language services were licensed as "optional to basic" services, which meant that if a Class 1 or 2 cable system chose to carry one or more of the services, it would have to be distributed as part of the basic service.

In addition, the Commission changed the carriage status of MuchMusic and TSN, to "dual carriage."[158] This meant that a cable system that chose to distribute one or both of those services would have to distribute them as part of the basic service, unless MuchMusic or TSN agreed to distribution on a discretionary tier.

As for the obligations imposed on the newly-licensed specialty services, the Commission established requirements relating to the nature of service, Canadian content and Canadian program expenditures. The Commission also imposed advertising limits by way of conditions of licence and established wholesale rates for the new services. In doing so the Commission noted that "such regulation is necessary to promote the provision of fair and equitable access."

By 1990, there were a total of twelve Canadian specialty services in operation and the Commission decided that it would be appropriate to introduce regulations of general application to apply to this new class of undertakings.

In its Public Notice introducing the very important *Structural Public Hearing*, the CRTC announced that it would make a number of changes to its Distribution and Linkage Rules.[159] The Commission changed the carriage status of each specialty service licensed to that date to "dual status" (which meant that they would have to be distributed as part of the basic service unless the cable system and specialty service agreed to distribution on a discretionary tier), and it revised the linkage rule for Canadian specialty services so that each Canadian specialty service could be linked in a tier with only one non-Canadian service.[160]

In 1994, the Commission approved applications to operate eight additional specialty services.[161] The six English language services (Discovery, Life, Bravo, Showcase, CMT and WTN) and Canal D were all licensed as "modified dual status" services, which meant that they would have to be distributed on a discretionary tier, unless the cable system and specialty service agreed to distribution as part of the basic service. RDI, on the other hand, was licensed as a "dual status" service. As was the case with the 1987 round of licensing, the programming "nature of service" description, Canadian content, program expenditures and basic wholesale rates were all regulated via conditions of licence.

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[158] Public Notice CRTC 1987-261.
[159] Public Notice CRTC 1993-74.
[160] Previously the ratio had been two non-Canadian services to every one Canadian service.
[161] Public Notice CRTC 1994-59.

In April 1996, the CRTC issued its policy on Access Rules which required cable distributors to distribute all specialty services appropriate for the market, subject to available channel capacity.[162]

Later that year, in September 1996, the Commission licensed twenty-two new specialty services. All were granted modified dual status. However, four of the services (Teletoon, NewsNet, History and Comedy) were granted immediate access rights. The other services were all licensed for digital carriage, which meant that the Access Rules would not apply to them until September 1, 1999. At that time, a cable distributor that had achieved digital penetration of more than 15% would be entitled to distribute the services on a digital basis, otherwise they would have to be distributed on analog.

The majority of the 1996 licensed specialty services were launched on a third analog tier by most cable distributors prior to the September 1, 1999 deadline.

While the Commission announced in 1997 that it would delay consideration of any new English-language specialty service applications,[163] it did consider several applications to operate new French-language specialty services. Decisions relating to those applications were issued in 1999 with the licensing of four new French-language specialty services (Canal Évasion, Canal Z, Canal Histoire and Canal Fiction).[164] After reviewing analog capacity reports provided by cable distributors, the Commission concluded that the addition of four new specialty services could be accommodated in francophone markets. The Commission granted discretionary carriage status to the four specialty program services, but required distributors to ensure that the four services would be offered together as part of the same discretionary tier.

In each of the above noted rounds of licensing of new specialty services, the Commission's approach was largely consistent. The *Specialty Services Regulations* have not changed appreciably since 1990, and the conditions of licence imposed on each specialty service were similar in each of the three rounds of licensing that took place in the 1990s.

In 2000, however, all of that changed. In *Licensing framework policy for new digital pay and specialty services*, the Commission set out a new licensing framework for digital pay and specialty services.[165] The framework was designed to take advantage of the expanded distribution capacity and flexibility of digital technology, while taking into account the risks inherent in launching new services on a digital-only basis, where the potential subscriber base would be considerably smaller. It was also the Commission's expectation that the regulatory framework would encourage the rollout of digital distribution technology, and would provide:

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[162] Public Notice CRTC 1996-60.
[163] Public Notice CRTC 1997-33-3.
[164] Public Notice CRTC 1999-98 and Decisions CRTC 99-109 to 99-112.
[165] Public Notice CRTC 2000-6.

> …a bridge between the traditional regulatory mechanisms - which have been highly supportive of emerging new Canadian services - and a more open entry environment that allows for greater risk-taking, provides for a greater number of services in the marketplace, and allows the success of services to be increasingly determined by customers.

Within this framework, the Commission decided to license two types of specialty services, namely Category 1 services, which would benefit from carriage by all broadcasting distributors that make use of digital technology, and Category 2 services, which would be licensed on a more open-entry basis. In addition, whereas, Category 1 services would benefit from genre protection, both with respect to Canadian specialty services and non-Canadian satellite services, the programming formats of Category 2 services would only be protected from those non-Canadian satellite services that would be "partially or totally competitive" with the Canadian service.

In its Category 2 licensing framework, the Commission established basic minimum licensing criteria for Category 2 services, which included minimum required levels of Canadian content. It also took the position that there would be no predetermined limit on the number of Category 2 licences that might be issued. Category 1 services, on the other hand, would be required to maintain higher levels of Canadian content (which would be comparable to those established for analog specialty services), and would also be required to make specific Canadian programming expenditures.

In November 2000, the Commission announced that it had approved license applications to operate a total of 283 new Category 1 and 2 digital specialty services. Consistent with the policy proposed in Public Notice CRTC 2000-6, the 21 Category 1 services (16 English and 5 French) were guaranteed access on a digital basis to Class 1 and 2 cable systems and to DTH distribution undertakings. The 262 newly licensed Category 2 specialty services, on the other hand, would have to negotiate for carriage with distributors.[166]

Current Regulatory Framework

Licensing Approach

As noted above, the Commission established a new licensing framework for both digital pay and specialty services.[167] Prior to that point, the Commission typically issued a call for specialty service applications and then approved only those applications that it considered would make the most significant contribution to fulfilling the objectives of the *Broadcasting Act*. The Commission had announced that it would licence two distinct classes of digital pay and specialty services: Category 1 services which would enjoy both digital access rights and genre protection, and Category 2 services which would have neither.[168] Following the year

[166] Public Notice CRTC 2000-171.
[167] Public Notice CRTC 2000-6.
[168] Public Notice CRTC 2000-6.

2000 round of licensing, the Commission would only issue licenses on a going forward basis for Category 2 digital services.

In the wake of that decision to establish an "open-entry" approach to the licensing of Category 2 services, the Commission was flooded with new applications to operate such services. The Commission recently noted that since this new open entry licensing policy for Category 2 services was announced it had, as of December 31, 2006, authorized a total of 579 Category 2 services, of which only 79 have launched and remain in operation! [169] The Commission then pointed out that the resources required to process these Category 2 applications were disproportionate to the number of services that have become operational.

Depending on whether the CRTC decides to accept other recommendations made in this report to streamline the regulations governing specialty channels and to reduce genre protection between Canadian specialty services, it may be possible to move to an exemption order for processing certain categories of Canadian Category 2 digital specialty services that would have limited amounts of Canadian content and hence no access rights.

As discussed in Chapters 6 and 7, we propose that the Commission consider linking carriage rights to Canadian content levels. Under this proposal, specialty services with the lowest permitted level of Canadian content would have no guaranteed carriage rights. They would be permitted to operate in the same genre as other specialty channels (with possible limited exceptions where the Commission determines that the service in question is important to achieving the policy objectives in subsection 3(1) of the Act and market cannot support a competing service). Such services could be identified in advance by the Commission and included in a list.

The Commission could then formulate an exemption order for this category of specialty services setting out the applicable obligations, rights and reporting requirements.

Recommendation 10(d)-1

We recommend that the Commission establish a set of conditions for exempting certain Canadian specialty services with little or no Canadian content, and no guaranteed access rights, from the requirement to obtain a broadcasting licence.

Programming Content

As in the case of OTA television services, specialty services must adhere to a set of programming content requirements that prohibit the services from broadcasting programming that contains certain types of content. The prohibitions set out in section 3 of the *Specialty Services Regulations* provide that no licensee shall broadcast programming that contains: (a) anything in contravention of the law;

[169] Public Notice CRTC 2007-10.

(b) any abusive comment or abusive pictorial representation on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability; (c) any obscene or profane language of pictorial representation; or (d) any false or misleading news.

The Commission first applied the prohibition on abusive comment on specialty services in the 1987 round of licensing. By that time, it had already been a feature of regulations governing the licensing classes of OTA television, radio, and pay television. The decision to extend these prohibitions to specialty services was not a hotly contested issue.

Section 4 of the *Specialty Services Regulations* also contains a prohibition on the advertising of alcoholic beverages unless certain conditions that are set out in the provision are met. Those conditions are the following: (a) the sponsor is not prohibited from advertising the alcoholic beverage by the laws of the province; (b) the commercial message is not designed to promote the general consumption of alcoholic beverages; and (c) the commercial message complies with the *Code for Broadcast Advertising of Alcoholic Beverages*.

Requirements relating to the advertising of alcoholic beverages, in one form or another, have been imposed on specialty services since the first licenses were issued in 1984. They were also incorporated into the *Specialty Services Regulations* in 1990. It has been noted by the Commission that "a primary objective of these regulations is to ensure that alcohol-related commercial messages do not promote the greater use of alcohol or represent the consumption of alcohol as a necessary part of any social activity or as a necessity for the enjoyment of life."[170]

In our view the requirements of sections 3 and 4 of the Regulations are consistent with the objectives in paragraphs 3(1)(g) and (h) of the *Broadcasting Act*, which require the programming originated by broadcasting undertakings to be of high standard and that broadcasting undertakings take responsibility for the programs they broadcast.

In our view, the prohibitions continue to be valid as a means of ensuring that specialty services do not abuse the privilege granted to them in their broadcasting licenses. It also enables the CRTC to take action if a licensee ignores its responsibilities.

Political Broadcasts

Under section 6 of the *Specialty Services Regulations*, a specialty service undertaking that provides time on its service during an election period for the distribution of programs, advertisements or announcements of a partisan political character, must allocate the time on an "equitable" basis to all accredited political parties and rival candidates represented in the election or referendum.

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[170] Public Notice CRTC 1986-176.

The requirements relating to the equitable allocation of political broadcasts were set out in both the *Radio Regulations, 1986* and the *Television Broadcasting Regulations, 1987*, and were incorporated into the licence conditions of specialty services in 1987, by reference to the *OTA Television Regulations*.

The rationale for the rules was set out by the Commission as follows:

> Throughout the history of broadcasting in Canada, licensees, as part of their service to the public, have been required to cover elections and to allocate election campaign time "equitably" to all political parties and rival candidates.
>
> The purpose of these requirements is to ensure that the public is informed of the issues involved so that it has sufficient knowledge to make an informed choice from among the various parties and candidates.[171]

In our view, the rationale for having this section is a valid today as when it was first imposed on specialty services in 1987. Its presence in the Regulations furthers the objectives set out in paragraph 3(1)(d) of the Act that require the broadcasting system to "safeguard, enrich and strengthen the political fabric of Canada", and "encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas and values."

Logs and Records

The requirements relating to the maintenance of a program log or a machine readable record of programming have been imposed on specialty service undertakings since their inception, initially through conditions of licence and in 1990 through the implementation of the *Specialty Services Regulations*. The current rules set out in section 7 require licensees to enter into the logs specific types of information and program codes, to retain the logs for a period of one year, and to furnish the logs to the Commission each month. In addition, under subsection 7(4) of the *Specialty Services Regulations*, a licensee is required to retain a clear intelligible audiovisual recording of all of its programming for a period of four weeks, or for a longer period where there has been a complaint or the Commission wishes to investigate the programming.

As is the case with respect to other types of undertakings, specialty service undertakings are required to maintain program logs and accounts in respect of programming expenditures to allow the Commission to ensure that those undertakings are operating in compliance with the Canadian program exhibition and expenditure requirements. We therefore recommend retention of section 7.

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[171] Public Notice CRTC 1987-209.

Requests for Information

Under section 8 of the *Specialty Services Regulations*, each licensee is required to file with the Commission an annual return that sets out its statement of accounts. In addition, each licensee is required to respond, at the Commission's request, to any complaint from any person and any inquiries relating compliance with self-regulatory codes. These requirements have been consistently imposed on specialty services dating back to 1984.

We consider that the requirements to furnish information to the Commission pursuant to section 8 are necessary to the fulfillment of the Commission's regulatory mandate and should be retained.

Program Delivery Agreement

Section 9 of the *Specialty Services Regulations* prohibits a specialty service undertaking from entering into a program delivery agreement with a non-Canadian. This prohibition is intended to prevent non-Canadians from controlling the precise time when a program is to be scheduled for broadcast on a specialty service and thus to be indirectly exercising control over the programming and scheduling of a Canadian service. The provision was imposed on specialty service undertakings in 1990 as part of the implementation of the *Specialty Services Regulations*. In our view, this provision is justified as a means of ensuring that the Canadian broadcasting system is effectively "controlled by Canadians" in accordance with paragraph 3(1)(a) of the *Broadcasting Act*.

We do not propose any changes to this section.

Undue Preference

Section 10.1 of the Regulations prohibits a licensee from giving an undue preference to any person, including itself, or subjecting a person to an undue disadvantage. It was inserted in the Regulations in 2001 and mirrors the undue preference provision included in the *Pay Television Regulations*.

The Commission has noted that a licensee of multiple programming services could confer upon itself an undue preference in negotiating the terms of carriage for all its commonly-owned services, or that programming services could potentially confer an undue preference on an affiliated distributor.[172] The provision was added to the Regulations to prevent such conduct.

Section 10.1 has, on at least one occasion, formed the basis on a complaint to the Commission.[173] That complaint, brought by Videotron ltée, was ultimately dismissed on the grounds that actions of RDS did not amount to the granting of a preference or disadvantage. However, it is not difficult to see how a licensee of

[172] Public Notice CRTC 2000-150.
[173] Broadcasting Decision CRTC 2002-254.

multiple specialty services could use its bargaining power as leverage against some BDUs, and thereby obtain advantages that would be undue.

At a time of increased concentration and consolidation of ownership in the Canadian broadcasting system, and increased cross-ownership of programming and distribution undertakings, we consider that there is a continuing need for an undue preference provision in the *Specialty Services Regulations*. Given our view that the Commission should move away from micromanaging the conduct of licensees, and should focus its efforts on establishing and enforcing performance objectives, we believe that this provision will become increasingly important in regulating the relationship between programming and distribution undertakings.

For the same reasons that we believe distributors should bear the onus for demonstrating that a preference or advantage is not "undue" we recommend that section 10.1 be amended to reverse the onus so once evidence of a preference or disadvantage has been established, the licensee that has granted the preference or conferred the disadvantage has the burden of demonstrating that its actions did not amount to an undue preference or disadvantage. In most instances, the party engaging in the alleged discriminatory or preferential conduct will be the party with access to the evidence of its own practices; therefore, it makes sense to place the onus on it to demonstrate that ostensibly discriminatory conduct does not result in an undue preference or disadvantage.

Recommendation 10(d)-2

We recommend that the wording of section 10.1 of the *Specialty Services Regulations* be amended to place the onus on licensees to demonstrate that any preferences they grant or disadvantages they confer are not "undue".

Nature of Service – Genre Protection

Each specialty service licensed by the Commission has a condition of licence that defines its "nature of service." By identifying the programming nature of the service to be offered, the Commission has been able to apply its "one service per genre" policy both to the licensing of new Canadian specialty services and with respect to the addition of new non-Canadian services to the Lists. The "one service per genre" policy serves to protect from competition those specialty services distributed on an analog basis, and to those Category 1 specialty services that were approved in 2000.

Under its policy, and with an exception for Category 2 services, the Commission generally requires that specialty services be complementary in their programming, and not compete head-to-head with one another in terms of programming. While Category 2 services may be competitive with each other, the Commission does not generally license a Category 2 service that would be directly competitive with an existing analog pay or specialty service, or with a Category 1 digital specialty service.

As noted above, the origins of this policy stem from 1984, with the first licensing decision of a Canadian specialty service. The Commission approved the application by CHUM to operate a music oriented specialty service, and denied a similar application by Rogers Broadcasting on the grounds that the size of the Canadian market would not support more than one such service in that genre.[174] While the Commission may not have realized at the time that it was articulating a policy that would come to define, in many respects, its future approach to licensing all Canadian specialty services, the reason given for licensing only one music service did become the rationale for licensing only one service per genre in each of the specialty service licensing rounds to follow.

Over the years, the rationale for the genre protection policy has been three-fold. First, it is designed to encourage diversity in Canadian broadcasting by ensuring that new applicants offer Canadians distinct types of programming services. Second, it is intended to help ensure that those specialty undertakings licensed are able to satisfy their regulatory obligations. Third, it recognizes that in a country the size of Canada, the market may not be able to support the licensing of more than one service per genre and still ensure that the services are able to make a maximum contribution to the exhibition and production of Canadian programming.

With respect to the application of the genre protection policy in the context of non-Canadian satellite services, the Commission had fully articulated this policy in 1984. As noted earlier, the Commission also established linkage rules for cable which applied to the distribution of approved non-Canadian services. The Commission concluded that it would not be in the interest of the Canadian broadcasting system to allow the carriage of non-Canadian satellite services that would be "either totally or partially competitive" with Canadian discretionary services.[175]

This policy of restricting access to the Canadian market by those non-Canadian services that are totally or partially competitive with a Canadian specialty service has remained the key feature of the Commission's approach to authorizing foreign services for distribution in Canada over the past twenty-three years.

It is important to note, however, that while both genre protection policies have been applied in Canada since the inception of specialty service television, those policies have evolved considerably over time as the number of genres recognized by the Commission have been expanded and fragmented, to the point where it is sometimes difficult to denote when one programming genre begins and another ends. The fragmentation of the genres has allowed for the licensing of multiple Canadian specialty services that compete to acquire the same programming and to attract the same audiences. In the area of sports programming for example, the Commission has licensed both TSN and Sportsnet, with TSN to operate a national sports service, and Sportsnet a regional sports service. However, when the programming schedules for both are compared, it is readily apparent that the nature

[174] Decision CRTC 84-338.
[175] Public Notice CRTC 1984-8.

of programs aired on the two services that are licensed to operate in distinct genres are virtually the same.

While a similar fragmentation of genres has been experienced with respect to the authorization of non-Canadian satellite services, the Commission appears to have been more consistent in its approach. There is no doubt that the Commission has over the past decade adopted a much more flexible approach in determining whether a particular non-Canadian satellite service would be either totally or partially competitive with an existing Canadian specialty service. The Commission has authorized in recent years a range of services to be distributed in Canada – including Bloomberg Television, RAI, RTPi (and a significant number of other general interest third language ethnic services) – that had either been denied access to Canada in the past - or most certainly would have being denied prior to 1997 on the basis that they would have been deemed to be at least "partially" competitive with an existing Canadian service. In this respect, today the Commission appears to apply its policy relating to genre protection and competitiveness only to those non-Canadian satellite services that would be deemed to be "totally" competitive with an existing Canadian service.

Given that the number of genres recognized by the Commission in recent years has expanded to the point where there is little or no distinction between many of them, and in light of the fact that the Canadian market has shown that it is now capable of supporting, in some cases, multiple services operating in these overlapping genres, we believe it is time for the Commission to revisit aspects of its genre protection policy.

The current policy that generally requires that specialty services not compete head-to-head with one another should be revised in a manner that takes into account the reality that exists in the Canadian broadcasting system and the fictional notion of a multiplicity of genres. Specialty services that make significant commitments to Canadian content, Canadian programming expenditures, public safety, or perform some other public interest function should be rewarded with preferred access and carriage rights in the manner suggested in Chapters 6 and 7. New Canadian specialty services that do not make the same commitments should be left to negotiate carriage rights – but should be allowed to enter the market on an open basis (subject only to genre protection of services designated by the Commission on an exceptional basis).

With respect to the genre protection policy that prevents the authorization of non-Canadian services for distribution in Canada where they would be either totally or partially competitive with an existing specialty service, we believe that this policy (with small modifications) continues to be appropriate as a means to ensure that the objectives of the Act are achieved. However, if the Commission takes this approach, it should not resort to splitting genres as the means of letting new services into the system. It should enforce its policy, and remove non-Canadian services from the Lists that have "morphed" their services into a genre already occupied by a Canadian service.

Recommendation 10(d)-3

We recommend that genre protection between Canadian specialty programming services be removed (except in exceptional cases where the Commission wishes to protect a specific service that is considered to be essential to attainment of one or more objectives in subsection 3(1) of the *Broadcasting Act*, such as 9(1)(h) services). This may also necessitate a review of the existing regulatory obligations imposed on undertakings that currently benefit from genre protection.

Wholesale Rates

Prior to 1987, the Commission did not regulate either the wholesale or retail rates of specialty services. In 1987, in response to rising concerns relating to fair and equitable access, the Commission agreed to regulate wholesale rates for specialty services distributed on the basic service. The Commission therefore established a regime for wholesale rate regulation to ensure that specialty services would achieve revenues necessary to meet their regulatory obligations, while at the same time taking account of concerns about subscriber rate increases for cable service.

The approach adopted in 1987 was uniformly applied to the specialty service industry in both the 1994 and 1996 rounds of licensing, and continues to be applied today to those specialty services that were licensed for analog distribution. (This is so notwithstanding that the basic subscriber fees charged by the BDUs have ceased to be regulated by the Commission). Given that Category 1 and Category 2 services were not permitted to be offered as part of the basic service, the Commission did not establish wholesale rates for these services.

As noted, the original rationale underlying the Commission's 1987 decision to regulate basic wholesale rates was to ensure fair and equitable access for specialty services to cable systems, which would, in turn, allow each service to achieve the revenues needed to fulfill its regulatory and licensing obligations. More recently, regulated wholesale rates have been used for a slightly different purpose as well. They have provided BDUs and specialty services with a starting point for negotiations regarding distribution on discretionary tiers, and have also been used by the Commission in this manner when resolving carriage disputes between BDUs and specialty services.

More recently, the Commission acknowledged in its *Digital Migration Framework* that regulated wholesale rates could serve as a useful point of reference when negotiating distribution on a discretionary digital tier.[176] The Commission addressed in that Public Notice the issue of whether, in an environment where basic cable rates are no longer regulated, it would be appropriate for wholesale rates for the digital distribution of analog pay and specialty services to be set by negotiations between the parties, rather than by regulatory fiat. The Commission concluded that

[176] Public Notice CRTC 2006-23.

it would be appropriate to cease regulating wholesale rates in a digital distribution environment:

> [I]n an environment where BDUs are largely rate deregulated, any wholesale rate established by the Commission can only have an indirect impact on the retail prices paid by consumers. Thus, regulated basic wholesale rates now have a lesser role to play in keeping the cost of cable service affordable.
>
> The Commission does not regulate wholesale rates for discretionary carriage. In addition, the majority of Class 1 cable systems are already rate deregulated.
>
> The Commission considers that it would thus be appropriate… to discontinue wholesale rate regulation in the digital environment. At the same time, and as several programming services have pointed out, the regulated basic wholesale rates of specialty services have come to serve as reference points when negotiating their wholesale rates for distribution on a discretionary basis. The Commission expects that the historical wholesale rates will likely continue to serve as reference points for negotiations for some time, and could also be used as reference points in the resolution of disputes.[177]

While regulation of wholesale rates is consistent with the policy objective in paragraph 3(1)(t) for distribution undertakings "to provide reasonable terms for the carriage" of programming services, the Commission needs to assess whether the BDU market is competitive enough to replace regulation as the means of establishing wholesale fees with respect to both analog and digital distribution.

While it is true that the regulated wholesale rate has been used as the starting point for negotiations between specialty services and BDUs, it is also true that the Commission has not, except in a few specific instances, reviewed whether rates that were originally established continue to be appropriate in an analog or digital distribution environment.[178] Some of the rates were established in 1987, in an environment that was quite different from what exists today. Seldom has the question ever been asked – is the basic wholesale rate for a given specialty service commensurate with the nature of the service and its value to consumers? If the Commission is not willing to do that, then perhaps it is time for the Commission to eliminate wholesale rate regulation for analog distribution, as it has done with respect to the Category 1 and 2 digital specialty services, and as it proposed to implement in Broadcasting Public Notice CRTC 2006-23, with respect to the digital distribution of the analog specialty services. It could then apply section 9 of the *BDU Regulations* on a complaint basis if parties were unable to negotiate commercial rates.

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[177] Broadcasting Public Notice CRTC 2006-23.

[178] Exceptions can be found in Broadcasting Decision CRTC 2004-10 and Broadcasting Decision CRTC 2003-23.

Advertising Limits

Since 1984, the Commission has placed restrictions on the nature and amount of advertising that specialty services may contain. Each of the licenses of the original four specialty services (MuchMusic, TSN, Telelatino and Chinavision) were subject to "expectations" that prohibited the services from distributing local advertising, and which provided that no more than eight minutes of advertising could be broadcast each clock hour. Those restrictions have been altered somewhat since 1987, and they now are imposed on specialty service undertakings as conditions of licence. Today, the majority of specialty services are limited to distributing only national advertising, and no more than twelve minutes of advertising per hour. There are exceptions for ethnic and third language specialty services, whose audiences tend to be located primarily in larger metropolitan centres in Canada. Such undertakings have mostly been authorized to include local and regional advertising on their services.

The rationale underlying these restrictions is to limit the impact that specialty services will have on the revenues of other broadcasting licensees, notably OTA television stations.[179]

As the number of specialty service undertakings has grown, to levels unforeseen in 1987, audience fragmentation and competition for advertising revenues has placed significant financial pressures on conventional OTA television broadcasters. The Commission recognized this recently when it decided to phase out the advertising restrictions for OTA television.[180]

The Commission has only recently authorized OTA television stations to increase the amount of advertising they are permitted to broadcast. Given the concerns expressed in Broadcasting Public Notice CRTC 2007-53 about the financial health of the OTA television industry, and given that the Commission has not had any opportunity to fully assess the impact of its decision to allow OTA television stations to expand their advertising minutes, we believe it might be premature for the Commission to consider expanding the number of minutes each specialty service could devote to advertising at this time. However we believe that the Commission should consider whether the current advertising limits should be removed for all programming services.

Recommendation 10(d)-4

We recommend that the Commission investigate whether varying restrictions on advertising by the different types of services, including specialty services, remain appropriate in the current marketplace and also that it consider removing the existing caps and limitations on specialty services.

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[179] Public Notice CRTC 1987-260.
[180] Broadcasting Public Notice CRTC 2007-53.

Carriage Status (Dual, Modified Dual)

While the Commission has indicated that it would be removing the three distribution designations that have applied to specialty services – which are "dual status", "modified dual status" and "discretionary" – when they enter a digital distribution environment, those designations continue to apply to the analog world until at least 2010.[181] In a digital environment, all specialty services are discretionary services, and BDUs are authorized to distribute them in any manner they see fit.

The original rationale for designating some specialty services as "dual status" was noted in a 1993 Public Notice.[182] The Commission concluded that the carriage model applicable to MuchMusic and TSN had been successfully providing desirable marketing flexibility to both the cable industry and to the specialty service providers in Anglophone markets. It therefore extended this status to other English and French-language specialty services licensed in 1987. By dual status, the Commission meant that, when distributed by a cable undertaking, these services must be distributed on the basic service unless the specialty service licensee consents to distribution on a discretionary basis.

A year later, the Commission altered its approach to licensing new specialty services (that had been announced only one year earlier) by designating most of the services licensed as "modified dual status" services.[183] The Commission stated that it was concerned that the cost of the basic service to the subscriber remain affordable:

> In this regard, the Commission's preference is that all new English-language specialty services be distributed as part of one or more high penetration discretionary tiers so that cable subscribers generally have the choice of whether to subscribe to them or not.
> …
> Accordingly, the Commission has decided to adopt a modified dual carriage policy for all but one of these new English-language specialty services.

However, different circumstances present in the Quebec marketplace, led to modified rules for that market:

> Characteristics of the Quebec marketplace, in particular its size, comparatively low cable penetration, restrictions relating to marketing, and the limited attractiveness of U.S. satellite services as packaging partners, have resulted in a different approach to the distribution of specialty services.
> . . .

[181] Broadcasting Public Notice CRTC 2006-23.
[182] *Structural Public Hearing*, Public Notice CRTC 1993-74, 3 June 1993.
[183] Public Notice CRTC 1994-59.

> In consideration of the current distribution environment in Quebec, and in view of the amended policies resulting from the structural hearing, the Commission has determined Le Réseau de l'information will have dual carriage status. Consistent with its request to be distributed on a discretionary basis, Arts et Divertissement will be accorded modified dual carriage status.[184]

The English and French-language analog specialty services that were licensed in 1996 and 1998 were similarly authorized for distribution on a modified dual status basis. Ethnic services and the post-2000 Category 1 and 2 digital specialty services were licensed as fully discretionary services, with the Category 1 and 2 services being distributed on a digital-only basis.

The designation of services as dual status, modified dual status and discretionary would appear to be historical anomalies that have no bearing on the programming value of a particular service, viewer demand or contribution to the policy objectives of the *Broadcasting Act*. These designations have more to do with the time of introduction of the services in question and not on any consistent criteria.

Recommendation 10(d)-5

We recommend that the Commission consider supplementing its access and carriage rules with a new regime that incents broadcasters to increase their Canadian content levels, invest in certain types of Canadian content, such as drama, or provide a service that fulfills a public interest function, such as public safety, in order to achieve priority access or carriage rights, and possibly placement in the basic service or preferred channel placement.

Canadian Content

Canadian programming exhibition requirements are imposed on all the specialty services via conditions of licence. These requirements vary widely, depending on the nature of the service offered and whether the service is a licensed as an analog, Category 1 or Category 2 specialty service. The English and French language analog specialty services typically have the highest Canadian content requirements, ranging from 100% Canadian programming for an information service like The Weather Network and Météomédia, down to15% Canadian programming for a service like TV5.

Category 1 digital services, because of their access rights, are obligated to ensure that they devote a minimum of 50% of the broadcast year and 50% of the evening broadcast period to the exhibition of Canadian programs.

The Canadian content obligations imposed on Category 2 services are considerably lower. English and French language services are required to devote

[184] Public Notice CRTC 1994-59.

35% of broadcast day and of the evening broadcast period to the broadcast of Canadian programs by the end of the third year of operation. Ethnic services are only required to ensure that in each broadcast year or portion thereof, the licensee devotes not less than 15% of the broadcast day and of the evening broadcast period, to the broadcast of Canadian programs.

The Commission has concluded that reduced Canadian content obligations would be appropriate in a digital environment where subscriber penetration would be limited.[185] With respect to Category 2 services, the absence of access guarantees and genre protection provided a further rationale for limiting the minimum Canadian content level.

Ensuring that Canadian programming services provide Canadians with access to significant amounts of Canadian programming is an overriding objective of the *Broadcasting Act*. As such, there continues to be a need for the Commission to establish minimum Canadian program exhibition requirements for the vast majority of specialty services.

As discussed above, we favour moving towards a simplified regulatory structure in which Canadian content, Canadian program expenditures and other public interest initiatives or functions are rewarded with enhanced access and carriage rights in a manner consistent with the objectives in the *Broadcasting Act*. We do not consider it appropriate to downgrade existing carriage rights unless they are no longer consistent with the criteria that would be established for an access and carriage regime based on merit. We favour a regime that creates incentives for enhancing the contributions specialty services make to the policy objectives of the Act by attaching increased access rights to those contributions.

Canadian Program Expenditures

The Canadian program expenditure (CPE) requirements imposed on specialty services at the time of licensing are determined on a case-by-case basis. The Commission's CPE requirements are based on such considerations as the genre of the service, the availability of Canadian programming falling within that genre, and the licensee's other plans and commitments. The Commission also takes into account the licensee's proposed wholesale fee and the type of distribution the service would receive.

Generally, these CPE requirements represent a percentage of the gross revenues earned by the service in the previous broadcast year. Category 1 services are also subject to a requirement relating to use of independent production, which obligates them to ensure that at least 25% of its Canadian programming, other than news, sports, and current affairs, is produced by non-related Canadian production companies.[186] Category 2 services, on the other hand, are not subject to CPE requirements.

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[185] Public Notice CRTC 2000-6.
[186] Public Notice CRTC 2000-171.

The requirement to make specific contributions to the production of Canadian programming was first introduced when the Commission licensed pay television undertakings in 1982. The CPE approach was then applied to the specialty services licensed in 1984, and has (with the exception of the Category 2 services) been a mainstay of the regulatory framework governing specialty service undertakings ever since. The Commission's objective has always been to ensure that the quality and distinctiveness of Canadian programming is enhanced, and to generate opportunities and revenue sources for the independent program production industry in Canada.[187]

The Commission's objective continues to be valid and is entirely consistent with paragraph 3(1)(e) of the *Broadcasting Act*, with each element of the broadcasting system "to contribute to the creation and presentation of Canadian programming" and subparagraph 3(1)(i)(v) which requires that the programming available in the system include "a significant contribution from the independent production sector."

However, it is our view that the specific requirements for each element to contribute to Canadian programming need to be reexamined and rationalized in a manner that treats competing entities in a comparable manner and recognizes that the various categories of programming services are no longer operating in tight compartments.

Recommendation 10(d)-6

We recommend that if the Commission collapses licence classes to reflect the fact that licensees of existing classes are competing with each other, the Canadian program expenditure requirements for competitors in the same class be examined and rationalized to the extent possible, given the nature of service each provides.

[187] Decision CRTC 84-654.

10(e) Pay-Per-View and Video-on-Demand

Introduction

In comparison to other classes of broadcasting undertakings, pay-per-view (PPV) and video-on-demand (VOD) undertakings are still relatively recent additions to the Canadian broadcasting system. The first application to operate an experimental PPV undertaking was approved by the Commission in 1990.[188] The decisions approving the first VOD applications were issued seven years later. None of the original VOD applicants approved by the Commission in 1997 were able to launch their services on BDUs. It was not until after the Commission concluded its 2000 round of digital licensing that the first VOD undertakings finally launched in Canada.

With a few exceptions, PPV and VOD undertakings are subject to the *Pay Television Regulations, 1990* (*Pay TV Regulations*). While the regulatory requirements imposed on VOD and PPV undertakings have been similar, the approach the Commission adopted for licensing these two classes of undertaking was, initially at least, substantially different.

The licensing model for the PPV industry, first established in the early 1990s, involved regional and linguistic monopolies. This mirrored the approach employed for the pay television industry after 1984. In 1995, however, the Commission approved competing license applications to operate a separate class of PPV undertaking called DTH PPV undertakings. That decision was followed five years later by the licensing of competing general interest terrestrial PPV undertakings. In addition to the general interest PPV undertakings that have launched, two other specialized PPV services are currently operating in Canada, providing primarily sports programming.

In contrast, VOD undertakings have been subject to a competitive licensing model since their inception. As noted above, the five applicants initially authorized in 1997 to operate VOD undertakings failed to launch.[189] Technological impediments, and the absence of access rules and carriage requirements for VOD services proved to be obstacles too difficult to overcome for those applicants. Since then, following approval in 2000 of applications by BDUs to operate their own VOD undertakings, VOD services have been a fixture in the broadcasting system. To date, a total of twenty VOD licence applications have been approved, and nine VOD undertakings are currently operating.

Over the last seven years, VOD has played an increasingly important role in the Canadian broadcasting system, as the number of channels devoted to VOD programming and the amount of content available to subscribers through this platform have increased far beyond the levels anticipated in 1997. Some of those VOD undertakings have experimented with subscription video-on-demand (SVOD), most have sought to expand their authority to broadcast commercial messages, and

[188] Broadcasting Decision CRTC 1990-78.
[189] Broadcasting Decision CRTC 97-283 to 97-287.

all have expanded the range of programming offered on an “on-demand” basis. These VOD services have certainly evolved far beyond the feature film library service that was initially envisioned in 1997. However, this has raised concerns on the part of competitors. These concerns relate to the degree to which VOD services should be permitted to compete with Canadian pay and specialty services which have significantly higher regulatory requirements. Also, the ability of VOD undertakings to offer SVOD bundles consisting exclusively of programming from non-Canadian sources is a concern.

History

Pay-Per-View

The first applications to operate PPV undertakings were filed with the Commission in 1984. The Commission announced, however, that it would not consider applications to operate PPV services at that time, given that Canada’s more traditional pay television industry had only been in operation for close to one year and was not financially stable.

In 1986, the Commission called for comments on the introduction of PPV television services in Canada. While the Commission sought comment on a framework for licensing those undertakings, it noted that it continued to have concerns about the impact that licensing PPV undertakings would have on the existing pay and specialty television undertakings.[190]

It was another two years before the Commission revisited the framework for licensing PPV services. In 1988, when the evidence began to mount that video rental outlets were having a negative impact on the pay television industry, the Commission began to examine how the offerings of its then existing three pay television licensees (Viewers Choice, Allarcom and Premier Choix: TVEC) might withstand the competitive threat. The Commission invited “discussion on the relative merits of pay-per-view as a mechanism to ensure enhanced viability of the existing pay television networks.”[191]

At that hearing, existing pay television licensees supported the concept of PPV, but expressed concern about the harm that would be inflicted on their operations if the Commission were to licence PPV undertakings on a competitive basis. The pay television licensees proposed, therefore, that they should be involved at the ownership level, as well as in program acquisition and scheduling of any new PPV services to ensure the orderly development of the market.[192]

The Commission indicated later that year that it would be prepared to consider PPV applications to operate PPV undertakings, provided “they reflect the

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[191] Notice of Public Hearing CRTC 1988-32.
[192] Broadcasting Public Notice CRTC 1988-110.

existing pay television structure and adequately address the concerns that have been raised."[193]

The Commission approved an application by APT, the existing pay television licensee for Western Canada, for authority to provide a PPV service in the three Saskatchewan cities of Regina, Saskatoon and Yorkton.[194] As had been requested by APT at the time, the licence was granted on an experimental basis for a two-year period. A full-fledged license was ultimately granted to APT in 1992.[195]

The second PPV licence was issued in 1991 to Viewer's Choice Canada (VCC).[196] It authorized VCC to carry on a terrestrial PPV undertaking throughout Eastern Canada. VCC was effectively controlled by the same group that owned the general interest pay television licensee serving Eastern Canada.

In approving both of these applications, the Commission implemented the approach to licensing that had been outlined in Public Notice CRTC 1988-173, whereby only one PPV undertaking would be licensed per market and the ownership structure for both would mirror that of the pay television industry. In the decisions approving the APT and VCC applications, the Commission emphasized that its primary concern with PPV was the ability of this new form of service to contribute in a meaningful manner to the development and exposure of Canadian programming, without damaging the existing pay television industry.

The new PPV licensees were regulated pursuant to the *Pay Television Regulations, 1990*, and specific conditions of licence. Those conditions included terms related to the distribution of a specific number of Canadian feature films (a minimum of 12) and Canadian-based events (2 each broadcast year), as well as maintaining certain ratios of Canadian to non-Canadian first-run film titles (1:20) and events (2:14) in each broadcast year. In addition, PPV licensees were required to remit to the rights holders of all Canadian films and Canadian-based events specific minimum amounts of the gross revenues earned from the exhibition of these Canadian films and Canadian-based events. They were also required to contribute a specific amount of money to the production of Canadian programming over the course of the licence term.

Similar requirements were imposed on the five DTH PPV undertakings whose licence applications were approved.[197] In response to a Direction from the Governor in Council that ordered the Commission to establish a class of licences in respect of DTH pay-per-view television programming undertakings, the Commission established a new class of licence, to be known as DTH PPV television programming undertakings.[198] Consistent with the OIC, this new class of licence

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[193] Broadcasting Public Notice CRTC 1988-173.
[194] Broadcasting Decision CRTC 90-78.
[195] Broadcasting Decision CRTC 92-28.
[196] Broadcasting Decision CRTC 91-160.
[197] Broadcasting Decisions CRTC 95-904 to 95-908.
[198] *Direction to the CRTC (Direct-to-Home (DTH) Pay-Per-View Television Programming Undertakings*, P.C. 1995-1106, July 6, 1995.

was distinct from the existing class of undertakings that provided PPV services. By licensing multiple DTH PPV services, the Commission for the first time established a competitive framework for PPV licensing.

In 1996, the Commission established its Access Rules for Canadian Specialty, Pay and PPV Undertakings, which required each Class 1 and DTH BDUs to distribute the services of at least one PPV undertaking.[199] Those rules were incorporated into section 18 of the *BDU Regulations* in 1998.

Also in 1996, the Commission authorized a specialized PPV service called Sports/Specials Pay-Per-View to operate on a national basis and be available for terrestrial distribution.[200]

In 2000, the Commission approved applications for two more PPV services. The first was issued to Bell ExpressVu to operate a national general-interest terrestrial PPV undertaking in competition with the two regionally licensed general interest PPV services. The second was issued to Breakaway PPV Corporation to operate PPV service exclusively dedicated to broadcasting the games of the National Hockey League involving the Vancouver Canucks, Edmonton Oilers and Calgary Flames.[201]

While a competitive licensing framework for PPV undertakings has been implemented in Canada for several years – since 1995 for DTH PPV and since 2000 for terrestrial PPV – the reality is that the PPV market does not exhibit the usual signs of a highly competitive market. Today, there are nine licensed PPV undertakings in operation: four provide DTH PPV services, and five provide terrestrial PPV services.

Two of the four DTH licensees are regional services – Shaw PPV serves Western Canada and Viewers Choice serves Eastern Canada – and both are distributed by Star Choice in those regions. Canal Indigo operates a French-language DTH PPV service that is distributed on Star Choice nationally. Bell ExpressVu, on the other hand, operates a bilingual DTH PPV service that is distributed on a national basis solely on the Bell ExpressVu DTH platform. As a result, subscribers to Star Choice and ExpressVu do not have a choice in respect of PPV service providers.

A similar situation exists with respect to terrestrial PPV services. Shaw's PPV service operates in Western Canada, Viewers Choice operates in the East, and Canal Indigo provides the French-language service nationally. While Bell ExpressVu was authorized in 2000 to operate a national terrestrial PPV undertaking in competition with these three existing PPV licensees, it has yet to launch that service. The only other PPV services operating in Canada are Rogers SportsNet PPV and Breakaway PPV, both of which serve niche segments of the PPV market.

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[199] *Access Rules for Broadcasting Distribution Undertakings*, Public Notice CRTC 1996-60, 26 April 1996.
[200] Broadcasting Decision CRTC 96-595.
[201] Broadcasting Decisions CRTC 2000-737 and 2000-738.

The absence of competition and consumer choice among PPV services is not surprising. The nature of the general interest PPV services, which offer primarily feature films, lends itself to one PPV service per BDU network. In addition, the fact that the terrestrial PPV services were firmly ensconced in the Canadian broadcasting system as a result or the "one service per market policy" originally employed by the Commission, and the significant ownership interest that Canada's larger BDUs hold in these undertakings, has made it very difficult for new competitors to enter the market.[202]

History of VOD in Canada

In 1994 the Commission issued an Order exempting from licensing all persons that carried on programming undertakings for the purpose of conducting limited field trials or experiments to test and develop a VOD service.[203]

The Commission's first attempt at licensing VOD undertakings in Canada occurred in 1997.[204] While none of the five undertakings approved in those decisions ultimately launched their services, the licensing model established in those decisions and in the introductory statement that accompanied those decisions, has continued to be applied to the industry since that time.[205]

In those five decisions, the Commission adopted a model for licensing VOD services that diverged from the model that had been employed just a few years earlier for the PPV industry. Unlike the PPV licensees, the VOD undertakings were subject to competitive licensing from the outset, and decisions approving applications were granted both to the three existing PPV licensees and to two other applicants that were unaffiliated with the pay television industry. In addition, the new VOD licensees would not benefit from any access or distribution rights, such as those that had been granted to PPV services in 1996. The rationale for the new approach centred on the Commission's new policy objective of fostering fair competition and an increased reliance on market forces:

> In the past, the Commission's general approach had been to foster the financial viability of pay television and pay-per-view undertakings by granting licences authorizing them to operate as regional monopolies. Today's decisions, however, are consistent with the Commission's policy objective to foster fair competition and an increased reliance on market forces in light of evolutionary changes within the broadcasting environment.

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[202] Rogers holds a 24.95% direct interest in Viewers Choice. Rogers, Cogeco and Quebecor each hold direct and indirect ownership interests in Canal Indigo. Shaw owns 100% of both the terrestrial and DTH PPV undertakings it operates. Bell ExpressVu owns 100% of its DTH PPV Service.

[203] *Exemption Order Respecting Experimental Video-on-Demand Programming Undertakings*, Public Notice CRTC 1994-118,

[204] Broadcasting Decisions CRTC 97-283 to 97-287.

[205] Public Notice CRTC 1997-83, *Licensing of New Video-On-Demand Programming Undertakings - Introduction to Decisions CRTC 97-283 to 97-287*.

> The Commission notes that the past two decades have witnessed the appearance of an increasing array of broadcasting services, particularly of pay television and specialty services competing for the attention of viewers. The increase in the number and range of programming services will accelerate with the introduction of digital distribution systems and addressable technology. [206]
> . . .

The regulatory framework for VOD undertakings was most recently summarized by the Commission in Decision CRTC 2000-172, when it approved applications by four new VOD undertakings that would be owned, directly or indirectly, by BDUs. The key elements of the framework were as follows:

- The services would be subject to the *Pay Television Regulations, 1990* and therefore prohibited from broadcasting advertising.
- The services would not be granted protection from the licensing of competitive services.
- The services would be permitted to offer programming from all content categories.
- The English-language and bilingual VOD services would be required to carry, at all times, a minimum ratio of 1:20 Canadian to non-Canadian feature film titles.
- The French-language service would be required to carry, at all times, a minimum ratio of 1:12 Canadian to non-Canadian feature film titles.
- With respect to non-theatrical films, all services would be required to carry, at all times, a minimum ratio of 1:10 Canadian to non-Canadian titles.
- The services would be required to contribute 5% of their annual gross revenues to a Canadian production fund that would be independent of the licensee.
- The services would be required to ensure that a minimum of 25% of the titles promoted on their promotional or "barker" channels each month would be Canadian.
- The services would be prohibited from acquiring exclusive or preferential programming rights.

After pointing out that the five original PPV undertakings had failed to launch, the Commission noted that it had decided to authorize VOD undertakings that are

[206] Public Notice CRTC 1997-83.

affiliated with BDUs as a means of ensuring that VOD services would launch in Canada:

> Each of the four VOD licensees in the current round is either integrated with or affiliated to a distributor. The Commission considers that the benefits of licensing distributor-integrated or distributor-affiliated VOD services considerably outweigh the disadvantages.
>
> A particular benefit is that an early launch of VOD services may be facilitated. In turn, an early launch would increase the attractiveness of digital technology for Canadian viewers, which should increase the penetration of the new Category 1 and Category 2 specialty services. This will provide Canadians with increased choice and diversity of programming.[207]

Since 2000, the Commission has approved applications to operate twenty VOD undertakings. According to the CRTC *Broadcasting Policy Monitoring Report 2007*, as of December 31, 2006, there were nine VOD undertakings operating in Canada. Each such VOD service is affiliated with a BDU and is only offered on those distribution systems with which it is affiliated.

As the Commission recently pointed out, when the current regulatory framework for VOD services was outlined in 2000, VOD was perceived as developing into primarily a feature film-based service with programs offered on a pay-per-title basis, similar to PPV.[208] The Commission, therefore, adopted a relatively light-handed regulatory approach to VOD undertakings, based largely on its approach to existing PPV services, to ensure they had the flexibility to develop the platform in innovative ways.

Regulatory Requirements for PPV and VOD Undertakings

Prohibited Programming Content

PPV and VOD undertakings are subject to certain requirements relating to programming content that are common to all broadcasters. Section 3 of the *Pay Television Regulations* prohibits licensees from broadcasting programming: (a) that contains anything in contravention of the law; (b) that contains any abusive comment or abusive pictorial representation on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability; and (c) that contains any false or misleading news.

These three prohibitions are found in each set of the Commission's regulations governing BDUs, specialty services, television broadcasters and radio stations. As noted elsewhere in this report, the prohibition on broadcasting this type of programming content is a reflection of the Commission's view that broadcasters, as licensees, are responsible for the programming that they broadcast and must

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[207] Public Notice CRTC 2000-172.
[208] Broadcasting Public Notice CRTC 2007-10.

ensure that such programming is consistent with the high standard requirement in paragraph 3(1)(g) of the *Broadcasting Act*.

In our view, these prohibitions continue to be valid as a means to ensure that PPV and VOD licensees do not abuse the privilege granted to them in their broadcasting licenses.

Commercial Messages

The prohibition on broadcasting commercial messages, which is set out in paragraph 3(2)(d) of the *Pay Television Regulations*, has also been discussed in this Report under the section relating to pay television regulation. It has been a hallmark of the regulation of pay television services since 1982 and was applied to the PPV and VOD industries when they were initially approved in 1991 and 1997, respectively. In recent years, however, the strict prohibition on broadcasting commercial messages contained in the Regulations has given way to a more flexible approach that has been implemented through conditions of licence which permit the broadcast of programming that contains certain kinds of embedded commercial messages.

It should be noted, that in the context of PPV and VOD undertakings, the definition of "commercial message" contained in the *Pay Television Regulations* has particular importance. That definition permits commercial advertising in certain situations, i.e. where the advertisement:

(i) is contained in the live feed of programming that is of the category set out in column I of sub item 6(6) of Schedule I and that is acquired by a licensee,

(ii) is broadcast during the same period, and originates in the stadium, arena or other venue, as the event itself, and

(iii) is distributed by the licensee without compensation;

This definition of "commercial message" enabled PPV and VOD undertakings to distribute programming containing commercial messages when it satisfies the above noted three criteria.

In 2005, a number of VOD and PPV undertakings were granted an exception to the rules relating to commercial messages contained in subsection 3(2) of the *Pay Television Regulations*. In those decisions, the Commission expanded the scope and nature of the commercial messages that each VOD and PPV undertaking is authorized to distribute. For example, the Commission authorized Rogers' PPV undertaking to distribute programming that contains commercial messages where those messages are already included in a program previously aired by a Canadian programming undertaking and where that program is subsequently offered at no

charge to the subscriber.[209] A similar application was approved for Rogers and other VOD undertakings in 2005.[210]

In approving those applications, the Commission pointed out that the prohibition on distributing commercial messages initially stemmed from its concern that these and other pay services should not have an undue negative impact on existing conventional broadcasters. The Commission went on to note that the commercial messages included in the programs provided to VOD licensees would be the same as in other Canadian programming undertakings; also, prior written approval of those undertakings would have to be obtained before programs could be distributed on a VOD service. In this context, the Commission accepted the argument of the VOD undertakings that

> …the proposed amendments would not create any additional direct revenue for the licensee, nor would the licensees of the other participating programming services stand to suffer from any decline in their advertising revenue. In fact, in addition to providing a second distribution window for Canadian programs, the proposed licence amendments may result in an increase in the advertising revenue earned by these other participating programming services.

Even more recently, new applications have been filed with the Commission by VOD licensees to further expand their ability to distribute programming containing commercial messages.[211] In its application, Rogers states that this amendment would allow it to offer Canadian programs which include any commercial messages as opposed to only those messages which appeared within the linear broadcast of the program, and to charge a fee to subscribers for accessing those programs.

Recommendation 10(e)-1

We recommend that the Commission review the advertising rules applicable to various classes of broadcasting licences, including VOD and PPV licensees, and consider rationalizing them in a manner that maximizes the potential value of programming services to advertisers, and revenues for the Canadian broadcasting system.

Independently Produced Programming

In accordance with paragraphs 3(1)(e) and (f) of the *Pay Television Regulations*, PPV and VOD licensees have, like pay television undertakings, generally been prohibited from distributing programming that is produced by the licensee or an affiliate. The rationale for imposing such a prohibition has been to

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[209] Decision CRTC 2006-667.
[210] Broadcasting Decision CRTC 2005-497. The Commission also approved at that same time in Broadcasting Decision CRTC 2005-498 an application by Groupe Archambault inc. to amend its VOD licence in the same manner.
[211] See Broadcasting Public Notice CRTC 2007-63, Item 1.

ensure that the programming produced by Canadian independent producers would be distributed on these services, rather than only those programs produced "in house" by the licensee.[212] This is consistent with subparagraph 3(1)(i)(v) which provides that the programming in the Canadian broadcasting system should include a significant contribution from the Canadian independent production sector.

While most VOD and PPV licensees continue to be restricted in this manner, the Commission has recently authorized some PPV and VOD licensees, as an exception to paragraphs 3(2)(e) and (f) of the Regulations, to distribute programming, other than filler programming, that is produced by the licensee or by a person related to the licensee, provided that such programming does not exceed 10% of the total hours of its programming broadcast in each broadcast year.[213] In authorizing this exception to the *Pay Television Regulations*, the Commission noted that it would be "in keeping with the Commission's general approach to give VOD licensees the flexibility to experiment with the types of programming they offer".[214]

As discussed in Chapter 6, we are of the view that a prohibition on producing more than 10% of programming "in-house", or from acquiring more than 10% from an affiliated company is excessively restrictive and inhibits the creation of Canadian programming by entities that might otherwise be able to contribute to the production of more Canadian content. We believe 90% is far more than "significant," which is what the *Broadcasting Act* prescribes.

Regulation 10(e)-2

We recommend that the restrictions on VOD and PPV licensees' in-house production of Canadian programming be relaxed in stages, and that the Commission carefully monitor the impact of this measure on the production of Canadian content and on the independent production sector in Canada.

Logs and Records

The requirements relating to the maintenance of program logs or machine readable records of programming is one of the few areas where the rules that apply to VOD and PPV undertakings differ. Similar to conventional broadcasters and other pay and specialty services, PPV undertakings are required under section 4 of *Pay Television Regulations* to enter into the logs specific types of information and program codes, to retain the logs for a period of one year, and to furnish the logs to the Commission each month. In addition, under subsection 4(4) of the *Pay Television Regulations*, each licensee must retain a clear intelligible audiovisual recording of all of its programming for a period of four weeks, or for a longer period where there has been a complaint or the Commission wishes to investigate the programming.

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[212] Public Notice CRTC 1990-10.
[213] See for instance Broadcasting Decision CRTC 2007-63 (Bragg) and Broadcasting Decision CRTC 2006-491.
[214] Broadcasting Decision CRTC 2007-63.

Given that VOD undertakings do not provide scheduled programs, the Commission adopted a different approach to govern the program reporting requirements for such undertakings. The Commission required VOD undertakings to maintain for a period of one year a detailed list of the inventory available on each file server, identifying each program by programming category and by country of origin, and indicating the period of time that each program was on the server and available to subscribers.[215]

As with other licensees, the reporting requirements imposed on PPV and VOD undertakings are essential to the Commission's ability to determine whether a licensee is complying with its regulatory obligations relating to Canadian program exhibition and should be retained.

Request for Information

Pursuant to section 5 of the *Pay Television Regulations*, each VOD and PPV licensee is required to file with the Commission an annual return that sets out its statement of accounts. In addition, each licensee is required to respond, at the Commission's request, to any complaint from any person and any inquiries relating to compliance with self-regulatory codes. These requirements have been consistently imposed on VOD and PPV undertakings.

An administrative body that is mandated to supervise and regulate all aspects of the broadcasting system requires access to information relating to the entities it regulates. As such, requirements to furnish information to the Commission are necessary to fulfilling the Commission's mandate and should be retained.

Undue Preference

Like pay television undertakings, PPV and VOD licensees are prohibited, under subsection 6.1(1) of the *Pay Television Regulations*, from giving an undue preference to any person, or subjecting a person to an undue disadvantage. This provision was added to the Regulations in 2001. Subsection 6.1(2) further provides that a licensee shall be considered to give itself an undue preference if the licensee distributes a pay-per-view program for which the licensee has acquired exclusive or other preferential rights.

As noted in the pay television section of this report, the provision was included in the *Pay Television Regulations* following a dispute involving PPV program rights for NFL Sunday Ticket programming that Rogers Cable had acquired for distribution on terrestrial pay-per-view services, but which were not made available by the NFL for distribution on DTH PPV services.[216] Initially, the provision simply provided that "no licensee shall distribute any pay-per-view program for which it has acquired exclusive or other preferential rights."[217] Following the issuance of its

[215] Public Notice CRTC 1997-83.
[216] Public Notice CRTC 1999-83.
[217] Public Notice CRTC 1999-204.

licensing framework for new digital pay and specialty services, the Commission sought to implement that framework through certain regulatory amendments.[218] One such amendment was to add an undue preference provision to both the regulations governing pay television and specialty services. As noted by the Commission, the provision was intended to address the concern that a licensee of multiple programming services could confer upon itself an undue preference in negotiating the terms of carriage for all its services.[219] The proposed amendments also address the concern that licensees of distributor-affiliated programming services could potentially confer an undue preference on the distributor to which they are affiliated.

As noted, the dispute involving PPV program rights for NFL Sunday Ticket raised concerns about the prospect of PPV licensees acquiring programming on an exclusive basis that would hinder the development of competitive PPV services. This concern triggered implementation of the provision (now subsection 6.1(2) of the *Pay Television Regulations*) that prohibits a licensee from acquiring exclusive or preferential rights.[220]

With the exception of the NFL Sunday Ticket dispute, which was addressed prior to the introduction of this provision into the regulations, the Commission has not been required to issue a determination involving a dispute under section 6.1 of the *Pay Television Regulations*.

At a time when concentration and consolidation of ownership is so prevalent in the Canadian broadcasting system, and when distributors are becoming more and more involved in the ownership and operation of programming services, there is a continuing need for an undue preference provision in the *Pay Television Regulations*. The only change that we would recommend to this provision would be to reverse the onus so that the licensee that is alleged to have granted the preference or disadvantage has the burden of demonstrating that its actions were not unduly preferential or disadvantageous.

Recommendation 10(e)-3

We recommend that section 6.1 of the *Pay Television Regulations* be amended to place the onus on the licensee to demonstrate that any preference conferred by it or disadvantage it has subjected a third party to is not "undue".

Nature of Service

Each PPV undertaking is subject to a condition of licence relating to its nature of service. This condition defines the geographic scope of the licence and the nature of the programming that can be offered on the undertaking. Originally, by identifying the nature of the service offered by each undertaking, the condition of licence was intended to assist in the application of the Commission's non-competitive licensing

[218] Public Notice CRTC 2000-6.
[219] Public Notice CRTC 2000-150.
[220] Public Notice CRTC 1999-83.

policy for PPV services. Today, the content categories that general interest PPV undertakings are authorized to distribute is unlimited. While general interest PPV services have no limits on the nature of the programming that each is permitted to offer, the sports-oriented PPV services continue to be prohibited from distributing programming that falls under Category 7 (Drama and Comedy), 8 (Music and Dance) and 10 (Game Shows).

In contrast to PPV licensees, VOD undertakings do not have a condition that defines the nature of the service, and as such are not subject to any limits in respect of the types of programs that may be offered over those services.

Given that the Commission has, for some time now, eliminated the "one licence per genre" policy for PPV undertakings and has allowed PPV undertakings to compete in the same market, the only rationale for maintaining conditions for these undertakings that limit the nature of the programming distributed on each PPV service, or limit its geographic scope, is to attach conditions relating to Canadian content and program expenditure that would be consistent with the nature of PPV service provided by each licensee.

Exhibition of Canadian Programming

The Commission has imposed, by way of condition of licence, obligations relating to the exhibition of Canadian programming on each PPV and VOD undertaking. Each type of PPV undertaking is subject to different Canadian program exhibit requirements, and VOD undertakings have requirements that are different from PPV services.

The exhibition requirements for general interest PPV undertakings operating in English-language markets have, for the most part, remained unchanged since the first (non-experimental) licence was issued to Viewers Choice in 1991. They vary only slightly from licensee to licensee. The general interest DTH PPV undertaking operated by Viewers Choice, for example, is required, by condition of licence, to distribute, a minimum of 12 Canadian feature films, and four English-language Canadian-based events in each broadcast year. In addition, a 1:20 ratio of Canada to non-Canadian feature film titles and a 1:7 ratio of Canadian to non-Canadian events must be made available to subscribers over a broadcast year must be Canadian.[221]

The requirements for general interest French-language PPV undertakings are slightly different. With respect to the PPV service operated by Canal Indigo, for example, a minimum of 20 Canadian feature films in the original French-language version or dubbed in French, which have been exhibited in theatres in French-language markets, and a minimum of twelve Canadian-based events targeting the French-language market must be provided in each broadcast year.[222] In addition, each licensee must maintain a film ratio of no less than 1:12 with respect to

[221] Broadcasting Decision CRTC 2002-385.
[222] Broadcasting Decision CRTC 2002-382.

Canadian and non-Canadian "first run" feature films, and a ratio of no less than 12:20 for Canadian and non-Canadian events.

Specialized PPV undertakings, such as Rogers Sportsnet PPV and Breakaway PPV, have a completely different set of requirements. Rogers, for example, is required to ensure that a minimum of 20% of the total number of hours of live sports events and special events made available in each broadcast year to PPV subscribers is Canadian content.[223]

VOD undertakings are required to ensure that not less than 5% of the English-language feature films, and not less than 8% of the French-language feature films in the inventory that is available to subscribers, are Canadian. They are also required to ensure that not less than 20% of all programming other than feature films made available in that inventory is Canadian. In addition, the feature film inventory must include all new Canadian feature films suitable for VOD exhibition.

As noted, the different Canadian content requirements established for English-language, French-language and specialized PPV undertakings are tied to the nature of service offered by each undertaking, and the availability of Canadian programming in those genres. That makes sense from a regulatory perspective, and does not require any change.

The same cannot be said for the Canadian content requirements for VOD undertakings. The Canadian programming exhibition requirements imposed on VOD undertakings are quite similar to those established in respect of general interest PPV undertakings. This approach made sense when the regulatory framework for the VOD industry was developed in 1997 and reiterated in 2000 because the Commission believed, at that time, the two types of services would be quite similar and would provide subscribers with access to the same types of programming, primarily feature films.[224] VOD undertakings have, however, evolved significantly since the first VOD licenses were issued by the Commission. Today, the content available on a VOD basis encompasses a significantly broader scope of programming than that offered on a PPV basis. This has provided VOD undertakings with significant advantages over PPV undertakings with whom they compete and it has also meant that VOD undertakings are increasingly competing with the services offered by licensed pay television and specialty service undertakings.

Recommendation 10(e)-4

We recommend that the Commission rationalize the current classes of broadcasting licences to take account of the changes that have occurred since the original classes of licence were established. This process may require that Canadian content requirements also be rationalized in order to level the playing field between licensees in a newly-collapsed class.

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[223] Broadcasting Decision CRTC 2005-83.
[224] Public Notices CRTC 1997-83 and 2000-172.

Expenditures on Canadian Programming

With respect to expenditures on Canadian programming, the Commission has imposed requirements on the PPV and VOD undertakings that are designed to help boost the production of Canadian feature films.

While not identical, the requirements for general interest DTH and terrestrial PPV undertakings and the VOD undertakings are quite similar. The English-language DTH PPV service offered by Viewers Choice, for example, is required to remit, in each broadcast year, 100% of the revenues earned from the exhibition of two Canadian-based events to the rights holders of those events and 100% of the revenues earned from the exhibition of all Canadian films to the rights holders of those films.[225] Also, 5% of the gross annual revenues earned by a DTH PPV undertaking must be contributed to the Fund to Underwrite New Drama. In addition, the Commission requires each DTH PPV licensee to ensure that the gross revenues earned by any feature film are split equally three ways among itself, the licensee of the DTH distribution undertaking, and the rights holder, and prohibits the PPV undertakings from purchasing non-proprietary distribution rights for feature films from Canadian distributors.

Terrestrial general interest PPV undertakings, such as Canal Indigo, are required to contribute 5% of their gross revenues, each broadcast year, to the production of Canadian feature films and Canadian events by remitting the money to a fund which is administered independently from the licensee.[226] In addition, the licensee must remit all gross revenues derived from the broadcast of Canadian feature films on its service to distributors and providers, with a minimum of 60% going to the programming providers.

Each VOD licensee is required to contribute 5% of its gross annual revenues to an existing Canadian program production fund administered independently of its undertaking.[227] Each licensee must also remit to the rights holders of all Canadian feature films 100% of revenues earned from the exhibition of these films.

In contrast to the expenditure requirements for the general interest PPV and VOD undertakings, and in view of the fact that they generally distribute live sports programming, specialized PPV undertakings are only required to ensure that a minimum of 5% of the gross annual revenues earned by its undertaking are contributed to an existing, independently-administered, Canadian program production fund.[228]

To our knowledge, the small differences in the CPE requirements that do exist among DTH PPV, terrestrial PPV and VOD undertakings have not been fully explained by the Commission, and it is perhaps time to, at the very least, rationalize

[225] Broadcasting Decision CRTC 2002-385.
[226] Broadcasting Decision CRTC 2002-382.
[227] Broadcasting Decision CRTC 2007-63 (Bragg).
[228] Broadcasting Decision CRTC 2005-83 (Rogers Sportsnet PPV).

and harmonize those requirements. If they are competing with each other, then they should be subject to the same requirements.

As noted above, it has also become apparent in recent years that the nature of the programming offered on VOD services is evolving and expanding well-beyond the feature film oriented service that it was originally expected to be. More and more, VOD undertakings are providing subscribers with access to programs that are available on specialty services, pay television services and even some OTA television services.

Recommendation 10(e)-5

We recommend that, if the Commission collapses licence classes to reflect the fact that licensees of existing classes are competing with each other in the same licence class, the Canadian content, program expenditure and other similar requirements of competitors in the same licence class be rationalized.

Subscription VOD (SVOD)

In 2000, the Commission addressed the issue of whether VOD undertakings should be permitted to offer programming in packages - or on a bundled basis (i.e. on an SVOD basis) – for a single subscription fee. The Commission concluded that imposing a time limit on the availability of programs of one week would be appropriate for VOD services. It was the Commission's view that a one week limit "would be consistent with the nature of VOD services to permit the VOD services to offer programming packages where the total period during which the programming may be viewed does not exceed one week."[229]

In reaching the conclusion that it would be inconsistent with the nature of a VOD undertaking to allow a VOD undertaking to sell programming in packages for more than one week, the Commission recognized that VOD services could become directly competitive with pay and specialty services. By bundling their programming, VOD services (and to a lesser extent PPV services) could create programming schedules similar to those created by specialty services, but would not have comparable requirements in Canadian content exhibition or Canadian programming expenditures.

In our view, the restrictions on SVOD represent another regulatory measure designed to preserve original licence class distinctions that are no longer reflected in the Canadian broadcasting system. While they make sense in an environment in which service distinctions really exist, and different classes of licence have different obligations to fulfill, they would be unnecessary if the Commission were to redefine the characteristics of a fewer number of licence classes, based on current realities of the market, and impose common obligations on the members of the new class.

[229] Public Notice CRTC 2000-172.

10(f) Broadcasting Distribution Undertakings

Introduction

This section of the report provides a brief overview of the history of the regulation of the broadcasting distribution industry in Canada, starting with the Commission's initial policies relating to cable television in the early 1970s and ending with the current framework that is largely set out in *BDU Regulations*. We then examine the current regulatory framework governing the broadcasting distribution industry with a view to providing some insight into the purpose and rationale underlying each regulation, rule or policy.

Over the years, the Commission has established an elaborate scheme for regulating broadcasting distribution undertakings. While the regulation of this sector began modestly in the 1960s and early 1970s with the imposition of a few licensing and carriage requirements for cable television distributors, the Commission has now put in place a plethora of regulations, licence conditions, exemption orders and policies that govern every type of distribution undertaking operating in the Canadian broadcasting system.

The regulatory framework governing the industry that has evolved over the past four decades has been a response to the increasingly important and central role that distributors play in the Canadian broadcasting system. As more and more Canadians subscribe to the services offered by distributors (currently an estimated 90%), and as more and more Canadian programming services rely on the distributors to access those subscribers, the activities of distributors have been the subject of detailed regulation to ensure that the policy objectives in subsections 3(1) and 5(2) of the Act are fulfilled. The regulatory framework in place today is designed to ensure that Canadians are able to access a diverse range of programming choices, which include a significant amount of Canadian programming options.

In addition to the central role BDUs play in the system as the primary vehicle through which Canadians access a range of video programming, two other key changes have influenced the broadcasting distribution regulatory framework. The first is technological change. From the first development of twelve channel cable networks, to the advent of signal trapping technology, and through to the expansion of analog capacity and hundred channel systems, and ultimately to the introduction of digital technology, the technological changes that have been experienced in the broadcasting distribution industry over the past four decades have enabled BDUs to greatly expand their capacity and allow for a significant increase in the number of programming services that can be delivered to Canadians. This has also allowed for more innovative value-added services to be distributed (HDTV, iTV and VOD).

The second key change is competition, and the presence of multiple digital distribution platforms through which Canadians can access programming. In the past decade, several competitive alternatives to the traditional cable television system have developed. In addition to DTH, the Internet, telephone companies, wireless broadcasting and illegal satellite services have all become points of access for Canadians to obtain video and audio programming. Their presence in the

Canadian broadcasting system has had an impact on how the distribution industry is regulated.

The Commission has, in some instances, established new regulatory measures, such as exemption orders and, in others, has adjusted existing measures to address new distribution platforms. Although the presence of these alternative platforms has had a significant impact on the system, cable television continues to be the primary access point to the system for nearly two thirds of Canadians. Overall, an estimated 90% of Canadians rely on the offerings of regulated cable, MMDS and DTH distribution undertakings to access programming.[230]

The 1970s – A Decade of Discovery

Cable television systems in Canada were initially licensed as "broadcasting receiving undertakings" beginning in June 1968, when the *Broadcasting Act* came into force. Prior to that date, the regulation of cable television systems (such as it was) fell under the purview of the Department of Transport. The first small community cable systems had begun to appear in Canada in the 1950s. At that point, those community antenna television (CATV) systems were little more than aggregators of a few signals of over-the-air conventional television stations and their operations had only a limited impact on the Canadian broadcasting system.

The transitional period, when jurisdiction over cable television was being transferred from the Department of Transport to the Commission, coincided with a period of rapid expansion in cable television systems throughout Canada. These systems and their penchant for distributing out-of-market television stations (and, in particular, significant numbers of U.S. television stations) began to have an impact on Canadian television stations. By providing Canadians, for a small monthly fee, with access to improved picture quality and increased viewer choice, cable operators began to achieve significant subscriber numbers. By 1970, the number of cable systems operating in Canada exceeded 340, and approximately 28% of Canada's four million urban households were passed by cable television networks.

The expansion of cable television networks, and their potentially negative impact on the audiences and advertising revenues of OTA television stations, compelled the Commission to find a way to integrate cable television into the regulated Canadian broadcasting system, in order to turn the cable industry from being a competitor to OTA television broadcasters into being a contributor to the Canadian broadcasting system.

The first major policy statement governing the cable television industry was issued in July 1971 in a document titled *Canadian Broadcasting: A Single System – Policy Statement on Cable Television*.[231]

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[230] In 2006, 7.3 million Canadian households subscribed to the services of cable BDUs and 2.6 million subscribed to DTH and MMDS undertakings: *Broadcast Distribution – Class 1, 2 and 3 CRTC Statistical and Financial Summaries 2002-2006*.

[231] *Canadian Broadcasting "A Single System" – Policy Statement on Cable Television*, July 16, 1971.

In that 1971 policy statement, the Commission highlighted two key concerns with respect to the cable television industry. The first was that cable systems redistribute programming that is indispensable to the Canadian television stations that produce and acquire it. The Commission noted that while cable television operators generate revenue from the distribution and sale of such programming to Canadians, they do not contribute to the costs incurred by the stations to produce and acquire programming. The second concern was that cable systems were importing, in some cases, the signals of up to eight television stations into markets that those distant stations were not licensed to serve. The effect of this was two-fold: (i) it devalued the licenses granted to Canadian OTA television stations operating in such markets and (ii) it reduced the level of diversity of programming available in the system by providing multiple markets with access to the same services.

In coming to terms with the appropriate policy or approach to integrating cable television networks into the system, the Commission emphasized the need to ensure that cable television would not weaken the ability of the system to produce programming choice and diversity, both from within Canada and from outside the country:

> The Commission believes… cable television can also contribute forcefully to the achievement of the fundamental objectives of Canadian broadcasting. It can widen the choice of programmes offered to Canadians. Not only can cable television systems provide programmes from the United States but they might some day, via satellites, give access to programmes from other countries of the world like France or Great Britain. They can also provide more means of communication for education under provincial authority; make local community expression easier; offer channels for distribution for more numerous kinds of social information, more diverse sources of knowledge and more varied styles of thought within our country.[232]

The policies outlined in the Commission's 1971 policy statement would be addressed with each cable television licensee at the time of licence renewal, and appropriate conditions of licence would be implemented in respect of the following matters: (i) priority carriage on the basic service for local and regional conventional television stations, and for a station operated by each of the CBC and the relevant provincial educational authority; (ii) access to a cable channel devoted to community expression; (iii) a financial contribution to assist in the development of high-quality Canadian programs; (iv) requirements relating to simultaneous substitution, when the identical program is carried on a cable system on more than one channel at the same time; (v) licensing procedures; and (vi) several other matters including the distribution of optional signals, such as U.S. conventional stations, the regulation of subscription fees and the distribution of distant signals.

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[232] *Ibid*, at p. 13.

Prior to 1976, there were no cable television regulations and the principal means of cable regulation was through conditions of licence. In addition, cable licensees were expected to follow various other Commission policies which had not been incorporated into conditions of licence, such as those relating to signal substitution and community programming.

In 1976, the various cable policies were consolidated and formally promulgated as the *Cable Television Regulations*. By this time, the Commission determined that it would be necessary to translate its policies into more precise regulations to enable the industry to develop in a more structured manner and to enhance the contribution the cable industry might make to the Canadian broadcasting system. In the policy statement that preceded the new regulations,[233] one of the key issues identified was the impact that cable television would have on over-the-air broadcasting. The Commission highlighted its concerns about fragmentation of audiences and the potential for new types of programming services (U.S. over-the-air and pay television) to be distributed by cable systems in competition with Canadian OTA stations, particularly local Canadian stations. The goal, according to the Commission, was to find a way to enable cable television to provide the wider choice of services that the public was demanding without destroying free OTA television and radio, which was deemed to be the "primary element" of the Canadian broadcasting system.

The new *Cable Television Regulations, 1976* were designed to address three central issues:

(i) the contribution that cable television should make to community programming;
(ii) the measures that cable television should be required to implement to minimize damage to the conventional broadcasters; and
(iii) the contribution that cable television should make to assist in the production of Canadian programming.

With respect to community programming, the Commission imposed an obligation on all cable television licensees to provide a community channel. The Commission also placed strict limits on the nature of the programming that could be aired on that channel, to ensure that it would be produced within the local community served, and prohibited the channel from containing any advertising material.

The remaining provisions in the *Cable Television Regulations, 1976*, were largely designed to address the second and third issues noted above, which were to limit the negative impact that cable systems have on the over-the-air stations and to establish measures that would assist in the production of Canadian programming. Interestingly, the concept that cable television licensees should make direct financial contributions to broadcasters or producers of programming was rejected by the

[233] Policies Respecting Broadcasting Receiving Undertakings (Cable Television), CRTC December 1975, at p. 2.

Commission on the basis that, "without enabling legislation… there is no simple mechanism to achieve such a transfer of funds…".[234]

To achieve these objectives, the Commission established, in the new regulations, priority carriage requirements for the basic service that largely mirrored those set out in its 1971 *Policy Statement on Cable Television*. It also imposed certain priorities relating to the carriage of Canadian radio stations, and prohibited a cable television licensee from distributing a Canadian service on a restricted channel or from altering or curtailing the signals it distributes. Finally, the Commission imposed simultaneous substitution requirements on larger cable systems (Class A systems with more than 3,000 subscribers) with respect to signals of higher priority local and regional television stations.

Other requirements, such as carriage rules limiting the distribution of U.S. television stations and distant signals, as well as the maximum fees that a cable television licensee could charge for its service, continued to be imposed by way of condition of licence.

By the end of the 1970s, the cable television industry was having an increasingly significant impact on the Canadian broadcasting system. A further review of the industry took place, resulting in the issuance by the Commission in 1979 of a new policy statement in "A Review of Certain Cable Television Programming Issues."[235] In that document, with the exception of a few minor adjustments, the Commission reconfirmed a number of the policies that had been established earlier in the decade.

The 1980s – A Decade of Growth

For the cable industry, the 1980s were characterized by a period of steady growth. This growth manifested itself in expanded channel capacity on cable systems, which enabled the carriage of a number of new Canadian pay and specialty television services, as well as the signals of approved U.S. satellite services. The growth was also evident both in the total number of cable subscribers, and in the growing number of communities served by cable. By end of the decade, close to seven million Canadian homes subscribed to the services of a cable television system.[236]

The subscriber growth experienced during the decade was, in part, spurred on by the introduction in 1984 of new non-Canadian satellite-to-cable services into the Canadian broadcasting system, such as CNN, Arts & Entertainment and The Nashville Network, as well as the licensing of a variety of new Canadian pay and specialty services between 1982 and 1987. These included pay television services like First Choice and Premier Choix, and specialty services like MuchMusic, The Sports Network, The Weather Network, Family Channel and Vision TV.

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[234] Policies Respecting Broadcasting Receiving Undertakings (Cable Television), December 1975.
[235] CRTC, *A Review of Certain Cable Television Programming Issues*, 26 March 1979.
[236] CRTC Annual Report,1989-90.

The Commission undertook its first full review of the 1976 *Cable Television Regulations* beginning in 1984, and implemented a new set of regulations governing the cable industry in 1986.

That review of its regulations was prompted by the view that the regulations had not fully kept pace with the development of new services, which included the Canadian pay and specialty television services, as well as some non-Canadian satellite-to-cable services. The Commission was also concerned that the regulations needed to be adjusted in light of new technologies that were delivering programming to Canadian homes, including U.S. satellites, video cassette recorders (VCRs) and scrambled, over-the-air subscription television systems (STV), which have been licensed as substitutes for cable systems in more than 100 smaller and remote communities beginning in 1982.

In developing new *Cable Television Regulations*, the Commission attempted to achieve three fundamental objectives: to incorporate policies adopted by the Commission over the last few years, to lighten the burden of regulation with respect to the operation of cable and STV undertakings, and to clarify certain provisions of the existing regulations.[237]

Central to the Commission's new approach to cable regulation was the objective of fostering and encouraging a strong, identifiably Canadian broadcasting system. With this objective in mind, the Commission continued to include in the regulations provisions specifying the priority carriage of Canadian services. The requirement of carriage of such services on the "basic" service (beginning with channels 2 - 13), and on unrestricted channels, was also maintained. The Commission also maintained the rules relating to simultaneous substitution, and rejected a proposal to include non-identical episodes ("strip programming") as part of the substitution rules.

In addition, the Commission indicated that it was committed to the principle that each cable system must devote a greater number of channels to the distribution of Canadian rather than non-Canadian programming services, on both its video and audio services. This principle of “preponderance,” which had been imposed by conditions of licence, was incorporated into the new regulations.

The Commission also introduced amendments designed to reduce the regulatory burden imposed on cable licensees. A general authorization to distribute certain types of programming services was directly included in the regulations, rather than requiring licensees to file an application with the Commission for authorization to distribute each new service. This eliminated the need for a lengthy regulatory process each time a licensee sought to distribute a specific Canadian or non-Canadian service on its system.

With respect to the regulation of cable rates, the Commission similarly streamlined the process for amending the installation and monthly subscriber fees.

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[237] Public Notice CRTC 1984-305.

Instead of authorizing a distinct installation fee for each licensee, the Commission established a "cap" for such fees. As for monthly subscriber fees, the Commission established a maximum monthly rate for each system.

The Commission also amended the limitations imposed on the operation of community channels by amending the rules to allow licensees to benefit from the use of contra, credit and sponsorship messages.

The 1990s – A Decade of Upheaval

In the 1990s, the Canadian broadcasting system experienced fundamental technological and competitive change, driven by advances in digital transmission and optical fibre and other distribution technology. More specifically, converging technologies in the broadcasting, telephony and computer industries, the deployment of interactive, digital distribution formats and the expansion of channel capacity enabled existing and new distributors to respond to evolving demands by consumers for new types of programming, for greater control over the programming they chose to receive, and choice of competitive distributors.

By the end of the decade, the broadcasting distribution sector had changed dramatically. At the beginning of the decade, even the most advanced cable systems only had the capacity to distribute programming services in a range of up to 50 analog channels. Competition among BDUs was not even on the Commission's policy agenda. In fact, in 1993, following its omnibus Structural Hearing,[238] the Commission said "no" to competition in the distribution sector. By the turn of the century, however, the Commission had endorsed the principle of competition in the distribution sector, with DTH, MMDS, telcos and some over-wired systems providing sustainable competition. Digital distribution technologies were also being implemented. Channel capacity on cable systems operating in a number of larger markets had grown into the hundreds.

The 1990s started with the enactment of the new *Broadcasting Act* in 1991, in which Parliament recognized the significant role distribution undertakings were playing in the Canadian broadcasting system. For the first time, the Act contained policy objectives specifically for the distribution sector, including paragraph 3(1)(t), which provides as follows:

> (t) distribution undertakings
>
> (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
>
> (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

[238] Public Notice CRTC 1993-74.

> (iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and
>
> (iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

Following passage of the new Act, the Commission initiated a number of proceedings to address issues relating to the impact that digital technology would have on the broadcasting system, the threat of U.S. DBS satellite services, and the potential for competition to develop in the broadcasting distribution sector. Many of these issues were addressed at the 1993 Structural Public Hearing.[239] The impact that the convergence of cable and telco technologies would have on the system were considered in the Commission's Convergence Report, which was issued two years later in May 1995.[240]

In December 1995, the Commission adopted a competitive licensing framework for the broadcasting distribution market. Also in 1995, the Commission approved the first DTH licence applications of ExpressVu and PowerDirecTV.[241] It also licensed an MMDS service for Manitoba at that time[242] and in 1996 approved the competitive national DTH licence application by Star Choice Television Network in August 1996.[243] In addition, in June 1996, the Commission approved the first competitive over-wire cable system to operate in Vancouver.[244] That same year, the Commission established Access Rules for pay and specialty services and adopted new rules relating to the operation and distribution of license exempt programming services.

In the Convergence Report, the Access proceeding and its licensing decisions for DTH and MDS, the Commission consistently stated a number of key guidelines that would apply to its new regulatory framework for broadcasting distribution undertakings. Specifically, the Commission was guided by the following principles:

- all distributors should be subject to similar rules and obligations with respect to predominance of Canadian programming, priority carriage, linkage, and fair and equitable access for programming services;

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[239] Public Notice CRTC 1993-74.
[240] *Competition and Culture on Canada's Information Highway* (Convergence Report), 19 May 1995.
[241] Decisions CRTC 95-901 and 95-902.
[242] Decision CRTC 95-910.
[243] Decision CRTC 96-529.
[244] Decision CRTC 96-224.

- all licensed terrestrial distributors should generally be required to carry, as part of the basic service, the same Canadian priority services as those prescribed in the existing *Cable Television Regulations, 1986* (the cable regulations). Satellite distributors should generally be required to meet carriage priorities as set out in Decisions CRTC 95-901 and 95-902 dated 20 December 1995, (the DTH decisions);

- all distributors of programming services should make a financial contribution to the development and production of Canadian programming, and the size of this contribution should be based on the gross annual revenues derived from their broadcasting activities;

- program rights purchased by licensees of Canadian programming undertakings should be recognized and protected;

- the regulations should be streamlined and simplified where feasible, and unnecessary requirements should be eliminated. Where possible, the number of situations where licensees must submit applications for licence amendments should be reduced; and

- an appropriate degree of flexibility and lighter regulation should be considered for small distributors, in light of their more fragile economic circumstances.[245]

In view of the fundamental changes that were taking place in the broadcasting system, the Commission decided in 1996 that it would be timely to review and update its regulations for distribution undertakings to ensure that there would be an orderly transition from a monopoly to a fully competitive environment, and that the new regime would treat all distributors equitably.

The Commission concluded that its proposed new *BDU Regulations* should apply to three distinct types of distribution undertakings, namely, all cable distributors, all DTH satellite distributors and those wireless distribution undertakings (MMDS) that provide a broadband, subscription-based service comparable to that provided by cable distributors.[246] The new *BDU Regulations* were implemented in January 1998.[247]

Under those new Regulations, the basic monthly fee of a Class 1 cable distribution undertaking would become deregulated once the undertaking could provide documentary evidence that the basic service package of one or more licensed DTH or terrestrial distributors is available to 30% or more of the existing households in that cable undertaking's licensed service area, and that the number of its basic service subscribers has decreased by at least 5% from the date that the basic service of a licensed competitor was first introduced in one licensed area of the

[245] Competition and Culture on Canada's Information Highway (Convergence Report), 19 May 1995.
[246] Public Notice CRTC 1997-25.
[247] SOR/99-423.

incumbent. The obligation to serve, which was only imposed on Class 1 distributors, would be removed once a BDU's basic rates were deregulated.

New inside wire rules were established to encourage the development of competition. The Access Rules were incorporated into the new *BDU Regulations*, and an important new mechanism was introduced to ensure that BDUs would make significant contributions to the production of Canadian programming. A variety of other new measures were also implemented in the new *BDU Regulations* to ensure that all distributors would be subject to similar rules and obligations with respect to the predominance of Canadian programming to be distributed, priority carriage, linkage, and fair and equitable access for programming services.

By the turn of the century, the two DTH BDUs (which used digital technology) were beginning to make significant subscriber gains, at the expense of cable licensees. In addition, the long-awaited roll-out of digital technology and the concomitant significant increase in distribution capacity was on the horizon.

The 2000s – Continued Growth and Maturity

The first decade of the 21st century has brought with it continued growth for the broadcasting distribution industry in Canada. There has been increased competition between BDUs, as almost every Canadian can now access at least two BDUs We have also witnessed the introduction of new distribution platforms such as mobile television services and increased use of the Internet, by both broadcasters and unregulated entities. Yet, despite this competition, costs for subscribers have continued to increase at an unanticipated rate.[248]

The advent of digital distribution technology, which had appeared imminent as early as 1993, finally arrived on larger cable networks as well as their DTH and MMDS competitors, and today more than 58% of Canadians receive their broadcasting services on a digital basis.[249] There has also been an unprecedented increase in the number of programming services available in the Canadian market.

In light of these fundamental changes and the maturing of the distribution industry, it is time to consider whether the detailed set of regulatory requirements contained in the *BDU Regulations*, conditions of licence, policies and orders continue to be appropriate and necessary for the industry.

The Current Rules and their Purpose

Requirement to "buy-through" the basic service

The requirement to buy-through the basic service before acquiring any discretionary services, which is currently found in section 5 of the *BDU Regulations*, has its origins in the Commission's 1971 policy statement titled "*Canadian Broadcasting: A Single System – Policy Statement on Cable Television.*" In that

[248] CRTC, *Broadcasting Policy Monitoring Report 2007*, July 2007.
[249] *Broadcasting Policy Monitoring Report 2007*, CRTC, July 2007, at pp. 99 and 106.

policy statement, the Commission established the requirement for cable licensees to provide a basic service.

This policy was reflected in the *Cable Television Regulations* in 1976, and has continued to be a central component of the regulations governing BDUs ever since. The original rationale underlying the requirement to distribute a basic service was to protect the local conventional OTA television stations that were licensed to operate in the market served by the cable distributor. The goal was to ensure that stations licensed for that market would be provided as part of the basic service, thereby limiting the potential for programming services delivered by the cable distributor to fragment the audience of the local OTA stations.

The buy-through requirement was confirmed in the 1996 policy statement announcing a review of the regulations governing BDUs. The rationale was stated by the Commission as follows:

> The Commission considers that it is important to maintain the general requirement that subscribers purchase the basic service before accessing discretionary services. The services of local broadcasters are a fundamental element of the Canadian broadcasting system, and linking the purchase of the basic service to discretionary tiers containing Canadian pay and specialty services recognizes the role and importance of local services.[250]

In our view, section 5 of the *BDU Regulations* is fully consistent with the policy objective in subparagraph 3(1)(t)(i) to give priority to the carriage of Canadian programming and, in particular, to the carriage of local stations. This provision ensures that all BDU subscribers receive these important elements of our broadcasting system and assists these services in maintaining a strong viewership. We therefore recommend retention of this section.

Preponderance Rule

All BDUs are required to ensure that a preponderance of both the video and the audio programming services received by each of their subscribers are Canadian. The preponderance rule that is currently found in subsection 6(2) of the *BDU Regulations* relates to the number of programming services received by a subscriber. Originally, however, the preponderance requirement was tied simply to the number of channels offered by a BDU. In the *Cable Television Regulations*, 1986, Class 1 and Class II, cable licensees were simply required to devote a greater number of video channels and audio channels to the distribution of Canadian programming services.

When the preponderance rule was first proposed by the Commission in Public Notice CRTC 1986-27, the Commission emphasized that it was one of the new measures designed to foster and encourage a strong, identifiably Canadian broadcasting system.

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[250] Public Notice CRTC 1996-69.

The Commission refined the rule in 1995 when it licensed DTH distributors for the first time. DTH distributors were permitted to offer a menu of services that provided less than a preponderance of Canadian services overall, but they were required, by condition of licence, to ensure that each subscriber receives a preponderance of Canadian programming services. When the regulatory framework governing cable television distributors was reviewed in 1996, the Commission proposed amending the *BDU Regulations* to make them consistent with the condition imposed on DTH licensees. The rationale for doing so was to ensure that all BDUs are subject to equitable rules. It was also recognition that the addressability of distribution technology being employed by BDUs would enable them to ensure that a majority of services actually received by each subscriber would be Canadian.

In our view, section 6 of the *BDU Regulations* is consistent with paragraph 3(1)(e) of the *Broadcasting Act* which requires each element of the Canadian broadcasting system to contribute in an appropriate manner to the creation and presentation of Canadian programming. We consider that this is an important provision to ensure both access to and presentation of Canadian programming to Canadians. Given the very significant access Canadians have to American and other non-Canadian programming services, a requirement for preponderance of Canadian services continues to have merit. We consider a "preponderance to be 51% or more.

Prohibition on Alteration and Deletion of Signals

The prohibition on altering and curtailing (or deleting) signals of programming services that are distributed by a BDU, which is found in section 7 of the *BDU Regulations*, was originally established in the 1976 *Cable Television Regulations*. While the number of exceptions to this requirement has changed over the years, the fundamental principle that BDUs should not generally be permitted to alter, delete or curtail the programs that they distribute has not changed.

While there is no specific objective in the *Broadcasting Act* that requires this measure, it is wholly consistent with the role of BDUs as distributors or carriers of programming services. Other than the exceptions in section 7, it would be unreasonable for BDUs to be allowed to alter the services they distribute without the permission of the signal originator.

Prohibitions on Programming Content – i.e. abusive comment

As previously discussed in Chapter 10(a), we consider that this provision is consistent with the requirements in paragraphs 3(1)(g) and (h) of the *Broadcasting Act*. It makes sense to apply these provisions to programming services "originated" by BDUs, such as community channels. This is consistent with the treatment of other broadcasting services. It would be more problematic if it were applied to services "distributed" by BDUs, given the requirement under section 8 not to delete or alter a programming service. Subject to the requirements in section 8 to obey court orders etc., we are of the view that this provision should be interpreted as

being limited to programming services over which BDUs exercise programming control.

Undue Preference

The prohibition on conferring undue preferences or disadvantages was first established in the *BDU Regulations* that came into force in 1998. In the proceeding leading up to the promulgation of the new regulations, the Commission stated that it believed that an undue preference provision, comparable to the unjust discrimination provision found in subsection 27(2) of the *Telecommunications Act*, would be appropriate in a broadcasting distribution environment characterized by competition among distributors. Initially, the concept of undue preference was only to apply with respect to the acquisition or distribution of programming. The Commission indicated such preferences may include situations where a distributor enters into an affiliation agreement or other contractual arrangement that has the effect of denying another competitor access to the service of a licensed programming undertaking, or where the distributor acquires a programming service under terms and conditions that are significantly advantageous to itself or its affiliate.

During the proceeding to consider the new *BDU Regulations*, a number of parties expressed concern that limiting the provision in this manner would not capture all instances where a BDU could act in an anti-competitive or unfair manner. With that in mind, the Commission revised the section so that it would apply to all matters, including those related to the acquisition and distribution of programming services and, more generally, to all broadcasting activities of BDUs (including such activities as limiting a competitor's access to a building).

The effectiveness of the undue preference provision in preventing BDUs from engaging in anticompetitive and unfair acts has produced mixed results. As noted recently by the Commission, often the party that is alleging an undue preference or disadvantage has considerable difficulty in fully establishing its case, due to the fact that the evidence needed to establish that a preference or disadvantage is "undue" is typically not in its possession, but rather in the hands of the party alleged to have given the undue preference or to have subjected someone to an undue disadvantage.[251] As such, the party who has filed the complaint has in some instances been unable to provide the Commission with an adequate record to fulfill its evidentiary burden.[252]

Given that it is, in some cases, difficult for a party alleging an undue preference or disadvantage to file the evidence necessary to prove that such a preference or disadvantage is undue, we agree with the Commission's proposal in Broadcasting Notice of Public Hearing 2007-10 to reverse the onus in section 9 of the *BDU Regulations*.

[251] Broadcasting Notice of Public Hearing CRTC 2007-10
[252] Broadcasting Notice of Public Hearing CRTC 2007-5.

Recommendation 10(f)-1

We recommend that section 9 of the *BDU Regulations* be amended to shift the onus to the party alleged to have engaged in the discriminatory conduct, once it has been established that they have given a preference or subjected any person to a disadvantage, to show that such preference or disadvantage is not "undue".

Inside Wire

The regime governing inside wire, which is set out in section 10 of the *BDU Regulations*, was first introduced in the 1998 *BDU Regulations*. Like the undue preference provision noted above, the purpose of establishing rules relating to the use of inside wire in single-unit and multi-unit dwellings was to prevent abuses in the broadcasting distribution market. It was thought that by establishing a clear set of rules that would promote the development of a competitive distribution market, without requiring the Commission to be constantly involved in resolving building access disputes, would be in the public interest.

In Public Notice CRTC 1997-25, the Commission concluded that a cable licensee's ownership of existing inside wire constitutes a major potential barrier to competition and consumer choice. As noted in that Public Notice, a customer is likely to be reluctant to switch service providers if such a switch entails undergoing the inconvenience and disruption of having duplicate inside wiring installed in the customer's home. Accordingly, the Commission considered that, to the extent possible, customers should have the ability to connect the existing inside wire to the network of their preferred BDU.

With that in mind, the Commission initially established a "customer ownership" model for inside wire, whereby the customer would be permitted to acquire the inside wire installed in its premises from the cable distributor. That model, however, proved to be unworkable. Issues of ownership between the cable licensee and the home owner, and concerns about the potential liability for abandonment of the wire, and the impracticality of removing wire from single-unit dwellings, compelled the Commission to re-examine its policy in 2000. In place of the customer ownership model, the Commission established a "non-interference" model for inside wire. Under this non-interference model, BDUs are prohibited from interfering with the use of the inside wire by another BDU, and are prevented from removing any such inside wiring in buildings if a request for use of the wire has been made by another BDU. Section 10 of the *BDU Regulations* also permits a BDU that owns inside wire to charge a just and reasonable fee for the use of that inside wire. In the case of single unit-dwellings, the BDU industry does not charge any fee. However, in multiple-tenant buildings (MDUs), the Commission established a fee of $0.52 per subscriber per month for the use of inside wire in MDUs.

The provision is still valid. The non-interference model has been an effective mechanism to promote competition by ensuring that subscribers are not confronted with a decision relating to inside wire ownership when considering whether to subscribe to the services of a BDU. By establishing a clear set of rules, the regime

has also allowed the Commission and BDUs to avoid becoming involved in lengthy regulatory proceedings to resolve disputes involving the use of inside wire.

Competitive Dispute Resolution before the CRTC

Pursuant to sections 12 to 15 of the *BDU Regulations*, the Commission has the authority to resolve competitive and access disputes, and it may issue binding determinations on the merits of a given case.

A dispute resolution mechanism was first incorporated into the *Cable Television Regulations* in 1994. The Commission noted that access to cable distribution by Canadian programming services is vital to preserving the Canadian character of the broadcasting system.[253] It therefore announced that it was establishing a mechanism to mediate and resolve disputes between licensees of programming undertakings and licensees of distribution undertakings regarding access to distribution facilities.

In recent years, an increasing demand has been placed on the Commission's dispute resolution processes. The advent of competition, the emergence of many more players, the use of differing technologies, a requirement for the sharing of infrastructure, and a parallel need for agreement on complex technical issues to ensure some level of interoperability, are among the factors contributing to this demand.

In Public Notice CRTC 2000-65, the Commission outlined its approach to resolving disputes under the *BDU Regulations* in the face of a significant increase in the number of requests for dispute resolution. It noted that it had established a core team of CRTC staff responsible for identifying the most appropriate process for resolving any given competitive and access dispute. The Commission then identified three mechanisms for resolving disputes:

- The staff-assisted dispute resolution model allows for Commission staff to choose among a variety of procedural options, whether involving mediation, arbitration or some other alternative technique, for resolving disputes. The Commission indicated that it expected that this model would be appropriate in a majority of disputes.

- The consensus-based model involves staff-facilitated meetings involving a broad cross section of industry representatives and other interested parties. The working group's purpose would be to find solutions to broad problems of a technical, operational or administrative nature, and perhaps industry-wide in scope, rather than to resolve disputes arising between individual parties.

- The expedited Commission determination procedure has, as its objective, the speedy resolution of competitive disputes. The Commission only uses this procedure as a last resort. Moreover, in

[253] Public Notice CRTC 1994-7.

> order to qualify for this procedure, four characteristics must be present: (i) only a small number of parties are involved; (ii) alternative methods have failed to resolve the dispute; (iii) no policy issues are raised by the dispute; and (iv) the dispute does not raise a multiplicity of issues.

While the Commission's approach to resolving disputes has considerable merit, there are growing concerns relating to the transparency of its dispute resolution process, particularly the expedited Commission determination procedure. It is our understanding that the Commission typically treats all documents relating to such disputes as confidential, including any decision its issues in respect of the dispute. While we accept that confidentiality is necessary in respect of the staff-assisted mediation and consensus-based models, there is little justification for refusing to disclose non-confidential documents relating to the expedited Commission determination procedure and no justification for granting confidentiality to the Commission's own decisions. The notion of holding in-camera proceedings and issuing "secret" decisions is the antithesis to the transparency and accountability tenets of SMART regulation espoused by the federal government. It also denies other parties the benefit of learning from the Commission's decisions and organizing their affairs in a manner that fully complies with the Commission's regulatory requirements.

As discussed in Chapter 7, if the Commission moves to a model that is characterized by less micromanagement and by more performance objectives, there will be a greater need for fast, effective disputes resolution mechanisms. Rules should also be put in place to enable the Commission to preserve the status quo until the dispute resolution process is completed.

Recommendation 10(f)-2

We recommend that the Commission adopt a more transparent decision-making process when it employs the expedited Commission determination procedure outlined in Public Notice CRTC 2000-65. Unless a party to the proceeding can demonstrate that information is confidential, all documents relating to the proceeding, including the document containing the Commission's final determination, should be placed on a public file.

Recommendation 10(f)-3

We recommend that the Commission adopt rules to preserve the status quo when a dispute resolution process has been initiated.

Priority Carriage Rules

The priority carriage rules set out in subsection 17(1) of the *BDU Regulations* have been a central feature of the regulation of cable distributors dating back to 1968. The current rules for larger cable distributors are, in fact, strikingly similar to those found in the Commission's *1971 Policy Statement on Cable Television*.

Under subsection 17(1), Class 1 and 2 terrestrial BDUs are required to distribute, beginning with the basic band, the signals of all local and regional television stations, and, in certain cases, the signals of extra-regional television stations. These BDUs must also distribute the English and French language services of the CBC/Radio Canada and, in the provinces where they operate, the service of the provincial educational broadcaster. DTH distributors (because of their national character) and the small Class 3 systems (because of their size and financial capacity) have fewer requirements.

In successive reviews of its cable regulations, the Commission recognized that the primary purpose of the distribution industry is to redistribute television programming. The Commission has repeatedly acknowledged the important role that local OTA television stations play in the Canadian broadcasting system, and the fact that these stations are increasingly reliant on BDU distribution to reach their audience.

While the role of local OTA television stations as the primary source of television programming for the Canadian broadcasting system has diminished significantly in recent years, the importance of BDU distribution to the success of local television has never been greater. Today, local television stations rely almost entirely on BDUs to reach their audiences.[254] If a conventional television station were not able to obtain carriage on the cable BDU that operates in its licensed area, it could not survive.

In our view, this section of the *BDU Regulations* is entirely consistent with the objectives in subparagraph 3(1)(t)(i), which requires distribution undertakings "to give priority to the carriage of Canadian programming services and, in particular, to the carriage of local stations."

Requirement to distribute priority services beginning with basic band

In subsection 17(2) of the *BDU Regulations*, each Class 1 and 2 terrestrial distributor is required to distribute the services listed in subsection 17(1), beginning with the basic band (channels 2 to 13).

This rule was first implemented as part of the 1976 *Cable Television Regulations*. At that time, most Canadian television sets were not equipped with channel converters that would allow a subscriber to receive television services on stations above channel 13. As a result, the basic band requirement was introduced to ensure that all subscribers to a cable television system could receive the priority signals.

The rationale underlying the channel 2 to 13 carriage requirement changed over the years as television sets expanded their channel capabilities well beyond channel 13. Rather than being a requirement that was necessary to ensure that subscribers could actually receive the service, channels 2 to 13 were considered to

[254] As noted earlier, less than 10% of Canadian homes receive their television signals off-air.

be “prime real estate” on a cable television system’s channel line-up that should be occupied by services that made the most valuable contribution to the objectives of the Act.

Significantly, no similar requirement was imposed on DTH distributors when licensed in December 1995.

Recommendation 10(f)-4

We recommend that the Commission investigate the relationship between channel placement and potential viewership. While many specialty services claim that their position on the dial is critical to their ratings, BDUs appear to disagree. If it is found that there is a direct correlation between channel position and viewership, the Commission may want to use this as another element of an incentive-based access policy designed to reward programming services with high Canadian content levels or other attributes that advance the objectives in subsection 3(1) of the Act.

Access Rules for Pay and Specialty and Category 1 Services

The Access Rules were first implemented as a policy statement by the Commission in April 1996.[255] At that time, the Commission indicated that it would include the new Access Rules as part of the revised regulations governing all BDUs.

The impetus for developing the Access Rules came from the Governor in Council when the Cabinet issued Order in Council P.C. 1995-398 in March 1995. In that Order, the Commission was asked to report on the rules to be established to ensure that BDUs would provide fair and equitable access to authorized television programming services, whether licensed or exempt by the Commission. The Governor in Council indicated in its OIC that “there is a need to develop… access rules… to ensure that fair and equitable access is given to all authorized programming services, whether licensed or exempt, which have not been assigned carriage priority by the Commission.” The OIC had been issued in response to the difficulties in obtaining distribution experienced by some specialty services licensed by the Commission in 1993.

The Access Rules are outlined in subsections 18(1) to (6) of the current *BDU Regulations*. Under the rules, each Class 1 and DTH distributor is required to distribute the services of all licensed specialty and pay television undertakings appropriate for its market, to the extent of available channel capacity. This meant that a BDU was required to distribute those specialty and pay television services operating in the official language predominating in the market, and at least one general interest PPV service operating in the pertinent official language. In addition, licensed ethnic programming services also had to be distributed if certain conditions were met, and a 1:1 linkage rule was established with respect to the carriage of exempt programming services.

[255] Public Notice CRTC 1996-60.

In September 1996, with the licensing of a number of new specialty services, the Commission added a new layer of complexity to the access requirements in English-language markets,[256] which would eventually find its way into subsections 18(7) to (10) of the new *BDU Regulations*. That new layer of complexity involved the Commission's decision to choose four English-language services to which the Access Rules would have immediate application, and an additional 13 English-language specialty services to which the Access Rules would apply by the earlier of the deployment of digital technology by the distributor, or September 1, 1999.

The Access Rules became even more complex in 2000 with the licensing of Category 1 and 2 specialty services. Category 1 specialty services were granted digital access rights on all Class 1 and DTH systems, whereas Category 2 specialty services were not.

In our view, subsections 18(1) to 18(5) and 18(11)are entirely consistent with the objectives in the *Broadcasting Act* to give priority to Canadian programming, and to ensure that Canadian programming is presented to Canadians.

However, as discussed in Chapters 6 and 7 of this report, we are recommending a simplified structure to incent programming services to provide more Canadian content by rewarding them with access rights. This system will still guarantee priority carriage to designated services, such as local OTA and 9(1)(h) services, but will tie access rights for most specialty services to the level of Canadian content they produce.

It appears to us that the access provisions that were included in section 18 to address the licensing of the new specialty services in 1996 during the transition from an analog to a digital distribution environment should be removed from the *BDU Regulations*, as they are outdated. This means that subsection 18(6) (which contains a rule relating to the number of analog channels that can be devoted to PPV), and subsections 18(7) to (10) (which contain rules relating to the launch of specialty services license in 1996) should be removed from the regulations.

Recommendation 10(f)-5

We recommend that the Commission delete from section 18 of the *BDU Regulations*, the provisions in subsection 18(6) to 18(10) that are no longer relevant to the terrestrial BDUs to which they apply.

Access Rules for Second language services

In subsections 18(11.1) to 18(11.5) and in section 33.3 of the *BDU Regulations*, the Commission has established a set of access rules governing the distribution of English-language pay and specialty services in francophone markets, and French-language pay and specialty services in anglophone markets. The rules require those Class 1, 2 and 3 cable BDUs that have a nominal capacity that is less

[256] Public Notice CRTC 1996-120.

than 750 MHz (and more than 550 MHz) and that deliver any programming service on a digital basis to 1 specialty service in the language of the French or English language minority for every 10 programming services that are distributed in that market in the language of the majority. For those Class 1 and 2 cable systems that exceeded a nominal capacity of 750MHz, the carriage requirements are more onerous. They must distribute one pay television service in each official language, all specialty services, other than Category 2 services, and the House of Commons in the language of the minority.

The Commission had initiated a proceeding in March 2000, to consider measures that could be implemented to increase the availability of minority official language specialty services to cable subscribers.[257] In April of that year, however, the Governor in Council issued Order in Council P.C. 2000-511, which asked the Commission to consult with the public and prepare a report on French-language broadcasting services available in French linguistic minority communities across Canada. In that OIC, the Governor in Council indicated that it:

- assigns high priority to the fact that the presence of French-language broadcasting services in the French linguistic minority communities in Canada contributes not only to the vitality and development of the Francophone communities, but also responds to the needs of all Canadians who wish to attain a better understanding of both official languages, and

- requests the Commission to seek comments from the public and to report on all French-language broadcasting services provided in French linguistic minority communities in Canada.

In *Achieving a better balance: Report on French-language broadcasting services in a minority environment*, the Commission outlined its policy to ensure that minority language communities throughout Canada could access a range of programming in the official language of their choice.[258] The policy adopted by the Commission was then reflected in the *BDU Regulations* in the manner noted above.

Subsection 3(1) of the *Broadcasting Act* provides that the Canadian broadcasting system should reflect Canada's linguistic duality, and also that:

- a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available;

- English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements.

The Commission's access rules relating to services operating in the official language of the minority would appear to further the specific objective of ensuring

[257] Public Notice CRTC 2000-38.
[258] Public Notice CRTC 2001-25.

that a range of broadcasting services in English and in French are extended to all Canadians as resources become available, and is consistent with priority assigned by the Governor in Council in OIC P.C. 2000-511 to "the presence of French-language broadcasting services in the French linguistic minority communities in Canada".

With this in mind, and with the exception of one minor change that would remove carriage requirements related to the House of Commons programming service from the *BDU Regulations*, we do not recommend any change to these measures. The one change we would recommend would be to incorporate requirements relating to the distribution of the House of Commons programming service into Distribution Order 2006-1. This "housekeeping" measure would ensure that all carriage requirements relating to CPAC and the House of Commons are in one regulatory instrument.

Recommendation 10(f)-6

We recommend incorporating requirements relating to the distribution of the House of Commons programming service into Distribution Order 2006-1.

Category 2 Services Linkage Rule

In 2000, when the Commission created the new type of service, known as a Category 2 digital specialty service, which did not have access rights, the Commission also established a 5:1 linkage rule. The rule, which is set out in subsections 18(12) to 18(14) and section 36, requires a Class 1 or 2 terrestrial distributor or a DTH distributor to distribute five unrelated Category 2 services for each Category 2 service that it distributes which is owned by a related undertaking.

In view of the fact that BDUs would have considerable power in negotiating terms of carriage, marketing arrangements and in selecting which Category 2 services they would distribute, the Commission concluded that it would be "appropriate to adopt measures to ensure that non-affiliated services are treated fairly by distributors".[259] The 5:1 linkage rule was, therefore, designed to ensure that, in an open-entry licensing environment without access rules, BDUs would not show favourable treatment toward services affiliated through common ownership.

While the 5:1 linkage rule for Category 2 services might have been necessary in 2000 when the Commission was embarking on a new form of open-entry licensing, this is no longer the case. To our knowledge, the vast majority of BDUs (even those that have corporate affiliates that operate a number of Category 2 services) have not reached this threshold and, in fact, offer substantially more than five non-affiliated Category 2 services for every one affiliated service they distribute. Moreover, even if they did bump up against this limit, it is not clear that to do so would be unfair or inequitable to other undertakings operating Category 2 services. We would prefer to rely on the strengthened non-discrimination provision and

[259] Public Notice CRTC 2000-6.

improved dispute resolution mechanisms to address this issue, rather than micromanaging the way that discriminatory conduct is to be avoided.

Recommendation 10(f)-7

We recommend that the 5:1 linkage rule for affiliated Category 2 services be deleted from the *BDU Regulations*.

Discretionary Services that may be carried

Sections 19, 33, and 39 provide BDUs with the authority to distribute a number of discretionary programming services, including regional and extra-regional television stations, pay television, specialty and PPV services, VOD services, community programming (terrestrial BDUs only), certain non-Canadian television stations (terrestrial BDUs only), eligible satellite services, certain distant Canadian television stations (terrestrial BDUs only), public affairs programming services and barker channel services.

This list of services has expanded over the years, but the basic premise underlying the provision, which is to specifically identify the types of programming services that BDUs are authorized to distribute, has not changed appreciably since the Commission first established such a list in a series of policy statements relating to authorizations to distribute non-Canadian services (such as CNN and A&E) in 1983 and 1984.

The policy rationale for limiting the types of services that may be distributed by cable systems was outlined by the Commission in 1983.

> [the Commission]…acknowledged the increasingly competitive nature of the communications environment brought about by the rapid expansion of a variety of technologies, and the consequent need for prompt action with regard to the introduction of new programming services to provide diversity and expand the range of discretionary services offered on cable systems. [260]

While it is perhaps time to consider whether the specific restrictions that the Commission has placed on the distribution of some of the services listed in section 19 are necessary to achieve the objectives of the Act, the notion that the Commission should authorize only certain services for distribution would appear to still be valid – as part of its authority to “supervise and regulate all aspects of the Canadian broadcasting system”.

Distributing non-Canadian Services that appear on Lists of Eligible Satellite Services

As noted earlier, the Commission’s policy relating to the distribution of non-Canadian satellite services was first articulated in policy statements issued in 1983

[260] Public Notice CRTC 1983-93.

and 1984. Under that policy, non-Canadian satellite services that would be directly competitive with Canadian services or otherwise have an adverse affect on the development of the Canadian broadcasting system would not be authorized for distribution in Canada.

The authorizations that are currently incorporated by reference into subsections 19(h) and (i) of the *BDU Regulations* were first introduced into regulations when the 1986 *Cable Television Regulations* were promulgated. The Lists of Eligible Satellite Services (the "Lists") have expanded since then to include Lists applicable to all BDUs, and the number of non-Canadian services on those Lists has multiplied.

Today, paragraphs 19(h) and (i) permit Class 1 and 2 BDUs to distribute services on the Part 2 Lists, paragraph 33(h) permits Class 3 BDUs to distribute services on the Part 3 Lists, and paragraph 38(b) permits DTH BDUs to distribute services on the DTH Lists.

The test that must be met by a non-Canadian service to be added to these Lists has evolved over the years, but the basic premise that any service added to the Lists should not have an adverse affect on the development of the Canadian broadcasting system continues to be applicable. The current requirements, set out in Public Notice CRTC 2000-173, include the following three aspects: (i) a statement from the non-Canadian service provider that it has obtained all necessary rights for distribution of its programming in Canada; (ii) an undertaking from the non-Canadian service provider that it does not hold, will not obtain, nor will it exercise, preferential or exclusive programming rights in relation to the distribution of programming in Canada; and (iii) evidence that the new non-Canadian satellite service would not be "either totally or partially competitive" with Canadian specialty or pay television services.

The Lists also contain additional limitations on the distribution of certain of the non-Canadian services. For instance, a cable BDU that does not receive off-air at its local head-end the signals of non-Canadian OTA television stations that appear on the Lists must obtain those signals from a licensed satellite relay distribution undertaking (SRDU).

There are also restrictions placed on the distribution of Playboy TV, because of the adult nature of its content, and Al Jazeera, because of the politically controversial nature of its programming: these restrictions are incorporated by reference into the *BDU Regulations* via the Lists.

The use of Lists to identify services eligible for distribution in Canada, and the test employed by the Commission when it considers applications to add non-Canadian services to the Lists, continue to be valid. While it is true that the non-Canadian services indirectly contribute to the objectives of the Act by adding diversity to the system, and by acting as packaging partners with Canadian programming services (thereby helping ensure that Canadians continue to subscribe to the system), it is also true that non-Canadian services do not make significant contributions to the production or exhibition of Canadian programming. As a result, if

it is determined by the Commission, using the test noted above, that a given non-Canadian service would have an adverse affect on the development of the broadcasting system, then it would appear to be consistent with the objectives of the Act to prohibit that service from being distributed in Canada.

Our only concern is that the "totally or partially competitive test" employed by the Commission is imprecise and not well-defined. In particular, it is often difficult for broadcasters, the operators of non-Canadian satellite services and other interested parties to recognize whether a non-Canadian satellite service is "partially competitive" with a Canadian pay or specialty service, and therefore ineligible for distribution in Canada. We believe the Commission should consider adopting a new approach to determining whether to authorize a non-Canadian satellite service for distribution in Canada, and that approach should be based on an assessment of whether the particular genre of programming can reasonably bear the entry into Canada of a service that operate in the same genre as the existing pay or specialty service.

Recommendation 10(f)-8

We recommend that the Commission adopt a more precise, market-based approach to authorizing the addition of non-Canadian satellite services to the Lists.

Recommendation 10(f)-9

We recommend that the requirement for terrestrial BDUs to obtain the signals of the U.S. OTA television stations from a licensed SRDU be deleted as a requirement.

Limits on distributing Promotional Services

The authorization for BDUs to distribute a promotional service that promotes the programming of other services (i.e. barker channel) is set out in paragraphs 19(n), 33(k) and 39(f) of the *BDU Regulations*.[261] The original authorization for a barker channel was set out in Decision CRTC 83-635, which followed the initial launch of pay television services in 1982. The policy was updated in 1995 in Public Notice CRTC 1995-172 and was most recently updated in 2007.

The current criteria applicable to barker channels, which are set out in Public Notice CRTC 2007-74, are as follows:

- Material aired on promotional channels must be limited to promotional programming pertaining to authorized programming services distributed by the licensee, including previews, clips or trailers.

[261] Broadcasting Public Notice CRTC 2007-74.

- At least 50% of the promotional programming aired in each quarter will be for the promotion of Canadian programming, to the extent that such material is available.

- Access to the promotional channel is to be made available on a non-discriminatory, equitable basis for the promotion of all Canadian television services that the licensee distributes.

- No fees may be charged for the exhibition of promotional material.

The rationale for authorizing BDUs to provide barker channels is fairly straightforward: they encourage Canadians to subscribe to new packages of services and they promote Canadian programming. In our view, the concept of requiring BDUs to use the barker channel to promote Canadian programming services is consistent with the objectives in subsection 3(1) of the Act and continues to have merit.

Distribution Rules – Analog specialties

The current distribution and linkage requirements applicable to Class 1 and 2 distributors, and the linkage rules applicable to DTH distributors, are incorporated by reference into subsections 20(1) and 40(1) of the *BDU Regulations*. Class 1, and to a lesser extent Class 2, distributors are subject to rules that govern both the distribution of Canadian pay and specialty services and linkage rules relating to the carriage of non-Canadian satellite services, whereas DTH distributors are subject only to linkage rules.

The rules relating to the distribution of Canadian programming services are set out in Broadcasting Public Notice CRTC 2007-51. Those rules require Class 1 BDUs to distribute Canadian pay and specialty services that were licensed in an analog distribution environment on a dual, modified dual or discretionary basis.[262] The Public Notice also imposes other distribution requirements relating to the distribution of ARTV, the common distribution of the four French-language services Canal Z, Séries+, Canal Évasion, and Historia, and the distribution of the Food Network, and the various requirements relating to the distribution of Category 1 services on a digital basis.

The rules requiring cable BDUs to distribute pay television, specialty and PPV services on a dual, modified dual or discretionary basis have already been discussed in detail in the preceding parts of this chapter that address those services.

[262] These terms “dual status” and “modified dual status” are defined in the Public Notice as follows – “dual status” means the service is distributed as part of the basic service, unless the operator of that service consents distribution as a discretionary service; and “modified dual status” means the service is distributed on a discretionary basis, unless the service agrees to its distribution as part of the basic service.

Recommendation 10(f)-10

We recommend that the Commission modify its access policy to reward services that have higher levels of Canadian content, enhanced Canadian programming requirements, or that serve to advance a particular policy objective, such as increased drama, with commensurate access rights. If this approach is adopted, section 20(1) of the *BDU Regulations* and the relevant Distribution Rules will have to be modified accordingly.

Distribution Rules – Digital Services

The Commission has established distribution rules with respect to those Canadian services that are distributed solely on a digital basis. Under these rules, Category 1 specialty services are not permitted to be offered on a stand-alone basis, and adult Category 2 services must be offered in such a way that subscribers are not obligated to purchase the service in order to purchase any other programming service.

The rule prohibiting Category 1 services from being offered on a stand-alone basis was designed to help ensure that those services can obtain a level of subscriber penetration (by being included in a package of services) that would make the undertaking financially viable and able to meet its regulatory obligations.

The Category 2 rule, which mirrors the rule applicable to Playboy TV, is intended to ensure that those subscribers who do not want to receive adult programming have the ability to ensure that it is not received in their homes.

In our view, the Category 2 rule remains valid since it provides consumers with the option of subscribing to Adult programming channels, or keeping them out of their homes, without having to sacrifice other non-adult channels that they might wish to obtain. (We would note in passing, however, that other Canadian services are marketing adult content as part of services that feature mainstream movies to all ages of viewership – so there is not any consistency in the application of this principle.)

On the other hand, the Category 1 rule appears to run counter to consumer demand by forcing consumers to take more services than they want. The mouse should not have to subscribe to the catnip channel in order to watch the cheese channel. If a programming service believes that it is being treated in a discriminatory manner, it should have recourse to the Commission pursuant to section 9 of the *BDU Regulations*.

Recommendation 10(f)-11

We recommend deletion of the rule prohibiting Category 1 services from being distributed on a stand-alone basis.

Linkage Rules for pay and specialty services

The linkage rules, which require a BDU to link the distribution of non-Canadian services with Canadian pay and/or specialty services, are applicable to Class 1, Class 2 and DTH BDUs. Under these linkage rules, any non-Canadian service on the Lists must be distributed in a discretionary package, and must be linked to Canadian pay television and/or specialty services distributed as part of that same package. In the case of a package containing one or more Canadian specialty services, only one non-Canadian satellite service from Section A of Part II, Part III or DTH List may be included in the package for each Canadian specialty service in the package. In the case of a package containing one or more Canadian pay television services, up to five non-Canadian services from either Section A or Section B of the List may be included in the package and linked with the Canadian service.

The Commission first established distribution and linkage (or what were called at the time "tiering and linkage") rules in a series of policy statements in 1983 and 1984. Those rules were eventually incorporated into the *Cable Television Regulations* in 1986. At that time, linkage requirements for specialty services were one Canadian service to two non-Canadian services. As for pay television, the linkage rule then was the same as it is now – one Canadian pay television service for every five non-Canadian services. In Public Notice CRTC 1984-81, the Commission indicated that it believed that these linkage rules were necessary

> to ensure that development of the Canadian pay television services is adequately supported through equitable marketing practices. The Commission has therefore decided that the authorized non-Canadian specialty services should be packaged, on a non-discriminatory basis, with Canadian pay television and/or with Canadian specialty services.

The reason that a 5:1 linkage rule for Canadian pay television services was established, rather than a 2:1 or 1:1 rule, related to the financial difficulties experienced by pay television in its early days. In addition, the fact that pay television services rely solely on subscription revenues to survive meant that strong packaging partners were needed to ensure their success.

In our view, the 5:1 linkage rule relating to pay television services is no longer necessary, as the pay television services operating in Canada have achieved considerable brand recognition and financial success.

We also favour elimination of the rule requiring all specialty services to be linked with non-Canadian services in packages on a 1:1 basis. As discussed in preceding chapters of this report, we favour a system in which: the overall package of programming services received by an individual subscriber contains a preponderance of Canadian services; Canadian programming services with high levels of Canadian content are rewarded with greater access rights; and consumers have more choice in deciding which discretionary services they purchase.

Recommendation 10(f)-12

We recommend elimination of the 5:1 linkage rule for Canadian pay television services and the 1:1 linkage rule applicable to specialty services.

Linkage requirements with respect to single or limited point-of-view religious services

Each Canadian single or limited point-of-view religious pay or specialty service may be offered in a discretionary package only with other Canadian single or limited point-of-view religious pay or specialty services, or with any non-Canadian religious satellite services as may be set out in a future List of Eligible (non-Canadian) Satellite Services. Similar to the rules of analog pay and specialty services noted above, there are minimum linkage requirements that require each Canadian single or limited point-of-view religious pay service to be linked in a package with no more than five eligible non-Canadian religious satellite services. Also each Canadian single or limited point-of-view religious specialty service may be linked in a package with no more than one eligible non-Canadian religious satellite service. In addition, a BDU is not permitted to offer a tier containing only non-Canadian religious satellite services.

The rationale for these linkage requirements was outlined by the Commission in Public Notice CRTC 1993-73:

> This approach would permit the creation of a tier of religious programming services that may be attractive to certain subscribers, while preventing any possibility of other subscribers being obliged to purchase single or limited point-of-view religious services in order to access other types of services. Packaging with other Canadian religious services will be at the discretion of the licensees of the program undertakings concerned.

We agree that subscribers should not be required to subscribe to single, or limited point of view, religious programming if they choose not to and that they should not be put in a position when they have to forgo other programming services to avoid these types of religious services.

Linkage Rules for Ethnic Services

In 2004, the Commission amended the distribution and linkage rules to include a “buy through” requirement for Canadian ethnic services.[263] (This followed the public controversy relating to the introduction into Canada of foreign broadcasting services, such as RAI International and RTPi.) Specifically, the rules provide that, in order to receive certain third-language non-Canadian general interest services, BDU customers must also subscribe to specified Canadian services that are providing

[263] Broadcasting Public Notice 2004-96.

service in the same language. In addition, BDUs wishing to distribute third-language non-Canadian general interest services must also offer a Category 2 service in the same language, provided that one has been launched (i.e., a "must-offer" requirement).

The purpose of this new linkage rule was to provide some level of protection for Canadian ethnic services that had launched in the same language. Without the linkage requirement, a BDU could refuse to distribute a Canadian ethnic service, and instead distribute a non-Canadian service in the same language. The fact that the non-Canadian service would not be contributing to the development of Canadian programming and that, in the absence of a linkage requirement, the Canadian service might experience difficulties attracting enough subscribers and advertising revenue to meet its licensing obligations, motivated the Commission to establish the buy through and must offer requirements.

This provision cuts across a number of objectives of the *Broadcasting Act* and creates a difficult policy choice for the Commission. The policy objectives in subsection 3(1) clearly favour the presentation of Canadian programming services to Canadians. However, paragraph 3(1)(s) also requires programming undertakings “to be responsive to the evolving demands of the public.”

When examining the issue of whether an immigrant to Canada should be able to select a programming service originating in his or her country of origin, after purchasing an overwhelmingly predominantly Canadian basic service, the question arises whether we should force that person to also purchase another Canadian service in the language of their country of origin. We are not certain that this is what is demanded of the system under the *Broadcasting Act*. In this context, it is also important to note that competing Internet services, like Jump TV, already offer Canadians a wide source of foreign language programming originating in scores of countries. If consumers opt for these services, rather than for the services offered on the Canadian broadcasting system, due to Linkage Rules and other consumer-unfriendly regulations, these subscribers might be lost to the system completely. With their departure will go advertising dollars associated with the basic tier and BDU contributions to Canadian content funds.

Recommendation 10(f)-13

We recommend eliminating the buy-through and linkage rules for ethnic services and giving Canadian services with high levels of Canadian content other advantages through access rights.

No Tier Containing only non-Canadian services

In addition to the above distribution and linkage requirements, the Commission has also consistently prohibited BDUs from offering a tier or a package

of services containing only English and French-language non-Canadian services. In a system where pay and specialty services are required by regulation and conditions of licence to meet strict CPE requirements, and Canadian content exhibition requirements, and where the primary contribution that non-Canadian services make to the broadcasting system is to act as packaging partners for Canadian services, this prohibition was considered necessary to ensure that English and French-language Canadian services will continue to enjoy the benefits of being packaged with non-Canadian services that are on the Lists.

Must carry House of Commons and Provincial Legislatures programming service on basic

Under subsection 20(2), all Class 1 and 2 distributors are authorized to carry, on an optional basis, the programming service of any undertaking that provides a service that consists of the proceedings of the legislature of the province in which it is operating. If a Class 1 or 2 distributor chooses to carry a programming service that includes the proceedings of a provincial legislature, the service must be distributed as part of the basic service, unless the operator of the programming service agrees to have the service distributed on a discretionary basis.

The Commission's policy relating to the carriage of services comprising the provincial legislatures was introduced by the Commission in 1983 in Public Notice CRTC 1983-245. It was included in the 1986 *Cable Television Regulations* and remains a fixture of the *BDU Regulations*.

Ensuring that Canadians can readily access the proceedings of the provincial legislature as part of the basic service and do not have to buy an additional package of services to obtain access to watch the proceedings of the Provincial legislature provides an important public service that contributes to the objective of serving to safeguard, enrich and strengthen Canada's political fabric.

Access Rules for Exempt Services (1:1 rule)

The Access Rules for exempt programming services were established in 1996, when the Commission adopted, for the first time, an access policy for all Canadian pay and specialty services.[264] Pursuant to section 21 of the *BDU Regulations*, in an analog environment, where a distributor elects to carry, on one or more analog channels, the service of an exempt programming undertaking (such as The Home Shopping Channel) in which the total ownership interest of the distributor and its affiliates exceeds 15%, that distributor must make available an equal number of channels for the distribution of services of third-party owned licence or exempt programming undertakings.

The Commission indicated when it issued the new *BDU Regulations*, that the 1:1 linkage rule would also be applied in situations where a BDU was offering an exempt service that was provided by a "similar type of distribution undertaking".[265]

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[264] Public Notice CRTC 1996-60.
[265] Public Notice CRTC 1997-150.

The concept of a similar type of distribution undertaking was not, however, explicitly included in the *BDU Regulations*, and instead was to be enforced by the Commission through the undue preference or disadvantage provision contained in section 9 of the *BDU Regulations*.

As with the access rules for pay and specialty services, the linkage rule for exempt programming services was designed to ensure that third party-owned exempt undertakings could obtain access to BDUs on a fair and equitable basis. The Commission noted that such concerns were limited to the analog distribution environment:

> …taking into account the capacity limitations that exist where distribution undertakings employ analog technology, the Commission considers that the appropriate principle in such circumstances should be the more limited one of precluding any preferential treatment being given to the exempt services in which distribution undertakings have an ownership interest.[266]

Concerns about preferential treatment for exempt services in which a distributor has an ownership interest have diminished greatly. There are very few distributor-owned licence exempt programming services offered by cable distributors. It would appear that the growth of the Internet and the introduction of a host of new non-Canadian and licensed Canadian services have reduced the appetite of BDUs to offer exempt programming services. With that in mind, we consider that this linkage provision could be removed from the *BDU Regulations*. If concerns arise in the future with respect to the distribution of exempt services, the Commission can adequately address those concerns under the undue preference provisions of the *BDU Regulations*.

Recommendation 10(f)-14

We recommend that the 1:1 access rule for exempt programming services in section 21 of the *BDU Regulations* be deleted.

Audio Programming "must carry" rules

Last year the Commission announced[267] that it was amending section 22 of the *BDU Regulations* to require Class 1 distributors, and those Class 2 distributors that elect to distribute audio programming services, to distribute local community, campus and native radio stations, as well as at least one CBC radio station operating in French and one in English. As a result of this amendment, Class 1 and 2 distributors no longer are required to distribute the signals of all local radio stations.

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[266] Public Notice CRTC 1996-60.
[267] Broadcasting Public Notice CRTC 2006-119.

The rationale for the change to the audio carriage obligations set out in section 22 was noted in Broadcasting Public Notice CRTC 2006-51 as follows:

> In the Commission's view, the distribution of all local radio stations by Class 1 and Class 2 BDUs does not generally represent the most effective or efficient use of distribution technology. The primary means of reception for radio stations is over-the-air reception, and cable serves as a supplement to that reception. Thus, based on the objective stated within subparagraph 3(1)(*t*)(ii) of the Act, it would be reasonable to amend or repeal section 22 of the Regulations.

With respect to the rationale for maintaining the carriage requirements for local community, campus and native radio stations, as well as at least one CBC radio station, the Commission indicated that it was concerned that these stations may face significant limitations in their ability to serve their respective communities absent distribution by BDUs.

We therefore recommend retention of section 22.

Audio Programming Discretionary Services

In addition to the radio stations and other audio programming services that BDUs are required to distribute under section 22, the *BDU Regulations* also set out, in section 23, the audio programming services (including radio stations) that each Class 1 and 2 BDU is permitted to distribute, which include (*a*) any Canadian audio programming service, (*b*) any non-Canadian audio programming service that is received over the air at the local head end (unless the service solicits advertising in Canada, or consists of programming that has predominantly religious content), and (*c*) any international radio service operated or funded by a national government or its agent.

Pay Audio Carriage Rules

The distribution of pay audio services by Class 1 and DTH distributors is subject to linkage requirements, in sections 24 and 41, that are similar to those applicable to exempt programming services, which are noted above.

The Commission determined in 1996 that, where the licensee of a distribution undertaking elects to distribute the service of a pay audio programming undertaking in which the total ownership interest of the distributor and its affiliates, as well as that of any other "similar type of distribution undertaking", exceeds 30%, the distributor must provide access to at least one other Canadian pay audio service in which the total ownership interest of the distributor and its affiliates, as well as of any similar type of distribution undertaking, is 30% or less.[268] As in the case with exempt services, the Commission decided when it introduced the *BDU Regulations* that the policy relating to the distribution of pay audio services owned by a "similar type of

[268] Public Notice CRTC 1996-60.

distribution undertaking" would be applied through the undue preference or disadvantage provision contained in section 9 of the Regulations.[269]

The following rationale for the linkage rule was noted in Public Notice CRTC 1997-150:

> The Commission's intention was to preclude the possibility of industry alliances that might unfairly deny access to the programming service of an independent pay audio programming undertaking.

In our view, the market for audio services is highly competitive with numerous OTA radio stations and now digital satellite radio services competing for market share. In this environment, and given our recommendation to strengthen the anti-discrimination provision in section 9, this rule is no longer required.

Recommendation 10(f)-15

We recommend that the Commission delete the linkage rules in sections 24 and 41 of the *BDU Regulations*.

Rules relating to the use of Restricted Channels (Section 25)

Since the *Cable Television Regulations* were first established in 1976, the Commission has prohibited BDUs from distributing certain Canadian programming services on a restricted channel.[270] The current rule, which is found in section 25 of the *BDU Regulations*, prohibits Class 1 and 2 BDUs from distributing on a restricted channel licensed Canadian pay and specialty services, community programming services, the priority services listed in subsection 17(1) or (5), the provincial legislature service or audio services that are required to be distributed under section 22 of the *BDU Regulations*.

The rule prevents a BDU from unilaterally deciding to distribute a service on a channel that may have significant audio and/or visual interference. The concern is that the financial well-being of a licensed programming service, and its ability to meet its regulatory obligations, could be materially affected by being distributed on a channel that experiences significant interference from an over-the-air station. This is consistent with the objectives of the *Broadcasting Act* to give priority to Canadian programming and to deliver high quality programming services.

Given the continuing presence and importance of the analog service offered by cable BDUs, concerns relating to the distribution of Canadian programming

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[269] Public Notice CRTC 1997-150.

[270] The *BDU Regulations* define a "restricted channel" to mean a channel of a cable distribution undertaking that is the same channel on which signals are transmitted by
(*a*) a local television station or a local FM station; or
(*b*) a television station or an FM station that has a transmitter site located outside Canada within 60 km of any part of the licensed area of the undertaking.

services on restricted channels have not diminished in any way. We therefore recommend retention of this section.

Channel realignment Notification

The requirement, set out in section 26 of the *BDU Regulations*, for Class 1 and 2 BDUs to provide Canadian programming services with 60 days written notice, prior to implementing a channel realignment, was introduced in 1996.[271] In that Public Notice, the Commission acknowledged that channel realignments could have a negative impact on programming services and that, at a minimum, each service provider affected by an alignment should have an adequate opportunity to inform its subscribers of its new channel position.

Significantly, no such rule was applied to DTH distributors.

In an environment where BDUs have the ability to impact the financial well-being of a programming service, simply by implementing a change to the channel upon which it is distributed, it is not an unfair burden to impose a requirement that some level of notice be given to the service before the channel that viewers have used to gain access to the service is to be changed. We recommend that the rule be extended to all BDUs.

As discussed earlier in this report, we also recommend that the Commission investigate the relationship between channel location and viewership to determine whether to reward Canadian programming services with high levels of Canadian content with favourable channel placement. Regardless of whether such an option is pursued, we consider this notice provision to be appropriate.

The following six rules are addressed in Chapter 10(b) respecting Community Television:

- Community Channel Programming Rules (section 27(1))
- Community Channel Promotional Announcement Rules (sections 27(1.1) and (1.2))
- Minimum local community programming requirements (section 27.1(1))
- Minimum access community programming requirements (section 27.1(3))
- Community Channel Logging requirements (section 28)

[271] Public Notice CRTC 1996-60.

Financial Contribution to Canadian Content

The contributions that most BDUs must make to support the production of Canadian programming are set out in sections 29 (for Class 1 and 2 BDUs) and section 44 (for DTH BDUs). In 1998, the Commission implemented sections 29 and 44 of the *BDU Regulations* wherein it required all Class 1, Class 2 and DTH licensees to contribute 5% of gross revenues derived from broadcasting activities to independent production funds for the development of Canadian programming.

Of the required amounts, 80% must be directed to the CTF, and 20% to one or more approved independent production funds. Recognizing the valuable role that the community channel had come to play in the broadcasting system, the Commission also permitted those Class 1 and 2 BDUs that elect to continue to provide an outlet for local expression (i.e. a community channel), to allocate a portion of the 5% (between 2% and the full 5%, depending on the size of the undertaking) for this purpose. The balance of the 5% contribution must be allocated to the CTF or one or more qualifying production funds. The specific funding split between local expression and production funds depends on the class of system and on the number of subscribers served.

From the very beginning of the Commission's jurisdiction over cable television undertakings, the notion that cable distributors should contribute to the cost of the production of programming has been a constant policy theme of the Commission.[272]

However, it was not until the Structural Public Hearing in 1993 that the Commission sought to adopt a funding formula for the production of Canadian programming that would involve the cable television industry. Following the Structural Hearing, the Commission concluded that more money must be raised within Canada for the production of Canadian programming to serve Canadian audiences, if such programming is to compete in the multi-channel universe. The Commission outlined the rationale for adopting a new funding formula as follows:

> An increasing challenge facing the Canadian broadcasting system and the Commission in an era of expanding viewer choice will be to ensure that Canadian information, ideas, values and creativity are given maximum exposure on our television screens. The Commission emphasizes that consistent with section 3 of the Act, not only must the Commission see to it that there are Canadian undertakings in operation, it must also ensure that those undertakings are distributing a diverse range of quality Canadian programming that is attractive to Canadian viewers. [273]

The Commission also announced that it would amend the cable rate regulation mechanisms to provide financial support for Canadian programming. Specifically, contributions by cable licensees to a production fund would be linked to the capital expenditure (CAPEX) component of the cable fee structure. While the

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[272] See, for example, the July 1971 *Policy Statement on Cable Television*.
[273] Public Notice CRTC 1993-74.

details of the mechanism are not important it is notable because it was the first time that the Commission announced a funding formula for the cable television industry to contribute to Canadian program production that would not be voluntary in nature.

The funding formulas for contributing to Canadian programming that are currently set out in the *BDU Regulations* were, in part, derived from the two principal mechanisms that the cable industry had utilized over the previous decade to contribute to Canadian programming. As noted, prior to 1998, Class 1 systems and Class 2 systems with 2000 or more subscribers, were required to provide and fund a community channel. In addition, many Class 1 distributors also made voluntary contributions to the Cable Production Fund, which was independently-administered and supported the creation of Canadian drama, children's programming and documentaries for exhibition by Canadian programming undertakings.

In its 1995 Convergence Report, the Commission affirmed that all terrestrial distribution undertakings should make comparable contributions to outlets for community expression, and that all licensed distribution undertakings, including DTH distributors, should make a financial contribution to the development and production of Canadian programming.

In the Commission's decisions approving the license applications for DTH distributors, it was decided that, since DTH distributors offer national services, their ability to provide opportunities for local self-expression would be problematic, and therefore a requirement was imposed on each DTH distributor to contribute 5% of its gross annual revenues to an independently-administered production fund for the creation of Canadian programming. In 1998, this requirement was included in the *BDU Regulations*, along with the current funding formula noted for Class 1 and 2 BDUs.

The funding mechanism established by the Commission in the *BDU Regulations* has been a success. Any concerns that the Commission or other parties might have had regarding the fate of community programming when the Commission amended its rules in 1998 have not materialized. BDUs have continued to provide an outlet for local and community expression on their undertakings and have, in most instances, provided adequate funding to their community channels.

At the same time, the additional funds that have been allocated to the CTF and the independently-administered funds have contributed to the production of significant amounts of new Canadian programming, particularly programming in underrepresented categories, like drama and children's programming. While the manner in which the CTF distributes the money it receives from BDUs and others has recently been subject to criticism, the CTF Task Force recently highlighted the fact that that funding received from BDUs "remains an effective mechanism to ensure that BDUs contribute to the fulfillment of the objectives of the *Broadcasting Act*." The Task Force also noted that the CTF and independently-administered funds are an important element in the broadcasting system:

> The CTF has become a key element in the production of Canadian programs, with its investments of over $260M per year, which are in

> addition to provincial and federal tax credits of approximately $455M per year and spending by broadcasters of approximately $1.8B per year. Other independent production funds certified by the CRTC allocate approximately $36M per year. The CTF money is directed only to programming in the genres of drama, children's and youth programming, documentaries and variety/performing arts.[274]

Pending implementation of some or all of the recommendations set out in the Report of the Task Force, and any other recommendations that come out of the Commission current proceeding on how best to implement the Task Force's recommendations, we are not proposing any fundamental changes to the funding formula set out in sections 29 and 44 of the *BDU Regulations*.[275]

As mentioned above, historically, DTH BDUs have not been permitted to provide a community channel because their satellite coverage was not limited to a "local community."

In our view, if DTH undertakings want to provide more Canadian programming and more outlets for "community" expression, they should not be discouraged from doing so. In our "narrow-cast" world, and in the world of the Internet, communities are less frequently described in terms of geography and more often in terms of "community of interest."

Since one of the objectives of the *Broadcasting Policy for Canada* is to "encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinion, ideas, values…" and "be drawn from local, regional, national … sources", and since the Canadian broadcasting system is required to be "readily adaptable to scientific and technological change", the time has come to reassess the role of DTH in providing an outlet for this form of inter-regional or national expression. In our view, it is conceivable that a format can be developed for regional expression on a national platform giving rise to an exchange of ideas across the country. This type of platform might make television more relevant in an environment where the Internet is currently providing a world stage for "local" expression.

The regulatory system should be encouraging more Canadian outlets for this form of expression – not limiting it.

Recommendation 10(f)-16

We recommend that the Commission permit DTH BDUs to provide a forum for inter-regional expression by Canadians and for participation in inter-regional communities of interest.

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[274] *Report of the CRTC Task Force on the Canadian Television Fund*, 29 June 2007.
[275] Broadcasting Public Notice CRTC 2007-70.

Simultaneous Substitution and Program Deletion

Rules requiring simultaneous signal contribution i.e., requiring BDUs to substitute the signal of a local or regional television station for that of a lower priority Canadian or non-Canadian television station when the signals contain programming that is identical and broadcast at the same time, have been a fixture of the Canadian broadcasting system since the early 1970s. Today, the simultaneous substitution rules are set out in section 30 of the *BDU Regulations* for Class 1 and 2 BDUs, and section 42 for DTH BDUs.

Under subsection 30(2) of the *BDU Regulations*, Class 1 distributors are obligated to perform simultaneous substitution pursuant to requests of local and regional television stations where the program service to be deleted and the programming service to be substituted are "essentially identical" and are simultaneously broadcast. Class 1 distributors are also authorized to perform similar substitutions at the request of Canadian specialty services. Class 2 distributors, on the other hand, are only required to perform substitutions with respect to privately owned local television stations, and only if the main studio of the privately owned local television station is located within the licensed area of the Class 2 distributor and is used to produce locally originated programming.

DTH distributors are subject to both simultaneous substitution and non-simultaneous program deletion requirements under the *BDU Regulations*. With respect to simultaneous substitution, subsection 42(1) of the *BDU Regulations* require DTH distributors to (a) delete a non-Canadian programming service and substitute the comparable and simultaneously broadcast programming service of the Canadian television programming undertaking whose signal is distributed by the licensee; and (b) delete, in respect of subscribers located within the Grade B contour of the Canadian television programming undertaking, a programming service that is comparable to that of the Canadian television programming undertaking and that would otherwise be received simultaneously by those subscribers.

In addition to these simultaneous substitution requirements, section 43 of the *BDU Regulations* also requires DTH distributors to delete, in respect of subscribers located within the Grade B contour of the Canadian television programming undertaking, a programming service that is identical to that of the Canadian television programming undertaking and that would otherwise be received by those subscribers on a non-simultaneous basis within the same broadcast week.

The non-simultaneous program deletion requirements set out in section 43, and the requirement to delete certain signals that are distributed to subscribers that are located within the Grade B contour of television station in paragraph 42(1)(b) of the *BDU Regulations*, have been suspended, by condition of licence, for both DTH distributors operating in Canada. In the place of these requirements are alternative measures, which include requirements to distribute a certain number of smaller market Canadian television stations and to devote a portion of the 5% contribution to Canadian programming to a new fund to assist these stations.

The original rationale for the implementation of rules relating to simultaneous substitution was outlined by the Commission in its 1971 *Policy Statement on Cable Television*. In that policy statement, the Commission sought to establish rules that would restore the significance of the franchise granted to stations licensed to service a community:

> Where a cable television system carries distant stations as well as the local service, it may well happen that the same programme is available on more than one channel at the same time…
>
> Here, the cable television system is providing no additional programme choice to the viewer. But the audience of the station licensed to serve the cable system area is still diminished. Neither viewer nor broadcaster benefits.
>
> The Commission is concerned to restore the licensing logic of the broadcasting system, and to strengthen Canadian television service, without reducing the choice and flexibility that cable television offers.

With the establishment of the *Cable Television Regulations* in 1976, the Commission incorporated its policy relating to simultaneous substitution into the regulations, making it a requirement for all cable distributors to perform such substitutions to protect the program rights of local Canadian television stations.

While the rules relating to simultaneous substitution have been adjusted over the years, the basic premise underlying the rules has not changed. In Public Notice CRTC 1996-69, the Commission emphasized that

> The Commission considers that simultaneous substitution remains an effective tool for maintaining the integrity of the program rights acquired by Canadian broadcasters and protecting their advertising revenue base.

A similar statement was made a year later when the Commission was considering whether to extend the substitution requirements to all competitive BDUs.[276] As noted by the Commission in that Public Notice, "the Commission considers that simultaneous substitution is an essential means of enabling broadcasters to exploit their program rights".

Simultaneous program substitution requirements have been an integral part of the regulatory framework for cable distributors since 1976 and have been considered to be an effective and necessary mechanism for protecting the program rights acquired by Canadian broadcasters.

However, as discussed in Chapter 6, simultaneous substitution also has a deleterious effect on the scheduling of Canadian programming content in peak viewing periods and therefore a negative impact on a key objective of the

[276] Public Notice CRTC 1997-25.

Broadcasting Act. For that reason, we have recommended that the Commission review the net impact of simultaneous substitution on the Canadian Broadcasting System and consider whether other regulatory mechanisms might better serve the system.

Authority to distribute specific U.S. 4+1 stations on basic

By condition of licence, the Commission authorizes each BDU that does not receive the signals off-air to distribute the five specific PBS, NBC, FOX, CBS, and ABC network affiliated television stations (the "4+1 stations") as part of the basic service. The rationale for the requirement to identify the specific 4+1 stations is tied to the simultaneous substitution rules noted above. In order for local Canadian television stations to be in a position to match their programming schedules with those of the 4+1 stations, and thereby take full advantage of the benefits associated with simultaneous substitution, they must know which 4+1 stations are being distributed.

We are not proposing any changes to this policy.

Winback Rules

The concept of winback restrictions was first introduced into the broadcasting distribution market on April 1, 1999. On that date, the Commission issued a letter to BDUs announcing that, as a matter of policy, it would require incumbent cable companies, for a period of 90 days, to refrain from the direct marketing of customers who have notified their intention to cancel basic cable service.

The Commission, in response to an application by the CCTA, announced[277] that it would remove the winback restrictions as they applied to incumbent cable BDUs serving single unit dwellings (SUDs). With respect to multiple unit dwellings (MUDs), however, the Commission determined that it would be appropriate to retain the winback rules for those customers. The Commission then introduced additional winback restrictions to govern the conduct of incumbent cable distributors in their dealings with residents of MUDs, which included the prohibition on contacting any resident of MUD who has switched to a new BDU, and a requirement to refrain from target marketing all residents of a MUD (or from offering them discounts or other inducements not generally available to the public) for a period of 90 days following the date on which a new entrant enters into an access agreement to offer services in the MUD.

The rationale for the winback rules was set out in an April 1, 1999 CRTC letter where the Commission compared the broadcasting distribution market to the telephone local exchange market and pointed out that the two markets exhibited similar characteristics. The Commission emphasized that the market power of incumbents, and the customer information they possessed, would allow them to win

[277] Broadcasting Public Notice CRTC 2004-62.

back customers after being notified of the intent to change service providers. In the Commission's view, "such activities would likely be an impediment to the development of a competitive local market". The Commission then noted that:

> The ability of new entrants to engage effectively in this activity is counterbalanced by the incumbent distributors' dominant position and their significant market share. Moreover, new entrants do not have a critical mass of historical customer information or the range of services that incumbent cable companies currently enjoy. Accordingly, the Commission considers it appropriate that the restrictions set out above should be imposed on an asymmetrical basis.[278]

Given that the Governor in Council,[279] the TPR Panel[280] and the CRTC itself[281] have moved to remove the winback restrictions in the local telephone market, even in advance of forbearance from rate regulation, and given that the new entrant BDUs have achieved success in the BDU market with approximately 26% of market share, it would appear that the winback restrictions are no longer required.[282]

Recommendation 10(f)-17

We recommend that the Commission eliminate the winback restrictions on cable BDUs.

[278] CRTC Letter - Re: CISC Dispute - *Rules Regarding Communication Between the Customer and the Broadcasting Distribution Undertaking* (April 1, 1999).
[279] Telecom Decision CRTC 2006-15.
[280] Telecommunications Policy Review Panel, Final Report, 2006.
[281] Telecom Public Notice CRTC 2005-2.
[282] CRTC, *Broadcasting Policy Monitoring Report* 2007, July 2007.

Local Avails

In a footnote to Broadcasting Decision CRTC 2007-169, the Commission described "local availabilities" as follows:

> (1) The term "local availabilities" refers to the approximately two minutes per hour of airtime set aside in the programming of certain U.S. satellite programming services for use by distributors. Although the programming services routinely include their own commercial or promotional messages in their satellite signals during these two minutes per hour, Canadian distributors are often permitted to strip out this material and substitute it with certain promotional messages.

Current CRTC policy, which has been implemented by way of conditions attached to the licenses of most of the larger BDUs, authorizes them to insert certain promotional material as a substitute for the local availabilities programming of the U.S. satellite services. At least 75% of local availabilities used by BDUs must promote Canadian programming services, and up to 25% may be used to promote other services offered to BDU subscribers, including certain non-programming services (such as Internet access).

The Commission stressed in Decision CRTC 2007-169 that its current policy "… assumes that Canadian BDUs have negotiated the right to use local availabilities from U.S. programming services". The CRTC does not, in other words, convey a right to Canadian BDUs to make use of local availabilities without first obtaining the consent of the affected U.S. programming services. This is, of course, consistent with the longstanding regulatory prohibition on alteration and curtailment of programming signals that is contained in section 7 of the *BDU Regulations*.

For their part, the BDUs do not advocate an amendment to section 7 of the *BDU Regulations*. They accept that it is necessary and appropriate to acquire, through negotiation with the U.S. satellite services, the right to use the local availabilities in these satellite programming signals – as their BDU counterparts in the U.S. have done for the past two decades.

However, BDUs have contended in several recent applications to the Commission that the current restrictive policy on the use of local availabilities should be changed. They have argued that BDUs should be able to "monetize" the potential Canadian advertising time that exists in the local availabilities (i.e., two to three minutes per hour) by selling the time to either local or national Canadian advertisers.

If there is to be greater reliance on market forces in the future, the Commission should recognize that there is significant potential to generate untapped Canadian commercial advertising revenues from the authorized sale by Canadian BDUs of the local availabilities time in the signals of U.S. satellite programming services they distribute. At the recent hearing of the Only Imagine Inc. application, it

was conservatively estimated that in excess of $40 million per year could be generated if the avails could be "monetized".[283]

A 'quid pro quo' for a more liberalized CRTC local avails policy might be a "tithing" of a percentage of the new advertising revenues to be donated to a television programming fund, such as the Canadian Television Fund.

Also there is room for discussion as to whether a more liberalized local availabilities policy should restrict the new Canadian advertising to national advertising. (Because of the significant amount of local television programming exhibited on the community channels of most cable BDUs we do not think that a restriction on the sale of local advertising would be necessary, but that is an issue the revised policy should address.)

Recommendation 10(f)-18

We recommend that the Commission consider a more market-oriented policy for the use of local availabilities – a policy which might generate revenue to support the production of Canadian programming.

Deletion and Substitution Rules for Distant Canadian Signals and Second Set of U.S. 4+1 stations

By condition of licence, most cable BDUs are currently authorized to distribute distant Canadian signals and a second set of U.S. 4+1 signals on a discretionary basis, subject to certain requirements imposed by the Commission in Decision 2000-437 (or subsequent decisions). DTH distributors are similarly authorized to distribute a second set of 4+1 signals, but their authority to distribute the signals of any Canadian television station is found in subsection 39(a) of the *BDU Regulations*.

Cable and DTH BDUs that have obtained the authority to distribute distant Canadian signals and the second set of U.S. 4+1 signals are required by condition of licence to adhere to the requirements regarding non-simultaneous program deletion set out in section 43 of the *BDU Regulations*. The Commission has, however, also indicated in various decisions that it would suspend the requirement to perform non-simultaneous program deletion if an agreement could be reached between the BDU and the broadcasters that would adequately protect or compensate the local OTA television stations for the negative impact that this form of distribution would have on the value of their program rights.

The standard condition of licence that was established in Decision CRTC 2000-437 reads as follows:

> The distribution on a discretionary basis on the licensee's digital service of a second set of U.S. 4+1 signals (that is, a set of U.S. 4+1 signals in addition to the set of such signals already carried by the

[283] Broadcasting Decision CRTC 2007-169.

> system) and Canadian distant signals is subject to the provision that, with respect to such signals, the licensee adhere to the requirements regarding non-simultaneous program deletion set out in section 43 of the *Broadcasting Distribution Regulations*. The Commission may suspend the application of this provision upon its approval of an executed agreement between the licensee and broadcasters. Such an agreement must deal with issues related to the protection of program rights arising in connection with the discretionary carriage of a second set of U.S. 4+1 signals and Canadian distant signals solely on the applicant's digital service, as approved in this decision.

There have been agreements between BDUs and the CAB, which have allowed the Commission to suspend the non-simultaneous program deletion requirements set out in section 43 of the *BDU Regulations*.[284] Most of those suspensive conditions were to expire on August 12, 2006. However, in subsequent decisions, the Commission has extended this until six months after the date the CRTC issued its determination in the proceeding initiated under Broadcasting Notice of Public Hearing 2006-5, *Review of certain aspects of the regulatory framework for over-the-air television*.[285]

As noted earlier, the Commission has repeatedly expressed concern about the negative impact that the distribution of distant signals into local markets could have on the revenue base of the local OTA televisions stations.

As a result of these concerns, the Commission established a “distant signal policy”, and incorporated it by reference into subsection 19(k) of the *BDU Regulations*, which requires Class 1 and 2 cable distributors to apply for the authority to distribute distant signals.[286] This policy remains in effect for those BDUs that do not have a condition of licence comparable to the one set out above, that was taken from Decision CRTC 2000-437.

The Commission’s rationale for allowing cable BDUs, such as those listed in Decision CRTC 2000-437, to distribute distant signals and an additional set of U.S. 4+1 signals without complying with the policy outlined in Public Notice CRTC 1993-74, was not explicitly stated in Decision CRTC 2000-437. However, the Commission did appear to accept the arguments of the cable distributors applying to carry the services that the distant signal policy outlined in Public Notice CRTC 1993-74 was appropriate only for analog distribution of those services:

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[284] In Broadcasting Decision CRTC 2005-198, for example, the Commission suspended the application of the provision, for a period ending August 12, 2006, subject to the requirement that the licensee pay the following monthly fees to the Canadian Association of Broadcasters, on behalf of affected broadcasters, in lieu of performing non-simultaneous program deletion: $0.50 for each subscriber who receives Canadian distant television signals on a digital discretionary basis and $0.25 for each subscriber who receives a second set of U.S. 4+1 signals on a digital discretionary basis.

[285] See for instance the Bell ExpressVu condition of licence in Broadcasting Decision CRTC 2006-572. The Commission issued its decision on the Broadcasting Notice of Public Hearing CRTC 2006-5 proceeding on May 17, 2007 (Broadcasting Public Notice CRTC 2007-53).

[286] Public Notice CRTC 1993-74.

> The Commission agrees that discretionary carriage in a digital format of Canadian signals included on the *List of Part 3 eligible satellite services* and an additional set of U.S. 4+1 signals, coupled with other initiatives such as the carriage of new licensed Canadian digital services, may indeed serve as an incentive for cable customers to subscribe to the digital service offered by cable systems. It also provides an opportunity to increase the choice of signals available to cable subscribers.

We are cognizant of concerns of OTA television broadcasters relating to the Commission's approach to authorizing the carriage of distant signals and how it is undermining the programming rights of these broadcasters. We would note, in this regard, that the approach adopted by the Commission in 2000 is quite different from the approach employed by the FCC in the United States. In the United States, retransmission consent is required for the carriage of all OTA television stations that do not have must carry status, including distant television stations.

In the situation where a cable system has obtained the consent necessary to distribute a distant television signal, a local television station that is transmitting its signal over-the-air in the same area served by that cable system is entitled to protect its programming rights by exercising non-duplication rights against the distant television stations. Where a local television station exercises its non-duplication rights, a cable system is required to delete the programming of the distant signal in respect of the programming that the local television station holds exclusive rights. The local television station may assert non-duplication rights regardless of whether their signals are actually being transmitted by the local cable system and regardless of when the programming is scheduled to be broadcast by the distant television station.

Recommendation 10(f)-19

We recommend that the Commission undertake a review of its distant signal policy and consider amending the carriage rules for distribution of distant signals to ensure that the programming rights of OTA television stations are adequately protected.

Carriage of APTN, CPAC, VoicePrint and TVA

Pursuant to paragraph 9(1)(h) of the *Broadcasting Act*, the Commission "may require any BDU licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission." The Commission has used this authority to require the distribution of four services as part of the basic service

offered by BDUs: TVA, APTN, CPAC and the audio programming service "VoicePrint" which is operated by the National Broadcast Reading Service.[287]

In Decision CRTC 98-488, 29 October 1998, the Commission approved the national distribution of TVA on the grounds that such distribution would help increase the availability of French-language television services across Canada and would contribute to the promotion of Canada's linguistic duality and cultural diversity.

In Decision CRTC 99-42, 22 February 1999, the Commission determined that the national distribution of APTN would strengthen the cultural identity of Aboriginal peoples and offer a cultural bridge between Aboriginal and non-Aboriginal Canadians that would further the objective set out in subsection 3(1)(o) of the Act.

In Decision CRTC 2000-380, as corrected by Decision CRTC 2000-380-1, the Commission concluded that VoicePrint provided a unique service of particular benefit to Canadians who are blind, visually impaired or dyslexic, and that its mandatory distribution was consistent with the accessibility objective set out in subsection 3(1)(p) of the Act.

In Broadcasting Decision CRTC 2002-377, as amended by the Distribution Order attached to Broadcasting Public Notice CRTC 2006-5, the Commission found CPAC's licensed public affairs programming to be a significant and valuable complement to its coverage of the proceedings of the House of Commons, and determined that, consistent with the objectives of the Act, granting CPAC mandatory carriage on the basic service of BDUs would contribute to maintaining and enhancing Canada's national identity and cultural sovereignty.

In our view, this policy is entirely consistent with the objectives of the *Broadcasting Act* and should be retained. Section 9(1)(h) provides an important means for the Commission to ensure carriage of important Canadian services which market forces might not otherwise dictate be carried in different regions of Canada. This power is also an important one in ensuring that the Canadian broadcasting system strengthens and enriches the cultural, political, social and economic fabric of Canada.

Obligation to Serve and Rate Regulation

Under the *BDU Regulations* that were promulgated in 1998, the basic monthly fee of a Class 1 cable distribution undertaking would become deregulated once the undertaking provides documentary evidence that the basic service package of one or more licensed DTH or terrestrial distributors is available to 30% or more of the existing households in the undertaking's licensed service area, and that the number of its basic service subscribers has decreased by at least 5% from the date that the basic service of a licensed competitor was first introduced in the licensed area of the incumbent.

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[287] Recently, in July 2007, the Commission issued Broadcasting Decision CRTC 2007-246, in which it approved four additional Distribution Orders for the National Broadcast Reading Service Inc., the Avis de recherché inc., CBC Newsworld and Lé Reseau de l'information.

A licensee would become fee deregulated 60 days following provision to the Commission of appropriate documentation verifying that the two-pronged test has been met, and that subscribers have been notified of the licensee's proposal to be deregulated.

Similarly, the cable television licensee's obligation to serve, contained in section 48 of the *BDU Regulations*, would cease to exist for Class 1 distributors when the test for deregulation set out in subsection 47(1) has been satisfied.

With respect to new entrants into the distribution market, the Commission indicated in Public Notice CRTC 1997-25 it would not regulate the rates of new BDUs. In the Commission's view, rate regulation of new entrants "would not be in keeping with the objectives of encouraging increased reliance on market forces in the provision of services and ensuring fair and sustainable competition in the delivery of communications services to the home".

Today, almost all Class 1 cable distributors have had their basic rates deregulated, and have therefore provided the Commission with documentary evidence that the test established in section 47 for deregulation has been satisfied.

Despite the fact that BDU rates have continued to increase over time, it appears that the BDU market satisfies the tests for rate deregulation recently established by the Commission and the Governor in Council in the local telephone market. In most Canadian markets there are between two and three BDUs operating (cable plus two DTH services), as well as OTA television and, in some cases, other smaller suppliers of MMDS. In addition, consumers have access to Internet and mobile television services. In some regions, the local telephone company also provides competition using IP-based BDU services delivered on their wireline facilities. Nationally, the Commission has reported that DTH services account for approximately 26.3% of subscribers of BDU services.[288] We would note that with this level of coverage from a range of facilities-based BDUs, and with this level of penetration by DTH BDUs, the BDU market would satisfy the Commission's recently established tests for forbearance from regulation of local rates in the telecommunications market, if such tests were applied to the BDU market. This would be true of the original test established by the Commission,[289] as well as the test formulated by the Governor in Council.[290] We expect competition to increase further once some of the packaging rules for programming services are relaxed.

For these reasons we do not see a need to regulate the retail rates for BDU services.

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[288] *Broadcasting Policy Monitoring Report*, 2007, Table 4.2.
[289] Telecom Decision CRTC 2006-15, *Forbearance from regulation of retail local exchange services*.
[290] Order Varying telecom Decision CRTC 2006-15, P.C. 2007-532, 4 April 2007.

Exemption Orders For Small Cable Undertakings

The Commission issued a *Proposed Exemption Order for Small Cable Systems*, in 2000 in the context of its review of the regulation of cable undertakings.[291] The order proposed to exempt persons operating cable systems that have fewer than 2,000 total subscribers (all systems and licences included) and serve smaller communities with populations under 10,000. The reference to a specific population of the area served was later dropped from the order.

The Commission again sought comments with respect to a revised proposed order as part of Public Notice CRTC 2001-59. The revised criteria were intended to reflect, among other things, the Commission's policy with respect to distribution of services in the official language of the minority set out in *Achieving a better balance: Report on French-language services in a minority environment*.[292]

The Commission was of the view that small cable systems generally have few employees and limited resources, and are therefore the most affected by the administrative burden of dealing with the Commission.[293]

The Commission felt that the exemption was appropriate given the fact that most of these systems were already regulated in a light manner. In addition, the Commission opined that deregulation would allow cable systems in rural areas to focus their energies on responding to increasing competition from both DTH and MMDS service providers.

The Commission issued its exemption order in December 2001.[294] The purpose of these small cable undertakings was described as serving small and rural communities, and serving fewer than 2,000 subscribers. The order, which was amended includes the following criteria:[295]

- Exempt cable undertakings are permitted to source their 4+1 U.S. network signals either from licensed SRDUs or from non-Canadian satellite service providers. Many of the small cable undertakings that are the focus of the current exemption order are not in a position to receive their U.S. 4+1 signals over the air or via microwave, and must acquire U.S. 4+1 signals from another source. Until December 2001, under the Commission’s rules, this source had to be a licensed SRDU. These Canadian SRDUs or their affiliates, however, also owned and operated the same DTH satellite distribution undertakings that were in direct competition with small cable operators.

- An undertaking having a bandwidth of 550 MHz or more was required to distribute the House of Commons proceedings and its committees,

[291] Public Notice CRTC 2000-162.
[292] Public Notice CRTC 2001-25.
[293] Public Notice CRTC 2000-162.
[294] Public Notice CRTC 2001-121.
[295] Broadcasting Public Notice CRTC 2002-74.

in both official languages (Public Notice CRTC 2001-121, para. 11). This criterion was later amended to harmonize with section 33.3(1)(c) of the *Broadcasting Distribution Regulations*, published in Public Notice CRTC 2002-72.[296]

- There is a requirement for a preponderance of Canadian programming services with respect to each of analog and digital signal delivery.[297]

- Any undertaking that has a nominal bandwidth capacity of at least 550 MHz and delivers any programming service on a digital basis must distribute the English and French language versions of CPAC's public affairs programming service. These undertakings are granted flexibility with respect to the technical means by which they distribute CPAC in both official languages.[298]

The number of exempted broadcasting distribution undertakings is difficult to ascertain because as providers of exempted services are not licensed and not subject to any other reporting obligations. However, it is apparent that the relative scope of the Small Cable Exemption Order has been considerable. As of March 31, 2000, prior to the introduction of the Order in December 2001, Canada reported 2,071 licenced cable undertakings. By March 31, 2004, that number had decreased to 663, in part due to the impact of the Order, and in part due to industry consolidation. When the Order was issued in December 2001, the Commission's records indicated that there were 1,583 cable distribution undertakings having fewer than 2,000 subscribers that were therefore eligible for exemption order.[299]

We do not recommend any changes to these exemption orders. They provide a very successful example of how regulation and the regulatory burden can be reduced through carefully structured exemption orders.

[296] Broadcasting Public Notice CRTC 2002-74.
[297] Public Notice CRTC 2001-12112.
[298] Broadcasting Public Notice 2002.
[299] Appendix II to Public Notice CRTC 2001-121.

10(g) Commercial Radio

The commercial radio broadcasting sector is one which the CRTC has maintained under close regulatory scrutiny since the Commission was established in 1968. It is significant, however, that the current version of the *Radio Regulations, 1986*, (as amended), which apply to both AM and FM radio broadcasting stations, is a much less onerous set of regulations than those which applied to commercial radio broadcasters thirty years ago.

Indeed the Commission's complex 1975 FM policy statement entitled, "FM Radio in Canada – A Policy to Ensure a Varied and Comprehensive Radio Service"[300] probably represents the high water mark in terms of detailed regulation of a particular sector of the Canadian broadcasting system. That FM Radio policy which was reflected in an earlier version of the *Radio Regulations*, was extremely regulatory and interventionist. It reflected a view that "the regulator knows best." It placed an FM licensee's extremely detailed programming Promise of Performance, with emphasis on such rarified programming concepts as Foreground and Mosaic programming, at the centre of a cumbersome regulatory system for radio.

Times have changed, and we are pleased to note that the manner in which the CRTC regulates commercial radio broadcasting in Canada has changed (and relaxed) as well.

The tendency over time has been to favour more light-handed regulation of radio, and more industry self-regulation.

Four decades ago, when the CRTC came into existence, the wide array of media choices that Canadians enjoy today could not be imagined. Radio stations, both public and privately owned, played a relatively more significant role than they do today in the dissemination of news and information, and in the influencing of opinion on matters of public concern. This was particularly so in smaller communities where the choice of print, radio and television media outlets was often quite limited.

For those reasons, the Commission in its early days developed a number of restrictive licensing ownership policies and regulations to ensure that there would be, to the extent practicable in given markets, diversity of voices for the expression of differing views on matters of public concern. This is, of course, consistent with the key policy objective in paragraph 3(1)(i) of the *Broadcasting Act*.

Radio news broadcasts were a relatively more important source for news and information programming before the advent of 24/7 news channels on television, let alone the widespread availability of the Internet.

The Commission was concerned in its early regulation of radio with ensuring that there was diverse editorial opinion on matters of public concern (particularly with regard to local and regional issues). It also enacted quite detailed regulations to

[300] CRTC Announcement, January 20, 1975.

deal with what today are known as issues of controversial programming – including advertising of such products as alcoholic beverages, birth control devices, or even financial interests in any mining, oil or natural gas property!

It was not until 1990 that the Canadian Broadcast Standards Council was established. This commendable initiative in industry self-regulation, along with a number of other broadcasting and advertising industry self-regulatory codes that are commented on elsewhere in this paper, allowed the CRTC to gradually vacate the business of actively regulating radio advertising (other than infomercials).

Through the 1980s, tuning to the FM band usurped the AM band. The Commission's perceived need to intensively regulate AM radio broadcasters, many of whom were struggling financially to compete with their new FM competitors, diminished.

For all of these reasons, over the past three decades the Commission has progressively relaxed the regulations and policies that apply to commercial radio broadcasters in Canada – particularly those broadcasting on the AM band.

Indeed, with the publication of its 1990 policy document "An FM Policy for the Nineties,"[301] the Commission relieved AM radio broadcasting stations from most substantial regulatory requirements, and significantly reduced the regulatory burden for FM radio broadcasting licensees as well.

As noted earlier, in the seventeen years since 1990 there have been three additional comprehensive public reviews of CRTC commercial radio policies and regulations. The most recent such review culminated in the publication last December of *Commercial Radio Policy 2006*.[302]

In the first introductory paragraph to that Public Notice the Commission stated:

> The Commission considers that the measures announced in this policy, particularly its new approach to Canadian content development, will allow the commercial radio sector to contribute more effectively to the achievement of the goals set out in the Broadcasting Act, while enabling it to operate effectively in an increasingly competitive environment for the delivery of audio programming.

That document was published following a public proceeding in which 194 written comments were submitted, and 48 parties also made oral representations at the public hearing in the National Capital Region in May 2006. Representatives of the Canadian music industry, the Canadian Association of Broadcasters ("CAB"), community and not-for-profit radio broadcasters, advertising industry representatives, unions and guilds, copyright collecting societies, as well as private individuals, all appeared and spoke their minds at that public hearing.

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[301] Broadcasting Public Notice CRTC 1990-111.
[302] Broadcasting Public Notice CRTC 2006-158.

The Public Notice which contains *Commercial Radio Policy 2006* identifies the challenges to commercial radio broadcasters that have been presented by the evolving array of new unregulated audio technologies. These include MP3 players, iPods, Internet music services and radio streaming, podcasting, peer-to-peer file sharing and downloading, and cell phone radio. However, the Commission went on to conclude, in that same paragraph, that "… the Canadian commercial radio industry remains healthy from a financial perspective."

That general conclusion, which is qualified and expanded upon later in the Public Notice, seems to have been confirmed by the financial results for Canada's commercial radio industry for 2006, which were released by the Commission on May 16, 2007. It has also been confirmed by the financial data on radio which was published in the Commission's *Broadcasting Policy Monitoring Report* 2007.[303]

Commission statistics indicate that total revenues for AM and FM radio broadcasting stations increased by 5.7% in 2006, going from $1.3 billion in 2005 to $1.4 billion in 2006. Although profits before interest and taxes (PBIT) increased by 2.7%, to $284.5 million in 2006, the sector-wide average PBIT margin remained in 2006 at 20% - the same level as in 2005.

It is not for the authors of this report to assess whether an average industry PBIT margin of 20% is adequate or appropriate. But, judging by the number of competitive applications in recent years for licences to establish new radio stations, even in mid-size and smaller markets in Canada, it would appear that many entrepreneurs and established MSO broadcasting companies believe that commercial radio broadcasting in Canada (on the FM band at least) is a good business to be in. This is so in spite of the competitive challenges from the expanding array of unregulated digital delivery platforms.

The most important policy/regulatory issue at the recent Commercial Radio Policy review proceeding was, of course, whether a minimum of 35% or 40% of Category 2 musical selections broadcast between 6:00 am and 6:00 pm, Monday through Friday, in any broadcast week, should be Canadian selections.

Obviously the very specific policy objectives in paragraphs 3(1)(c), (f) and (s) of the *Broadcasting Act* make it abundantly clear that it is appropriate for the Commission to establish minimum Canadian content levels for Canada's commercial radio broadcasters. Those three policy objectives speak to the necessity of having not only appropriate levels of Canadian programming in Canadian broadcasting, but also of making predominant use of Canadian creative and other resources.

Because the emphasis on the regulation of spoken word programming on radio (including advertising) has declined over the decades, for the reasons adverted to above, much of the continuing regulation by the CRTC of commercial radio broadcasting relates to measures designed to strengthen and support the Canadian music industry, including new and emerging artists.

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[303] *Broadcasting Policy Monitoring Report 2007*, CRTC, July 2007, pps. 15-24.

Part of our mandate in writing this report is to question the continuing rationale for CRTC regulations and policies. Were it not for the existence of the clear broadcasting policy objectives in section 3 referred to above, we might have been tempted to ask – from a pure "market forces" and more streamlined regulatory perspective – whether it is still necessary for the CRTC to strictly enforce broadcasting regulations and policies designed to ensure minimum levels of Canadian content airplay, and also other policies designed to ensure that emerging Canadian creative artists get access to, and exposure on, the public airwaves in Canada.

The answer to that question provides a clear illustration as to why it is simply not possible to understand the regulation of broadcasting in Canada, absent a familiarity with the objectives of the statutory *Broadcasting Policy for Canada*.

Canadian songwriters, composers, and performers are not licensees under the *Broadcasting Act*, but they are definitely intended beneficiaries of that Act. (They stand in relation to the Canadian radio broadcasting industry under the Act in much the same relationship as Canada's independent television program producers stand vis-à-vis Canada's television broadcasting industry.) Both creative groups are "designated beneficiaries" of a regulatory system for broadcasting that is intended by Parliament to foster and encourage the use and exhibition of Canadian creative resources.

From the inception of CRTC regulation of broadcasting, the Commission has recognized the synergistic relationship that exists between Canada's radio broadcasters and the Canadian music industry.

Indeed, CRTC regulations and policies relating to the broadcast of minimum levels of Canadian content music, by both AM and FM radio stations, are generally credited as being a principal reason that Canada has produced a disproportionate share of world-renowned performing artists in the field of popular music.

It is admittedly a matter of conjecture whether such Canadian popular music stars as Shania Twain, Celine Dion, Bryan Adams, Daniel Bélanger, Avril Lavigne, Nelly Furtado, Nickelback or Diana Krall, would have achieved world acclaim had it not been for the "regulatory leg-up" they received in their early performing years through airplay exposure that resulted from minimum Cancon music requirements for Canadian radio stations.

Whether or not it is an urban myth that Canada's annual popular music awards (the Junos) are named after the first Chair of the CRTC, no one seriously contests the fact that CRTC regulation of radio broadcasting has made a very significant contribution to strengthening Canada's popular music industry over the past four decades.

The Commission's first *Radio Regulations* establishing minimum Canadian content levels for AM radio broadcasting stations (at the 30% level) were enacted in 1970.[304]

There has been active dialogue since that time amongst radio broadcasters, representatives of the Canadian music industry and the Commission as to what is the appropriate minimum Cancon level for different classes of Canadian radio stations.

Whether the appropriate minimum level of Cancon Category 2 popular music played currently by FM stations is 30%, or 35%, or 40% is considered by most Canadians to be a matter for the CRTC to establish. There is little room for discussion as to whether there should be regulatory minima with regard to Cancon music – even if the minimum is much lower as it is on ethnic or specialty format radio broadcasting stations in Canada.

CRTC support for Canada's music industry does not end with regulated minimum levels of Cancon music airplay on commercial radio stations. The Commission has over the years developed a set of regulations and policies that relate to the creation, support and development of Canadian musical talent, including emerging artists.

Commercial radio broadcasters in Canada have for the past three decades been committed by conditions of their respective licences to support Canadian talent development (CTD) initiatives, which the Commission now prefers to refer to as Canadian content development (CCD) initiatives. Some of these CTD (or CCD) regulatory obligations arise from promises made at CRTC licensing hearings, others as benefits commitments made to support applications for authority to transfer ownership or control of licensed radio broadcasting undertakings. Many CCD commitments flow from an arrangement with the CRTC that was negotiated in 1996 on behalf of the commercial radio industry by the CAB.

The Commission, in an effort to make it easier for licensees to know what it will consider to be an "eligible initiative" in support of CTD or CCD, periodically publishes notices to clarify its policies in this area. The last such Public Notice was published in July, 2007.[305]

Similarly, because radio broadcasting is generally recognized to be first and foremost a "local" communications medium, CRTC radio regulations and policies have from the earliest days stressed the desirability of all commercial radio licensees providing local programming. This includes local news, weather, sports coverage, and the promotion of local events and activities.

The Commission, by requiring minimum levels of local programming from its radio broadcasting licensees, contributes to the fulfillment of the policy objective in paragraph 3(1)(i) of the Act, which states that the programming provided by the

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[304] Decision CRTC 70-99;, SOR/70, 256.
[305] Broadcasting Public Notice CRTC 2007-79.

Canadian broadcasting system should be "drawn from local, regional, national and international sources" (emphasis added). Radio is primarily a local medium: the CRTC ensures that it provides local programming.

This policy of support for local programming on radio also contributes to the fulfillment of another broadcasting policy objective in paragraph 3(1)(i) of the Act which says that the programming provided by the Canadian broadcasting system should, amongst other things,

> "(iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern."

Thus, although the Commission has relaxed its strict regulation of AM commercial radio broadcasters in respect of required minimum levels of local programming over the years, it continues to require that FM radio licensees adhere to a one-third local programming commitment. If they do not provide local programming in a community, they may not solicit advertising from that community.

Because of the incredible growth of media outlets, and of various sources of news, information and editorial opinion in the digital age, the Commission has come to accept that most Canadians, regardless of where they live, now have access to "many choices and many voices." Concerns with common ownership of more than one AM and one FM station in the same language in the same market diminished in the 1990s, and in its 1998 *Commercial Radio Policy* the Commission significantly liberalized its *Common Ownership Policy* for commercial radio. Those amendments have served to financially strengthen the commercial radio industry, and have been generally well received.

Even though the promotion of diversity in programming is a hallmark of CRTC regulation, as early as 1995 the Commission recognized that market forces might actually contribute to programming diversity - as broadcasters in the same market would seek to differentiate their stations from one another. Following the 1995 Review of Certain Matters Concerning Radio,[306] FM radio stations were given the flexibility of changing programming formats without Commission approval. (It is worth noting in passing that radio broadcasters in the U.S. do not require FCC approval prior to changing formats, but in the United Kingdom prior approval of the regulator, Ofcom, is still required.)

It is our overall assessment that the commercial radio sector is one where the Commission has significantly amended its regulatory policies and regulations over the years in response to the constantly changing environment, both technological and financial, in which commercial radio broadcasters operate and compete.

Perhaps because Canada's radio broadcasters as a group have tended to be strongly supportive of their industry association, and because the CAB has been vigilant on behalf of its members in representations before the CRTC, as have the

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[306] Broadcasting Public Notice CRTC 1995-60.

various associations that represent the music industry in Canada, this sector of the broadcasting industry has most definitely not been neglected by the CRTC.

Successive amendments to the *Radio Regulations* from the early 1980s forward have tended to diminish, rather than increase, the regulatory burden for Canada's commercial radio broadcasters, and, for the most part, have taken account of relevant financial and technological developments.

However there remains one area of commercial radio policy that is ripe for review, and that is the policy on digital radio broadcasting.

Digital Radio Broadcasting

On December 15, 2006 the Commission published its *Commercial Radio Policy* 2006[307] and it also published a separate Public Notice entitled, *Digital Radio Policy*.[308]

The reason that the Commission could not simply incorporate its determinations and recommendations for a future digital radio policy into a more comprehensive document on *Commercial Radio Policy* 2006 is that the CRTC cannot circumvent the Department of Industry ("the Department") on issues of spectrum policy and management.

That is because primary regulatory responsibility for radio frequency spectrum policy and management resides with the Department under the *Radiocommunications Act.*[309]

At the time the 2006 *Commercial Radio Policy* review was conducted, Canada's radio broadcasters were still operating under the troubled 1995 *Transitional Digital Radio Policy*.

That 1995 transitional policy had been put in place by the Commission following consultation with those responsible for spectrum policy in the Department.[310] The Department had, in what was a highly controversial decision at the time, elected to establish an L-band spectrum allotment plan, reserving frequencies from 1452 to 1492 MHz for use by digital radio broadcasting (DRB) undertakings in Canada.

The allotment of L-band frequencies was controversial because it was apparent that in the U.S. the Federal Communications Commission ("FCC") was favouring another technological approach to support the transition of commercial radio broadcasters to digital. The FCC has supported a quite different solution to digital transitioning, known as In-Band-On-Channel ("IBOC") technology. IBOC technology has allowed AM and FM radio stations in the U.S. to convert from analog

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[307] Broadcasting Public Notice CRTC 2006-158.
[308] Broadcasting Public Notice CRTC 2006-160.
[309] *Radiocommunications Act* (R.S.C. 1985, c. R-2) as amended.
[310] Broadcasting Public Notice CRTC 1995-184 ("the Transitional Digital Radio Policy").

to digital within their existing spectrum allocations i.e., on the existing AM and FM frequency bands, respectively.

The L-band DRB option selected for Canada in 1995 involved a first transitional stage, in which incumbent AM and FM licensees were to establish new digital transmitters and facilities which they would operate in parallel with their existing station(s). When that first transitional phase was completed, the concept was that a second stage policy involving consideration of all aspects of DRB would be put in place. That policy would apply to incumbents and to new entrants alike.

In any event, the 1995 *Transitional Digital Radio Policy* was a failure. Over the past decade there has been what is described in various Public Notices as an "extremely slow roll-out" of L-band DRB in Canada. We would call it a death march.

This slow roll-out is the result of a number of inter-related factors. First and foremost is the limited availability of relatively high cost L-band DRB receivers in the marketplace. Manufacturer-installed DRB L-band receivers in automobiles are non-existent in 2007, more than ten years after the introduction of the transitional policy. In what has been a classic "chicken and egg" situation, relatively few Canadian radio stations have actually launched L-band digital service, because there are so few DRB L-band receivers in the marketplace, and the lack of available DRB programming has exacerbated the low demand for L-band digital receivers. The result is that the transition from analog to digital radio in Canada has been stalemated, whereas it has proceeded apace in the U.S. using IBOC technology.

Certain statements contained in the *Digital Radio Policy* document of December 15, 2006 indicate that the CRTC has finally "grasped the nettle" on this vexatious regulatory issue, and is prepared to contemplate the implementation of IBOC technologies in Canada, if the Department concurs.

A letter of May 28, 2007 to the Commission from the Assistant Deputy Minister of the Department was posted on the CRTC website. That letter seems to suggest, in somewhat convoluted bureaucratic terms, that the allocation of L-band frequencies for the transition in Canada to DRB was a marketplace mistake, and that, subject to further industry consultation, an IBOC option for Canada may be favoured. The letter contains the following prophetic sentence,

> "As well, the department is currently developing a standard for the implementation of IBOC."

Given the time that has been lost over the past decade with the ill-fated L-band DRB transitional plan, we believe that a revised digital radio policy is perhaps the most pressing regulatory policy issue in the commercial radio sector today.

The Commission acknowledged last December 15, in its *Digital Radio Policy* Public Notice, that

> "… the use of IBOC technology which enables the transition to digital without consuming additional spectrum and allows for the provision of supplementary

program information and multicast services, could be considered for licensing."

To proceed to the licensing stage the Commission will need to persuade the Department that the transition to digital radio broadcasting is a regulatory priority of the highest order.

Recommendation 10(g)-1

We recommend that the Commission, as a matter of urgency, clarify with Industry Canada when its standard for the implementation of In-Band-On-Channel (IBOC) technology will be complete and also clarify its own intentions in respect of future licensing of applications involving the use of IBOC technology.

In addition to digital radio policy there are three other commercial radio policy issues that we believe merit reconsideration in the interests of Smart Regulation. These are described below.

Programming Formats

As noted elsewhere, in 1995 the Commission, in its "Review of Certain Matters Concerning Radio,"[311] effectively removed any regulatory constraints on FM broadcasters who may wish to change programming formats. This commendable act of deregulation in favour of market forces did not apply to those (relatively few) FM licensees who have committed to broadcasting in so-called "Specialty" formats, i.e. ethnic radio stations or those favouring Category 3 music, such as jazz or classical.

The historical rationale for the Commission to regulate and monitor the programming formats of competing commercial radio broadcasters had been, of course, to promote programming diversity within the system and within individual markets.

As noted earlier, the Commission had already deregulated the formats of AM radio broadcasters in 1990. Therefore, when it ceased actively regulating the formats of FM radio broadcasters in 1995, Commission staff no longer had to "patrol the fence lines" by monitoring the formats of competing FM broadcasters serving a given market.

Notwithstanding this act of deregulation twelve years ago, discussion of formats for proposed new commercial FM radio stations still dominates competitive FM radio licensing hearings today. A significant portion of competing applicants' time at FM licensing hearings is given over to defending the choice of one's proposed format, and explaining why it would be most suitable to fill a perceived "hole in the market."

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311 Public Notice CRTC 1995-60.

Given that the successful applicant at such a competitive FM licensing hearing would be able to launch the new station to air immediately following the award of a licence using a totally different programming format than that proposed and examined at the licensing hearing, we believe that this continuing preoccupation by the Commission with programming formats for new FM radio stations brings the regulatory process into disrepute. It causes Commissioners to devote an inordinate amount of expensive public hearing time delving into an issue which is (appropriately) no longer the subject of CRTC active regulation.

We appreciate that Commission questioning of FM applicants regarding their proposed format is said to be part and parcel of the Commission's analysis of each applicant's business plan. However, we believe the time has come for the Commission to publicly acknowledge that, save for exceptional circumstances perhaps, it will no longer devote any significant time at public hearings to the issue of proposed formats for new FM radio broadcasting stations, and that it will place more reliance on market forces in regard to this issue.

Recommendation 10(g)-2

We recommend that the Commission not devote a significant amount of time at competitive public hearings for the licensing of new FM radio broadcasting stations on the issue of proposed programming formats, in recognition of the fact that FM licensees are no longer required by regulation or condition of licence to program their stations according to a particular format.

Hits Policy

In the Commission's 1975 policy "FM Radio in Canada – A Policy to Ensure a Varied and Comprehensive Radio Service"[312] the concept of monitoring and regulating the ratio of hits to non-hits that are broadcast on each commercial FM radio station was introduced. The basic concept was to increase diversity on the air waves, and to encourage the air-play of new and emerging Canadian artists. The hits/non-hits policy applied to all FM stations that broadcast popular music. They were required to maintain the level of hits below 50% of popular music selections broadcast during a broadcast week. The policy was enforced through incorporation of this commitment into a licensee's Promise of Performance, which became a condition of licence.

Over time the Commission has reduced, by stages, the application of this policy. In 1990 the CRTC exempted French-language stations from the hits policy.[313] In 1997 the Commission reduced the impact of the rule for most commercial radio stations, but continued to apply it to English-language commercial

[312] CRTC Announcement, January 20, 1975.
[313] Broadcasting Public Notice CRTC 1990-11.

radio stations in Montreal and Ottawa.[314] This was done in an attempt to level the playing field between French-language and English-language broadcasters who were competing for listeners and advertisers in those bilingual markets. The concern was that if the French-language FM broadcasters in those two markets were also required to play 65% French-language vocal selections (see discussion below) they would be at a competitive disadvantage with their English-language counterparts, if they were no longer restricted to a level of "hits" below 50%.

Although this rule offers a degree of protection to the French-language commercial FM stations in the markets of Montreal and Ottawa/Gatineau, we believe that this policy should be revisited by the CRTC and considered at the same time that adjustments to the 65/55 French-language vocal music regulation are next reviewed. The Commission might consider that if it gives more latitude to French-language commercial FM stations with respect to the minimum levels of French-language vocal music they are required to broadcast, perhaps this Hits Policy for the markets of Ottawa and Montreal might no longer be required. A recommendation relating to this issue is made at the end of the next subsection.

French language vocal music

The Commission's longstanding policy, which is reflected in section 2.2 of the *Radio Regulations*, requires that a minimum of 65% of the Category 2 vocal music selections aired by French-language radio stations (AM and FM) during each week be in the French language.

In addition, the regulations require that a minimum of 55% of those French-language vocal musical selections be broadcast, in their entirety, between 6:00 am and 6:00 pm, Monday to Friday, in any given week.

This is sometimes referred to by French-language broadcasters and representatives of the music industry as the Commission's "65/55" rule.

The objective of this regulation is obviously to encourage airplay opportunities for French-language vocal artists, and to ensure, consistent with the policy objectives in subsection 3(1) of the Act (particularly paragraph 3(1)(m)), that Canada's linguistic duality will be reflected on the radio airwaves.

We understand the rationale for this policy and the regulations that implement it, and we appreciate that this 65/55 rule was thoroughly reviewed in the context of the 2006 *Commercial Radio Policy* proceeding. However, we believe the implications of this 65/55 policy should be reviewed in the context of the highly competitive marketplace in which radio broadcasters operate today. As the Commission noted in its *Commercial Radio Policy 2006*, the new digital audio technologies, such as MP3 players, iPods, satellite radio and Internet music services, allow young people to access the music they want to listen to from many diverse sources, when they want to listen.

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[314] Broadcasting Public Notice CRTC 1997-42.

Also, francophone radio listeners in Canada have always demonstrated a strong interest in popular English-language music. In that respect the commercial radio marketplace is very different than the television marketplace, where francophone viewers have always shown a strong preference for programming in their own language.

Therefore it is understandable that francophone broadcasters, particularly those in bilingual markets such as Ottawa and Montreal, complain that the "65/55" French-language vocal music rule puts them at a competitive disadvantage with English-language stations in the same market.

As noted above, it is principally for that reason that the Commission continues to apply its hits policy to English-language broadcasters in Montreal and Ottawa. This has been the regulator's attempt to "level the playing field." We question, however, whether this excessively regulatory approach is still necessary, or is consistent with the principles of Smart Regulation.

Recommendation 10(g)-3

We recommend that the Commission reconsider all of the marketplace and broadcasting policy implications of both its hits policy and the continued application, in the markets of Montreal and Ottawa, of its 65/55 French-language vocal music policy.

Emerging Canadian Artists

The CRTC emphasized in its *Commercial Radio Policy 2006* that it expects broadcasters to provide more support to emerging Canadian artists and emerging Canadian music. This, in our opinion, is a commendable and appropriate way to strengthen Canadian musical culture, both in the French and English languages. A few realities, however, should be noted.

First, it is imperative that workable definitions of "emerging music" and "emerging artist" be developed. The best way to establish such a definition, we believe, is to have representatives of the Canadian radio broadcasting industry and of the Canadian music industry mutually agree on those definitions. We also believe that both English-speaking and French-speaking markets may each require separate definitions that reflect the distinctive realities in this field.

(We are reminded that a "one size fits all" definition of what constitutes a musical "hit" did not always work well for the separate linguistic radio markets.)

It should also be acknowledged, especially where emerging music and emerging artists are concerned, that commercial radio is not the only sector with something to contribute. Community radio, campus radio, public radio and satellite radio should all be given a voice in this matter as all have a role to play in providing showcases for emerging Canadian artists.

What is more, we believe that the music and broadcasting industries should agree on how best to promote these emerging artists. We do not believe that the mere imposition of quotas, for example, would address their concerns.

The Commission in its *Commercial Radio Policy 2006* indicates a preference for a case-by-case approach to this issue, through the use of conditions of licence, rather than imposing a uniform regulation. We think this approach is appropriate.

A certain flexibility will also be necessary to account for special commercial radio formats; for instance, a specialty radio station with a licence to broadcast "retro" music will obviously be unable to contribute to emerging music.

Recommendation 10(g)-4

We recommend that the Commission encourage representatives of the Canadian music industry and the Canadian radio broadcasting industry to work together to develop workable definitions of the terms "emerging artists" and "emerging music" that would be suitable for regulatory purposes in each of the French and English language sectors of the Canadian broadcasting system.

Subscription Radio

In addition to free, over-the-air private and publicly owned AM and FM radio broadcasting stations, most Canadians also have the option of subscribing to a service that provides a form of pay radio or pay audio service.

They can elect to receive for a monthly fee, one or other of Canada's competing satellite subscription radio services, or choose to subscribe to a package of programming services from their cable or satellite television service provider that includes a pay audio service.

Because there were only two satellite subscription radio undertakings licensed in 2005 (Sirius Canada and XM Canada) and because only four pay audio services were licensed in 1995 (of which only two Galaxie and MaxTrax survive today), the Commission has not promulgated a set of regulations to apply to either satellite subscription radio undertakings or to pay audio undertakings.

The two competing satellite subscription radio licensees, and the two competing pay audio undertakings, are each subject to a set of conditions of licence (COLs) that are attached to their respective licences.

These COLs are, as required by section 9 of the Act, "… related to the circumstances of the licensee

(i) as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1) of the Act."

This form of direct regulation of licensees by conditions of licence, which incorporate by reference any appropriate regulations from the *Radio Regulations, 1986*, rather than promulgating a whole set of additional regulations to apply to a small, specialized class of undertakings, allows the Commission to tailor-make the licences to suit its regulatory objectives.

10(h) Community Radio

Community radio broadcasting has a long history in Canada. Similar to commercial broadcasting, the regulation of community broadcasting has been marked by a gradual lightening or "streamlining" of regulation. The Commission released new policies on community radio – including what is termed "campus" radio, in 2000.[315] The express purpose of those policies was to focus on simple, effective and easily measured programming requirements for these two separate, but related, types of radio services. This was intended to increase their potential revenue sources, and to lessen the administrative burden associated with regulation.

The Commission currently distinguishes between two general categories of community radio services. The first general category is referred to as simply "community radio." This category of service is distinguished by its broad community-based ownership structure. The general category is further divided into two sub-categories: "Type A" community radio stations are stations in which no other radio station, other than a CBC station, operates in the same language in all or part of its market. "Type B" community radio stations have at least one other radio station, other than a CBC station, operating in the same language in all or part of its market.

The second general category of community radio services is called "campus radio." As the name suggests, these services are associated with post-secondary educational institutions. The general category of "campus radio" is further sub-divided into "community-based campus radio" and "instructional radio." Community-based campus radio stations operate in a manner that is similar to traditional community radio stations in that, although the service is associated with a post secondary educational institution, the programming on the service is accessible, and meant to reflect, the broader community. Instructional stations, on the other hand, are intended to operate primarily as a training ground for students in broadcasting courses. These services provide community-oriented programming, but they also offer at least some formal educational programming.

As a further "sub-sub-category," the Commission licenses "developmental" versions of community and campus stations on a case-by-case basis. These stations are expected to develop into full-fledged stations of their particular category after a three year period (at which time the developmental licence expires).

The 2007 *Broadcasting Policy Monitoring Report* indicates that the following numbers of stations of the different categories have been licensed:

[315] Public Notice CRTC 2000-12 (*Campus Radio Policy*); Public Notice CRTC 2000-13 (*Community Radio Policy*).

Category	Total	French	English	Other
Type A Community	45	34	10	1 (bilingual)
Type B Community	50	26	23	1 (multicultural)
Developmental	10	0	9	1 (bilingual)
Total Community	105	60	42	3
Community-based Campus	41	5	36	0
Instructional	9	Not specified		
Developmental	1			
Total Campus	51			

There is, and has always been, a tendency for relatively more French-language community radio stations to exist, and more English-language community-based campus stations at any given time. This reflects the early growth of community radio in the Province of Quebec under a provincial funding program.

Community stations and campus stations are regulated in a similar manner, overall, but there are subtle differences between the Commission's specific policies in each sector as set out in the following chart:

Criteria	Community	Campus
Ownership and Operation	Non-profit organization providing for membership, operation and programming primarily by members of the community at large	Non-profit organization associated with a post-secondary educational institution. The board of directors should provide balanced representation of the student body, the institution, volunteers and the community at large
Role of Volunteers and Community Access	Volunteer and community access important to role of community station, but programming is <u>not</u> required (by definition) to be produced primarily by volunteers; stations are expected to provide for community access to programming and ongoing training in the community	*Community-based*: Programming produced <u>primarily</u> by volunteers (students or community); may (but not required to) provide access for community members' programming *Instructional*: Primary role is to provide training to students Both types must indicate role station will play in training students and other volunteers, and approximate percentage of programming to be produced by students to fulfill course requirements

Criteria	Community	Campus
Overall Role	To provide community access to the airwaves and offer diverse programming reflecting the community's needs and interests To provide diversity in the system in music and spoken word programming	To provide programming that is different in style and substance to programming provided by commercial stations and the CBC, including "alternative" programming in both music and spoken word Should be complementary to existing other campus and community stations
Spoken Word	*Type A*: 15% each week with focus on community-oriented spoken word *Type B*: 25% each week with focus on community-oriented spoken word	25% each week spoken word including specialized programs such as public and community affairs programs *Instructional*: Two hours per week must be formal educational programming and 4% of all programming is expected to be "news", with particular emphasis on local news
Music	20% of musical selections each week must be other than the "Pop, Rock and Dance" subcategory (21) 5% of musical selections each week from Category 3	No limit on "Pop, Rock and Dance" 5% of musical selections each week from Category 3 *Community-based*: on English-language stations, no more than 10% of musical selections each broadcast week may be "hits" *Instructional*: on English-language stations, no more than 30% of all musical selections each broadcast week may be "hits"
Canadian content	35% for Category 2 music each week – but Commission is prepared to consider lower thresholds for music genres in which availability of Canadian music is low, "expected" to be distributed evenly throughout the broadcast day 12% for Category 3 music each week	35% for Category 2 music each week – but Commission is prepared to consider lower thresholds for music genres in which availability of Canadian music is low, "expected" to be distributed evenly throughout the broadcast day 12% for Category 3 music each week
French-language vocal music (French-language stations)	65% for Category 2 music each week, "expected" to be distributed reasonably throughout the broadcast day	65% for Category 2 music each week, "expected" to be distributed reasonably throughout the broadcast day
Advertising	No restrictions	A maximum of 504 minutes each week, and no more than 4 minutes per hour
Acquired and Network programming	No fixed amounts of station-produced programs *Type A*: Permitted to affiliate or acquire programming as "wrap around" programming *Type B*: Required to demonstrate at licensing and renewal that acquired and network programming will complement and not replace local programs	At least two-thirds of programming each week must be station-produced

Criteria	Community	Campus
Hours of broadcast	To specify number of hours per week at licensing or renewal and permitted to deviate by up to 20% per week without further authority	Expected to offer "full" service (126 hours per week), with exceptions permitted during vacation periods
Local Talent Development	Expectation that stations should promote and feature music by new Canadian artists, local artists and artists seldom played elsewhere; plans to be specified upon licensing and at renewal	Expectation that stations should promote and feature music by new Canadian artists, local artists and artists seldom played elsewhere; plans to be specified upon licensing and at renewal
Cultural Diversity	Expectation that station will maintain and strengthen efforts to offer diversified programming reflecting needs and interests of community (including in playing music not often played on commercial stations and providing spoken word programming reflecting minority cultural groups), and in promoting cultural diversity in employment practices *Type A*: Permitted to broadcast up to 40% third-language programming without prior Commission approval; *Type B*: Permitted up to 15% without prior Commission approval	Expectation that station will maintain and strengthen efforts to offer diversified programming reflecting needs and interests of community (including in playing music not often played on commercial stations and providing spoken word programming reflecting minority cultural groups), and in promoting cultural diversity in employment practices Campus stations without local ethnic station permitted to broadcast up to 40% third-language programming without prior Commission approval; other campus stations permitted up to 15% without prior Commission approval

Developmental stations for both community and campus stations are subject to lighter regulatory requirements primarily in the areas of specific spoken-word requirements. They are required to comply with the general ownership provisions for the relevant category of service, as well as the minimum Canadian content requirements. Developmental stations are restricted to a power or ERP of five watts or less.

The overall purpose of the foregoing regulatory framework is to establish community and campus radio services as services to offer an alternative source of programming to what is typically available from commercial broadcasters and from the CBC.

The Commission has identified the non-profit component of community and campus stations as being important to their role. Regarding campus stations, the Commission stated that "a healthy and vibrant not-for-profit sector is essential to fulfill the goals of the Act." Regarding community stations, the Commission noted that their not-for profit nature should assist in achieving their objective of offering programming that is different from, and complements, the programming of other stations in the market.

Other elements of the policy include community access (for community stations), reliance on volunteers (for campus stations), a limit on the level of popular music (community stations) and hits (campus stations), a minimum level of spoken word programming (varying by station type), a minimum level of Category 3

programming, a restriction on advertising levels for campus radio, and a "cap" on third-language programming in larger markets and markets served by ethnic radio broadcasters. These policy requirements are all designed to differentiate community and campus service from commercial radio – and to a lesser extent from the CBC – and to ensure that the services offer diversity in music and spoken word content. Although this objective is not stated expressly in the Commission's policy, it seems to us to be also an objective to protect commercial radio broadcasters from community-based competition.

These elements of the Commission's policy have been successful, but some aspects could be questioned.

Programming Content Requirements

Community stations are restricted from broadcasting more than 20% of their music from the Pop, Rock and Dance genre. Campus radio, on the other hand, is not limited by musical genre, but the level of "hits" is limited.

The rationale for limiting the amount of "Pop, Rock and Dance" on community stations is not clear. Assuming, for example, that the "Pop, Rock and Dance" selections on a community stations were otherwise distinctive from the "Pop, Rock and Dance" selections found on traditional commercial radio, it seems to us that the community station could still be very distinctive from traditional commercial radio and could, indeed, continue to reflect the community served. This would be particularly the case, for example, with a community service that intended to serve a younger audience (similar to a campus station in some respects) but outside of the territory of an established post-secondary institution.

It may well be that part of the difference in treatment between community and campus radio services in this area derives from the greater role that community radio plays in French-language markets (particularly in Quebec) and the lack of an adequate "hits" definition for French-language selections. It should be possible, though, to develop criteria for French-language vocal selections similar to "hits" criteria that would ensure that Pop, Rock and Dance music selections on community stations were different from mainstream selections on commercial radio.

Requiring community stations to limit their selections from the most popular musical genre with younger audiences seems counter-productive in reaching these audiences. It also seems to pre-suppose which particular demographic "communities" should be served by community radio services.

Recommendation 10(h)-1

We recommend that all community and campus radio stations be permitted more flexibility in offering music from different genres – including more music from the Pop, Rock and Dance subcategory, if that is considered appropriate by the licensee for its community.

One of the most significant content requirements for community and campus radio is the minimum level of spoken word programming. Fully one-quarter of a Type B community and campus radio station's programming must be spoken word programming. Even Type A community services, which provide service in markets in which, by definition, they are (or were) the first entrant other than the CBC, are required to offer 15% spoken word content.

The Commission's intention is clearly that this spoken word programming be focused on the local community and "in-depth" in nature, particularly in the case of campus stations. There is no doubt that the requirement helps to differentiate community and campus stations from their commercial counterparts. The mix of programming found on community and campus stations is unlike that of commercial radio formats. There is equally no doubt that quality spoken word programming helps to reflect a community to itself and helps to contribute to the diversity of voices that are heard on the airwaves. Similarly, the requirement that instructional stations provide a minimum level of news programming makes sense if the belief is that students learning the ropes of broadcasting should learn about news programming – one of the fundamental components of our broadcasting system.

The question to be asked, though, is whether the minimum levels set by the Commission continue to be appropriate or necessary. Viewed differently, should the Commission's views as to what level of spoken word programming is necessary take priority over the community's own views – as expressed through the board and management of the community-owned radio station? It is not obvious to us that the Commission's views will necessarily achieve the best result in each case.

While some minimum level of spoken word content does seem necessary to preserve the community access component of a community-station's mandate – a level of 25%, or 4.5 hours each broadcast day, on average, seems high for each and every community station.

Recommendation 10(h)-2

We recommend that the Commission consider lowering the spoken word programming requirement for community and campus radio stations to a level that would ensure community access and reflection in spoken word programming, but not necessarily to the exclusion of other programming as determined by the community station itself.

Advertising

The last remnant of advertising restrictions in community radio is the four minute per hour limit on campus stations. Advertising restrictions in the campus radio sector date from the earliest days of the community radio policy. The rationale for the restrictions (albeit in an even more restricted form than is currently in play) was set out as follows:

> The Commission considers that campus stations should continue to be funded from a variety of sources. It believes that, if such stations were to

> become heavily dependent on advertising, they would tend to adopt programming strategies similar to those of commercial stations and the diversity of programming available to listeners would be reduced.
>
> The Commission is also aware that many commercial stations operate under sever economic restraints, and is reluctant to increase the competition they face for advertising dollars.[316]

While advertising restrictions had originally been applied to both community and campus stations, over time the Commission has lifted the restrictions that applied to the community sector. Now, Type A and Type B community stations are unregulated in terms of advertising content and may access local and national advertising. In removing the final restrictions on Type B community stations (i.e. those stations that operate in the same market as local commercial radio stations), the Commission commented:

> The CAB opposed the elimination of the limits on advertising for Type B community stations. The Commission, however, continues to believe that if Type B community stations are to fulfill their intended role and mandate, they must have adequate, more secure and consistent revenue streams to enable better planning. The Commission also believes that placing limits on advertising is not the most effective way to guarantee that community stations offer programming that differs in style and substance from that provided by other types of stations. The Commission considers that simple and effective programming requirements will achieve this objective (emphasis added).[317]

We agree with this statement. It would seem to apply equally to campus radio.

Perhaps the key difference between the two sectors is the ability under the existing policy of campus stations to play more “Pop, Rock and Dance” music than their community counterparts. It may be (although it is not stated expressly) that the maintenance of the cap on advertising on campus stations reflects a concern that the greater flexibility in music programming, if combined with advertising, could tempt campus radio stations to pursue more “mainstream” programming, rather than the alternative style of program for which they are now known.

We believe that other components of the community radio policy – and in particular the non-profit nature of licensed organizations, and the degree of community ownership and control, mitigate strongly against highly commercialized formats of campus stations. Moreover, if the Commission is particularly concerned that campus stations should not become more commercial and should play more Canadian local and “emerging artists”, for example, than their commercial counterparts, then this particular objective could be pursued directly through other restrictions or requirements directed at that particular issue. Regulating format and programming focus of a station *indirectly* through restrictions on advertising is not

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[316] Public Notice CRTC 1991-118.
[317] *Community Radio Policy*, Public Notice CRTC 2000-13.

likely to lead to greater programming diversity in programming on a campus radio station.

Recommendation 10(h)-3

We recommend that the advertising restrictions for campus stations be removed.

11. MAJOR CRTC BROADCASTING POLICIES

11(a) Ownership

Statutory Requirements

There are several statutory provisions that underlie the regulation by the Commission of the ownership and control of broadcasting undertakings. Paragraph 3(1)(a) of the Act, the first of the broadcasting policy objectives discussed in Chapter 3, states that "the Canadian broadcasting system shall be effectively owned and controlled by Canadians."

Paragraph 3(1)(b) notes that the Canadian broadcasting system "makes use of radio frequencies that are public property." This use of public property constrains the private ownership of broadcasting undertakings.

Paragraph 3(1)(d) states that the Canadian broadcasting system should, amongst other things, "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" and "encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity." Paragraph 3(1)(i) states that programming provided by the Canadian broadcasting system should "be varied and comprehensive," drawn from a variety of geographic sources, and "provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern." Paragraphs 3(1)(d) and 3(1)(i) together serve as a statutory basis for ownership policies relating to diversity that the Commission has applied over the years.

Under paragraphs 22(1)(a) and 26(1)(c) of the Act, the Governor in Council (i.e. the Cabinet) has the power to direct the Commission "respecting the classes of applicants to whom licences may not be issued or to whom amendments or renewals thereof may not be granted." Two such directions are currently in force.

The first, *Direction to the CRTC (Ineligibility of Non-Canadians)*[318] provides that the Commission may not issue, amend or renew a broadcasting licence to a person who is not a Canadian. This reflects the policy objective in paragraph 3(1)(a) of the Act. That Direction notes specific requirements that must be met by different kinds of entities in order to qualify as Canadian. In addition, section 3 of that Direction provides as follows:

> Where the Canadian Radio-television and Telecommunications Commission determines that an applicant is controlled by a non-Canadian, whether on the basis of personal, financial, contractual or business relations or any other considerations relevant to determining control, other than the beneficial ownership and control of the voting shares of a qualified successor by a

[318] SOR/97-192, April 8, 1997.

Canadian carrier or its acquiring corporation, the applicant is deemed to be a non-Canadian.[319]

That section gives the Commission discretion to apply what is sometimes referred to as a "control in fact" test to determine whether an applicant should qualify as Canadian.

Under the second *Direction to the CRTC (Ineligibility to Hold Broadcasting Licences)*,[320] broadcasting licences may not be issued and renewals may not be granted to provinces, agents of provinces or municipal governments unless the applicant (i) is an independent telecommunications carrier that the Commission determines is not directly controlled by a province and enjoys some independence, (ii) is an independent corporation that the Commission determines is not directly controlled by a province or a municipal government and that has been designated by statute or the provincial cabinet to provide educational broadcasting, or (iii) intends to retransmit programming in an area which is not otherwise served by a broadcasting distribution undertaking.

That Direction is discussed in the section of this report which deals with the Commission's policy on educational broadcasting, because that Direction was enacted in 1972 primarily to facilitate the introduction into the Canadian broadcasting system of educational programming provided by independent provincial educational broadcasting authorities.

Current Ownership Regulations and Policies

The regulations adopted by the Commission for different types of broadcasting undertakings – i.e. the *Radio Regulations, 1986*, the *Television Broadcasting Regulations, 1987*, the *BDU Regulations*, the *Pay Television Regulations, 1990* and the *Specialty Services Regulations, 1990* – all require that Commission approval be obtained prior to any change in the effective control of a licensed broadcasting undertaking or (i) the acquisition of 30% or more of the voting interests of the licensee or any person controlling the licensee, or (ii) the acquisition of 50% or more of the common shares of the licensee of any person controlling the licensee. Notification to the Commission is required within 30 days of the acquisition of 20% or more, or of 40% or more, of the voting interests of a licensee, or any person controlling the licensee. Such notification allows the Commission to monitor changes of ownership in broadcasting licensees that might over time contribute to a change in effective control of that licensee.

Notwithstanding that the regulations state that control of a voting interest by a person includes situations where the person is, *directly or indirectly*, the owner of the interest, the Commission's practice in the administration of the ownership regulations is to consider only direct ownership. Thus, the acquisition of all of the voting interests of a licensee by a wholly-owned subsidiary of a person from another wholly-owned subsidiary of the same person will require the prior approval of the

[319] SOR/97-192, April 8, 1997.
[320] SOR/85-627, June 27, 1985.

Commission, despite the fact that absolutely no change has occurred in the ultimate ownership or control of the licensee.

In some circumstances, the Commission allows transactions involving publicly traded securities to be closed in trust prior to receipt of the approval required under the regulations.[321] (Paradoxically, this policy sometimes allows very significant transactions involving transfers of shares of public companies to be completed quite quickly under trust arrangements prior to final Commission approval, while completion of smaller transactions is often delayed pending receipt of such approval).

The Commission imposes a standard condition on all broadcasting licences that provides a total prohibition of the transfer of the licence. As a result of the way in which this standard condition is worded, a proposed acquisition of a licensed broadcasting undertaking that is to be effected via a transfer of assets requires the issuance of a new licence with the associated requirement for a public hearing, and consequent time delays. An acquisition effected via a share transfer may, however, be approved administratively, and in a much shorter timeframe. While there may be no substantive difference between a share transfer and an asset transfer, the procedural requirements and consequent approval timelines are often very different.[322]

The Commission imposes a few "operational" restrictions on broadcasting undertakings that relate in part to ownership of the undertakings. First, the Commission imposes a standard condition of licence that the undertaking "shall be operated in fact by the licensee itself." Second, the *Radio Regulations*, 1986 and the *Television Broadcasting Regulations*, 1987 each impose the requirement that a conventional radio or television broadcasting licensee must own and operate its transmitter. Finally, a further restriction is imposed on radio licensees, by section 11.1 of the *Radio Regulations*, 1986, which essentially prohibits a licensee, unless authorized by a condition of licence, from operating its station under an agreement (a "local management agreement", or "LMA"). An LMA is an agreement between a licensee and another licensee with respect to *any aspect* of the management, administration or operation of two or more stations in the same market. The Commission's 2006 *Commercial Radio Policy* affirmed with minor revisions its previous guidelines for a case-by-case review of LMAs, and concluded that "[l]icensees of commercial radio stations that wish to enter into an LMA, or any similar business arrangement, whether formal or informal, must first apply for Commission approval to obtain conditions of licence authorizing them to do so."[323]

To ensure compliance with the *Direction to the CRTC (Ineligibility of Non-Canadians)*, and to administer ownership policies that are designed to ensure a

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[321] Broadcasting Public Notice CRTC 1999-196.

[322] We are aware that the Commission holds the view that it must issue a new licence (and hence hold a public hearing pursuant to section 18 of the Act) when an asset purchase takes place. (See Broadcasting Circular CRTC 2007-4). However, we disagree with the Commission's view that this is what the statute requires.

[323] Broadcasting Public Notice CRTC 2006-158.

"diversity of voices" in the system (discussed below), and because it is Commission policy to regulate each participant in the ownership chain (from the licensee to the person with ultimate ownership and control), very detailed ownership information is required with all applications for approval of a proposed change in ownership. The Commission has recently issued for public comment a proposal to introduce an annual ownership information filing, which would obviate the requirement to provide complete ownership information with every application for a new licence, renewal of a licence, or for approval of a change in ownership or control.[324]

The Commission currently applies a number of ownership policies, relating to the following issues:

- Common ownership of broadcasting undertakings serving the same market
- Concentration of ownership
- Cross-media ownership
- Vertical integration
- Licence trafficking
- Benefits

These policies were summarized in the Notice of Public Hearing which initiated the Diversity of Voices proceeding.[325] The public hearing in that proceeding commences on September 17, 2007. It will provide the Commission with an opportunity to review, with a broad cross-section of interested parties, widely divergent views on the several policy issues identified in the Notice.

The particular ownership policy which we believe requires an early review is that related to the requirement of an applicant to pay for public benefits in association with a proposed transfer of ownership and control of certain classes of broadcasting undertakings. The history and rationale for the Commission's policy on benefits, and our recommendations in regard to that particular policy, are outlined in the following chapter of this report. In summary, we believe that certain inconsistencies in the Commission's policy on benefits need addressing – as a matter of priority.

We have reviewed the submissions on the public record for the forthcoming Diversity of Voices proceeding, and note that a wide range of opinion exists on most of these issues.

Notwithstanding our views on the benefits policy as it is currently administered and implemented, we do not have the same level of concern with

[324] Broadcasting Public Notice CRTC 2007-64.
[325] Broadcasting Notice of Public Hearing CRTC 2007-5.

regard to the other policy issues identified in the Notice of Public Hearing. For example, with regard to the potentially important issues of vertical ownership or cross-media ownership, particularly in situations involving common ownership in the same market of a daily newspaper publisher and an OTA radio or television broadcasting undertaking, we would note that the Commission conducts a prudent "case by case" review of such situations, and typically imposes safeguards by way of conditions of licence relating to the maintenance of separate news-gathering teams and separate newsrooms. These safeguards appear to have been readily accepted by the industry, and to have worked well over the years.[326]

In respect of trafficking in broadcasting licences, again the Commission tends to review cases involving potential abuses on a case-by-case basis, and we do not believe that any "cast in bronze" minimum ownership periods for licensed undertakings need be introduced. Inevitably there will be situations involving changes of ownership of large MSO broadcasting companies where there may be one or more relatively newly-licensed small undertakings that become implicated in the overall proposed change of ownership of the parent MSO. However the Commission has in the past dealt with such cases wisely, on a case-by-case basis, and we are confident it will continue to do so.

With regard to limits on the common ownership of radio broadcasting stations serving the same market, as noted in the section of this report which deals with commercial radio broadcasting, Commission policy on multiple licence ownership for commercial radio stations was liberalized considerably in 1998. This contributed to an overall strengthening of the radio broadcasting industry, and did not result in any appreciable lessening of diversity in respect of programming formats. That revised policy was confirmed in the 2006 *Commercial Radio Policy*.

As many of the participants in the Diversity of Voices proceeding have identified, it may be wise for the Commission to retain the discretion to deviate in certain instances from that aspect of its existing *Common Ownership Policy* which generally restricts ownership to one OTA television station in the same language in the same market. This particular issue was reviewed before the Commission earlier this year in the context of the BGMctv/CHUM transfer of ownership proceeding, and no doubt will be the subject of further lively discussion in the forthcoming Diversity of Voices proceeding.

In respect of the somewhat broader public policy issue of concentration of ownership in Canada's broadcasting industry, we are confident that the Commission will have a much clearer idea after the September hearing as to whether it should adopt quantitative measures or indices of concentration, and/or whether it should promulgate rules relating to allowable ownership levels in all or some sectors of the industry.

However we would note that, as the Canadian broadcasting industry becomes more consolidated, particularly in the BDU and specialty service sectors, there does exist the potential (on both sides) for attempts to exploit market power.

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[326] See Decisions CRTC 2001-457, and CRTC 2001-458.

That is in part why the Commission, in addition to promulgating Access Rules, has included in the *BDU Regulations* and in the *Specialty Service Regulations* provisions proscribing the granting of undue preferences or the imposition of undue disadvantages. It is also why, as discussed elsewhere in this report, we believe the Commission should strengthen those provisions.

Recommendation 11(a)-1

We recommend replacing the standard condition of licence that simply prohibits any transfer of that licence with a standard condition prohibiting such a transfer "without the prior approval of the Commission."

Recommendation 11(a)-2

We recommend that the Commission amend the ownership provisions in the regulations to adopt the approach that is consistently used in corporate and securities law, which deems a person to own beneficially securities that are owned by entities controlled by that person.

Recommendation 11(a)-3

We recommend that the Commission consider the broader use of exemption orders for broadcasting undertakings and that any ownership concerns that would apply to exempted undertakings be merely stated as a condition of exemption. Enforcement of compliance with such conditions could be subject to periodic monitoring by the Commission, or be complaints-based.

We also have one additional recommendation that would reduce the regulatory burden, and would make the ownership regulation of broadcasting undertakings closer to the form of regulation that applies to Canadian carriers under the *Telecommunications Act.* However, this recommendation would require a revision to the *Direction to the CRTC (Ineligibility of Non-Canadians)*. It also deals with matters currently under active review by the Commission pursuant to its *Call for Comments on a proposed Broadcasting Ownership Information Management System.*[327] It may therefore be outside the scope of our mandate.

Recommendation 11(a)-4

We recommend that the Commission establish a regulation, pursuant to a revised Direction, that states that licensee must at all times be "Canadian" within the meaning of the Direction and that provides for the filing of information to support such eligibility "as and when requested by the Commission", as opposed to being collected routinely.

[327] Broadcasting Public Notice CRTC 2007-64.

11(b) Benefits

One of the more controversial broadcasting policies is that which the CRTC originally referred to as its policy on "clear, significant and unequivocal benefits", and which is now more commonly referred to simply as the CRTC policy on benefits.

That policy, which comes into play when the Commission assesses a proposed transfer of ownership and control of certain types of broadcasting undertakings, has evolved considerably over the past three decades.

Unlike most other important broadcasting policies, the Commission's benefits policy is not directly grounded in an explicit policy objective of either subsection 3(1) or 5(2) of the *Broadcasting Act*. However, because those policy objectives are so far reaching it would be possible to conclude that the policy objectives in paragraph 3(1)(e) and subparagraph 3(1)(s)(i) of the Act are applicable. Those policy objectives provide that:

> (e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming.
>
> (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,
>
> (i) contribute significantly to the creation and presentation of Canadian programming,

The Commission established its benefits policy in the 1970's – long before the above noted objectives were added to the Act in 1991. In establishing its benefits policy the Commission relied simply upon the broad authority contained in its statutory mandate i.e., "… to regulate and supervise all aspects of the Canadian broadcasting system". The Commission's jurisdiction to implement its benefits policy in respect of transfer applications has never been formally challenged, even though the policy has resulted over the past thirty years in the transfer of more than a billion dollars to various program production funds, music industry organizations such as FACTOR, MusicAction and Radio Starmaker Fund, to the upgrade and rebuilding of cable television networks, and to other initiatives designed to strengthen and enhance the Canadian broadcasting system and improve the level and quality of broadcasting programming that Canadians receive.

The Commission's benefits policy was developed in the mid-1970s through a series of transfer of ownership decisions: there was no general policy statement on benefits policy issued by the Commission at that time.

In a leading 1977 decision, the Commission denied an application of Maclean Hunter Cable TV Limited to acquire Western Cablevision Limited.[328] In doing so it

[328] Decision CRTC 77-456.

articulated a “three pronged test” that proposed purchasers would have to satisfy to win approval for such transfer applications, viz.,

> “… that such transfer will not affect the ability of the licensee to maintain existing broadcasting services; that it will benefit the subscribers and the communities served, and that it is in the public interest.”

In those early days, because the Commission’s benefits policy was evolving on a case-by-case basis, it was not always clear to would-be purchasers of broadcasting undertakings exactly what the Commission expected of them, in terms of either the quantum of “significant and unequivocal” benefits or the nature of the precise benefits to be proposed.

Moreover, the Commission was loath to suggest that there was a minimum percentage of the overall value of the transaction that would have to be committed by the purchaser toward clear and incremental benefits in order to obtain Commission approval for a proposed transfer. The Commission stressed repeatedly that its expectations in respect of benefits on transfers did not comprise a form of transfer tax or levy, and insisted that it would assess each proposed transfer of control on its own merits.

In many transfer decisions the Commission stated that because it was not Commission policy to call for competitive licensing applications in association with proposed transfers, the Commission expected applicants to develop “… the best possible proposal under the circumstances.” Part and parcel of that best possible proposal was to be a proposed package of clear, incremental, significant and unequivocal public benefits commensurate with the size and nature of the transaction. The regulatory onus was on the proposed purchaser to ensure that the public benefits resulting from the proposed transfer would be at least comparable to what might have been offered by applicants had the Commission conducted a competitive *de novo* licensing process for the broadcasting undertakings that were the subject of the proposed transfer. The proposed benefits were to flow to the subscribers, and/or the communities served by the undertaking, as well as to the Canadian broadcasting system as a whole.

Because there was not even a published Commission benchmark or guideline as to the level or quantum of benefits that the Commission might expect in association with any given proposed transfer application, there was a considerable variation in the size and composition of proposed benefits packages. Often if an applicant had a significant policy obstacle to overcome, such as concentration or cross-media ownership that would result from the proposed transfer, the applicant would propose a very large benefits package, hoping that the benefits package would be too attractive for the Commission to deny the application.

In an important 1986 decision the Commission denied an application by Power Corporation of Montreal to acquire effective control of Télé-Metropole ltée, then the licensee of CFTM-TV Montreal, and controlling shareholder of the TVA

Network.[329] The principal reason provided for denying that application was an inadequate level of proposed tangible direct public benefits.

The share purchase price for that transaction was $97.8 million, and the quantifiable incremental tangible public benefits package was valued by the Commission at less than $4 million. In its reasons for decision the Commission implicitly invited Power Corporation to reapply and to propose a larger benefits package. The Commission stressed that the incremental benefits proposed must be "… commensurate with the magnitude of the transaction".

To assist its members to better understand the requirements of the Commission's benefits policy, the CAB in 1987 commissioned a lengthy study entitled, "Significant and Unequivocal Benefits". That study contained a thorough analysis of CRTC transfer decisions, and reviewed the rationale for the benefits test and the criteria applied by the Commission to determine whether a given transfer of control application would be considered to be in the public interest.

In 1992 the Commission published a long-awaited Public Notice entitled, *Assessment of the Impact of the Benefits Test Applied at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*.[330] That Public Notice concluded that,

> "… for the time being … in the absence of a competitive process, application of the benefits test remains the best method of ensuring that applications for transfer of control ownership are the best possible proposals under the circumstances, and are beneficial to the public served by the undertakings, and to the Canadian broadcasting system as a whole".

Since 1992 the Commission has published several more Public Notices that relate, in whole or in part, to more detailed aspects of its policy on benefits.[331] Those four Public Notices issued between 1992 and 2000 served to a large degree to clarify, refine and demystify the Commission's policy on public benefits. One of the important issues that was clarified in that period was that although there was no set percentage of the value of the transaction to be expected in all cases, generally speaking the Commission thought 10% of the value of the transaction was an acceptable benchmark for benefits.

In the Public Notice entitled, *Commercial Radio Policy 1998*, the Commission repeated its mantra that each transfer application is dealt with on a "case-by-case basis" and that there are "… no set guidelines or benchmarks concerning what would constitute an acceptable level of tangible benefits", but went on to say (as the whole broadcasting industry knew by then) that "… these have generally represented approximately 10% of the value of the transaction" (i.e. the unofficial benchmark).[332] It then went on to explain that for future transactions involving

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[329] Decision CRTC 86-367.
[330] Public Notice CRTC 1992-42.
[331] Public Notice CRTC 1993-68, 1996-69, 1998-41 and 1999-97.
[332] Public Notice CRTC 1998-41.

profitable commercial radio undertakings it would reduce the level of expected benefits from 10% to 6% of the overall value of the transaction.

Perhaps the most significant amendment made to the Commission's policy on public benefits was that in 1996 by which all distribution undertakings were excluded for the future from the purview of the benefits policy.[333]

The Commission's rationale for deciding in 1996 that the public benefits test would no longer apply in respect of future transfers of control of distribution undertakings was the enhanced level of competition that by then had been introduced in the distribution sector. In making its announcement of this significant change in policy, the Commission noted that it had recently removed "… all or most of the existing licensing restrictions on market entry" in the distribution sector, and had encouraged competition in that sector from both direct to home ("DTH") and MDS distributors.

The Commission has recently reviewed its policy on benefits in conjunction with both its 2006 *Review of Commercial Radio* and its 2006/2007 *Television Policy Review*.[334]

Most recently, in the context of the pending public proceeding on Diversity of Voices, the Commission has called for comments from interested parties, not on the overall efficacy of its benefits policy, but on how that policy furthers the diversity of voices in the broadcasting system.[335]

The Commission's benefits policy has over the past three decades resulted in an enormous transfer of financial resources to various third party organizations, such as FACTOR, MusicAction and Radio Starmaker Fund, and to the various television program production funds that help to sustain the independent television program production industry in Canada. Approved benefits resulting from transfer of ownership and control of cable television systems prior to 1996 have also helped to finance the upgrading and digitization of Canada's terrestrial broadcast distribution networks. (A very significant percentage of benefits associated with cable transfers were dedicated to system rebuilds and upgrading in the twenty years preceding 1996.)

In addition, at the local community level there are literally thousands of performing artists and creative groups who have been, and continue to be, direct recipients of financing that has resulted from the Commission's policy on benefits.

The recently published *Broadcasting Policy Monitoring Report 2007* contains a chart (at page 75) that indicates that for the period 11 June 1999 to 31 December 2006, there had been a total of $545.6 million of benefits committed in association with applications for transfer of ownership and control of various forms of English

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[333] Public Notice CRTC 1996-69.
[334] Public Notice CRTC 2006-158.
[335] Public Notice CRTC 2007-5.

and French language television stations.[336] Those figures do not include, of course, the very large benefits package recently approved by the Commission in association with the pending transfer to BGM/CTV of ownership and control of certain assets of CHUM Limited, of the benefits proposed in the pending application of Canwest to acquire control of Alliance Atlantis, the pending application by Rogers Broadcasting to acquire ownership and control from the Trustee of the Citytv stations, or the pending application by Astral to acquire the radio stations owned by Standard Broadcasting.

Also it should be remembered that during the thirty year period prior to 1996 there were very large benefits packages approved in association with the many transfer of ownership and control applications as Canada's cable television industry consolidated. Admittedly a high percentage of those benefits were dedicated to cable systems upgrading and rebuilds, but there were also significant amounts transferred to various television program production funds, to captioning organizations, and to worthy broadcasting industry organizations, such as Canadian Women in Communications, Aboriginal Voices Radio, Innoversity and Media Awareness Network, to name only a few.

We believe, given the number and magnitude of the cable television system transfers in the 1980s and early 1990s, and given that direct benefits rarely if ever represented less than 10% of the value of those transactions, that it is not an exaggeration to say that the total value of benefits packages over the past thirty years would exceed a billion dollars.

Assessment of the Benefits Policy

Notwithstanding the significant financial contribution made by the Commission's benefits policy we believe that the policy as it is currently implemented is uneven in its scope and application, and produces somewhat quixotic results, and should be reviewed.

The strongest criticism of the current policy is the unevenness of its application. As noted, in 1996 the Commission decided that its benefits policy would no longer apply in respect of applications for transfers of BDUs because barriers to entry to the distribution sector had been lifted, and because cable television distributors were facing direct competition from DTH and MDS distributors.

It is difficult for the authors of this report to appreciate, given the constantly expanding share of the television viewing and advertising markets enjoyed by specialty television services, and by services available on the Internet and on other digital broadband distribution programs, why the Commission has not also relieved the OTA television broadcasting sector of the requirement to pay benefits in connection with proposed transfers. Surely the OTA television sector is as competitive as the broadcast distribution sector.

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[336] *The Broadcasting Policy Monitoring Report* 2007 available at www.crtc.gc.ca/eng/publications/reports.htm.

Moreover, the Commission's decision in 1998 to reduce the level of expected benefits in conjunction with transfers of profitable commercial radio broadcasting undertakings, from 10% to a minimum of 6%, while maintaining its historical 10% expectation for transfers of all television undertakings – OTA and specialty – seems somewhat arbitrary. Indeed, if one compares the average PBIT level in 2006 for Canada's commercial radio broadcasters with that for their OTA television counterparts, there does not appear to be a financial justification for the significant differential in expected benefits in the two sectors.

A third criticism of the benefits policy, one over which the Commission has little ability to control, is that it results in extremely uneven flows of benefit monies into the Canadian broadcasting system. In an unusual year such as 2007, in which the Commission is assessing several very large proposed transfers of control, there will doubtless be very large amounts of benefits monies committed over the next seven years to such eligible third party beneficiaries as FACTOR, MusicAction, Radio Starmaker Fund, the Canadian Television Fund and the various other television program production funds, and to other worthy organizations in and around the Canadian broadcasting industry.

However, 2008 could very well be, for a variety of reasons beyond the control of the Commission, a "dry" year in terms of proposed transfers of ownership and benefits, in either the radio or television sectors, or both. Because of the manner in which the system works, the flow of money in the benefits stream is totally dependent on how many "deals" involving proposed transfers get done in the Canadian broadcasting industry in a given period of time.

For these reasons we believe that the benefits policy does not comply with the principles of smart regulation.

Recommendation 11(b)-1

We recommend that the Commission conduct a public process to review its overall benefits policy, including its rationale, the manner in which the policy is implemented, the classes of undertakings to which the benefits requirement should apply on transfers, and the type of entities that should benefit from the policy. Any replacement policy should strive for more even-handed and rational application amongst competing undertakings and a more consistent and predictable funding of the intended recipients.

11(c) Aboriginal Broadcasting

The *Broadcasting Policy for Canada* set out in the *Broadcasting Act* refers specifically to Aboriginal broadcasting and the presence of Aboriginal peoples in the broadcasting system. Subparagraph 3(1)(d)(iii) of the Act speaks to the requirement that the programming and employment opportunities within the broadcasting system should reflect (among other interests) "the special place of Aboriginal peoples" within Canada society. Paragraph 3(1)(o) states that programming that reflects "the Aboriginal cultures of Canada" should be provided within the broadcasting system as resources become available for that purpose.

Before it was amended in 1991, the *Broadcasting Act* did not refer specifically to Aboriginal peoples. Nonetheless, the CRTC developed practices and policies relating to Aboriginal or Native broadcasting well before the Act was amended. These policies focused largely on Aboriginal radio and television programming in Northern and remote communities and reflected the technological innovations of the times.

New communications technologies presented great opportunities to deliver more broadcasting signals to Northern and remote communities, but also posed a threat to Aboriginal languages and culture. One commentator compared the Southern television programs delivered to the North to a neutron bomb that "destroys the soul of a people but leaves the shell of a people walking around."[337]

Looking back more than twenty five years, the level of co-ordination between the CRTC and the federal government in response to these opportunities and challenges is notable. The CRTC conducted extensive public consultation and review of Northern and Native broadcasting in 1979 and 1980. The federal government also conducted its own consultations and in 1983 established a formal policy framework to support the production and funding of Aboriginal programming in the North, the *Northern Native Broadcast Access Program* (NNBAP). The NNBAP funding led to the establishment of thirteen Aboriginal-owned and controlled communications societies across the North to provide radio and television programming (varying from society to society) in Aboriginal languages.

In the 1980s Aboriginal broadcasting grew substantially in the North. By 1989, the Commission considered that it should update its regulatory approach to Aboriginal broadcasting. The Commission's resulting *Native Broadcasting Policy*, remains the foundation of the Commission's existing policies for Aboriginal broadcasting.[338]

The regulatory framework applies across Canada and is meant to minimize the regulatory burden on what are frequently (but not always) small undertakings. The Commission emphasized that “it is the Aboriginal broadcasters themselves who are best qualified to determine and meet the needs of their audiences”. The policy

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[337] Rosemarie Kuptana, President of Inuit Broadcasting Corporation quoted in *Caplan/Sauvageau* (518).
[338] Public Notice CRTC 1990-89.

framework requires that Aboriginal undertakings be non-profit in nature, specifically oriented to the Native population and reflect the interests and needs specific to Native audiences. No specific requirements apply regarding the use of ancestral languages, given the diversity and the varying levels of use of such languages , but preservation of such languages remains a key stated objective for Aboriginal undertakings. Similarly, the Commission did not set out specific requirements regarding "Native music", but Aboriginal stations were expected to play a role in developing Aboriginal artists.

Aboriginal Radio Broadcasting

The *CRTC's Native Broadcasting Policy* focuses mostly on Aboriginal radio services. Two types of radio stations were identified: Type A stations, being stations operating in markets where no other commercial AM or FM radio licensee is in operation; and Type B stations, those operating where at least one other commercial AM or FM radio licence is in operation in the same market at the time of licensing or renewal. Naturally, Type A stations were subject to lighter regulatory control than Type B stations, including limited filing requirements and no limits on advertising. Type B stations, in comparison, filed promises of performance at licensing (regulated as "expectations") and were limited to four minutes of advertising. Both types were also subject to the generally applicable radio regulations relating to, for example, Canadian content and the retainer of logger tapes.

The fundamental aspects of the Commission's 1990 policy remain in place for Aboriginal radio, although regulation has been lightened further. Type A radio stations are now exempted from licensing requirements and no longer have to meet logging, Canadian content or other requirements of the radio regulations, and Type B stations are no longer subject to advertising restrictions.[339] Promises of Performance are no longer required. In one area, however, regulation has been tightened: Type B stations that had previously offered commercial "wrap around" programming after the end of their locally produced programming (consisting, for example, of conventional popular radio programs from out-of-market commercial stations broadcast before the end of the broadcast day) are now either "encouraged or required" to use programming from another Aboriginal station or network.[340] In practice, it appears to us that the Commission is quick to impose the use of Aboriginal wrap-around programming, or a minimum level of specific Aboriginal programming, by COL in instances when concerns are voiced by conventional commercial broadcasters in the same market.[341]

The highest profile application of the Commission's *Native Broadcasting Policy* in the radio sector has been the licensing in 2000 (and subsequently) of Aboriginal Voices Radio Inc. (AVR) to operate an Aboriginal radio network and Type

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[339] Public Notice CRTC 1998-62, *Exemption order respecting certain native radio undertakings.*
[340] Public Notice CRTC 2001-70, *Changes to conditions of licence for certain native radio undertakings*.
[341] *Licence renewal for CFNR-FM* , Decision CRTC 2001-346; *New undertaking at Dolbeau-Mistassini*, Decision CRTC 2001-354; *New undertaking at Fort Frances*, Broadcasting Decision CRTC 2003-571.

B FM stations in each of Toronto, Kitchener-Waterloo, Vancouver, Calgary, Edmonton, Ottawa/Gatineau and Montreal. The stated purpose of this network is to serve the urban Aboriginal population.

In addition to the elements of the *Native Broadcasting Policy* set out above, the Commission has imposed specific requirements on each of AVR's stations regarding local programming (25% of each broadcast week), local newscasts (daily newscasts to be provided within 12 months of the decision), the level of "structured enriched spoken word programming" (20 hours each broadcast week), the amount of Aboriginal-language programming (2% of the spoken word programming each broadcast week), and the level of vocal music selections provided in an Aboriginal language (2% of all vocal music selections each broadcast week).[342]

These specific commitments reflect undertakings made by AVR in the context of competitive applications for scarce FM frequencies in urban markets, as well as some areas of concern noted by the Commission regarding the licensee's performance over its first licence term. At the same time, it is difficult to square the particularity of these conditions, with the Commission's statement in its 1990 policy that it is the Aboriginal broadcasters themselves who are "best qualified to determine and meet the needs of their audiences." Notwithstanding that the Commission's *Native Broadcasting Policy* calls for relatively light-handed treatment of Aboriginal radio stations, it would appear to us that AVR has had very detailed conditions attached to its several licences.

Overall, the Commission's policies for Aboriginal radio appear to be working well, at least for the more traditional kind of local Aboriginal station or network. According to the 2007 *Broadcasting Policy Monitoring Report*, there are 46 Type B Native radio stations and seven native network radio licensees. (The number of Type A Native radio stations is no longer reported by the Commission.) For Type B Native radio stations reporting to the Commission more than 80% of their revenue comes from sources other than advertising, such as government and band council grants and other revenue generated by the stations.

While relatively remote stations, and those serving more localized Aboriginal communities seem to be surviving and offering valued service, especially in Aboriginal languages, AVR has not yet offered a full level of service in all of its licensed urban areas.

Aboriginal Broadcasting in Television

The Aboriginal television broadcasting sector is not as widely dispersed among Aboriginal communities as the radio sector. This is largely a function of the much higher costs involved in operating television facilities and in acquiring and producing television programming.

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[342] *The foregoing conditions of licence relate to the Toronto, Vancouver, Calgary and Ottawa stations only*, Broadcasting Decision CRTC 2007-121.

In 1990, when the *Native Broadcasting Policy* was released, a small number of Aboriginal television services had been licensed in the North. These services provided a few hours of programs each week, frequently in Aboriginal languages, for OTA distribution in Northern communities where facilities existed. CBC's Northern service, TV Ontario and Northern local broadcasters also broadcast a few hours a week of Aboriginal television programming provided by the Aboriginal communications societies.

Aboriginal broadcasters, producers and audiences criticized these arrangements as providing insufficient and poorly scheduled air time to serve Aboriginal communities. To remedy this shortfall in access for Aboriginal programming, the federal government implemented the Northern Distribution Program which provided most of the funding for a dedicated satellite transponder to distribute Northern television programming to a network of terrestrial transmitters throughout the North. The CRTC licensed the resulting network, Television Northern Canada (TVNC), in 1991.[343]

In a nutshell, the network operated by pooling the television programming provided by its member societies (six of the Northern Native Communications societies then active in television programming) and distributing it via satellite across the North.

Over the course of the 1990s, TVNC became well-established as the first level of service in Aboriginal languages across the North. Still, with both the Government and the CRTC's own policy focused on the North, and as a direct consequence of cut backs to funding programs that had supported broadcasting and other media outlets in the South, service to Aboriginal communities in the South of Canada lagged behind.

The Royal Commission on Aboriginal Peoples, which was established in 1991 and reported in 1996, looked closely at Aboriginal media in Canada, and noted this gap between Northern and Southern broadcasting. The Royal Commission, following an earlier recommendation of a different committee, stated that the establishment of a third, national network, an autonomous, Aboriginal-language service, similar to CBC and Radio-Canada, would be an ideal answer to the question of Southern access. At the same time, the Royal Commission noted that the cost of such a network could be a prohibitive factor and that “designated fees”, or some form of joint venture arrangement with public and commercial broadcasters, could be used to offset these costs.

Two years after the Royal Commission’s report, the CRTC invited TVNC to file an application for a television service to be made widely available throughout Canada to serve the needs of various Aboriginal communities, as well as other Canadians.[344]

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[343] Decision CRTC 91-826.

[344] *Additional National Television Networks - A Report to the Government Of Canada pursuant to Order In Council P.C. 1997-592*. Public Notice CRTC 1998-8.

TVNC responded to this invitation and the CRTC licensed Aboriginal Peoples Television Network (APTN) in 1999.[345] APTN is a national network with the mandate to broadcast programming that reflects the needs of all Aboriginal Peoples: First Nations, Inuit and Métis.

APTN is a "one of a kind" service in Canada and, as a result, is subject to its own unique body of conditions of licence and expectations. Nevertheless, a number of the elements of the Commission's 1990 *Native Broadcasting Policy* find reflection in how APTN is regulated.

APTN operates on a non-profit basis; in fact, it is a registered charity. APTN's ownership structure provides for representation by Aboriginal Peoples across Canada. By condition of licence, APTN is required to have a 21 member board of directors with at least 10 directors representing Southern Canada, 10 directors representing Northern Canada, and at least one director selected by the Aboriginal communications societies supported by the Northern Native Broadcast Access Program.

While APTN is required to comply with the *Television Broadcast Regulations, 1987*, the CRTC regulates APTN's activities largely through conditions of licence and related regulatory “expectations” noted as a part of APTN's original and first renewal decision. APTN is subject to conditions of licence regarding the level of Aboriginal-language programming (30 hours each broadcast week, rising to 35 hours by 2012), French-language programming (18 hours each broadcast week, rising to 20 hours by 2012), the broadcast of CRTC-defined "priority programs" during prime time evening hours (currently seven hours each broadcast week, rising to eight hours in 2007/2008), reliance on the independent production sector for programming (at least 80% of programs other than news, current affairs and sports must be obtained from independent producers), provision of described video for English- and French-language drama (by 2007/2008 all new, first run drama must contain described video) and provision of closed captioning (all English-language news and 90% of all other English-language programming, and 25% of all new, original French-language programming starting in 2007/2008). APTN is subject to the standard television broadcaster suspended conditions of licence regarding compliance with the CAB codes in relation to *Sex-role portrayal*, *Advertising to Children*, and *Violence in Television Programming*.

The CRTC requires all Class 1, Class 2, multi-point distribution undertaking and DTH broadcasting distribution undertaking licensees to distribute APTN's service as a part of the basic service by means of a distribution order made pursuant to paragraph 9(1)(h) of the *Broadcasting Act*.[346] Licence exempt cable distribution undertakings serving between 2,000 and 6,000 subscribers must also distribute APTN's service as a part of the basic service pursuant to the applicable exemption order.

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[345] Decision CRTC 99-42.
[346] Distribution Order 1999-2 (*Appendix to Public Notice CRTC 1999-70*).

By condition of licence, APTN is permitted to charge broadcasting distribution undertakings a wholesale fee of up to $0.25 per subscriber. This wholesale fee accounts for most of APTN's revenue. APTN is also permitted by condition of licence to broadcast advertising and infomercials. APTN continues to receive some federal government funding through the Northern Distribution Program which offsets a portion of the costs of APTN's Northern distribution network costs, and APTN is supported directly by both Cancom and Star Choice Television Network Inc., which voluntarily allocate a portion of their CRTC-required support for Canadian programming to APTN.

APTN has become the Commission's primary tool for the direct reflection of Aboriginal culture in television and for the advancement of Aboriginal Peoples in the television broadcasting industry. In addition to APTN, the CRTC 2007 *Broadcasting Policy Monitoring Report* states that seven other originating television stations are licensed, as well as one other television network, Wawatay Communications Society. The activities of these other services are limited.

Apart from Aboriginal-owned television stations, other initiatives do exist in television broadcasting for Aboriginal Peoples. These include specific proposals made by commercial television broadcasters to support Aboriginal programming and reflection (typically in the context of the Commission's benefits policy for transfers of control in the television sector), as well as opportunities for access in community-based media, such as local community channels. None of these initiatives have the profile enjoyed by APTN, nor have they had the same impact in providing broad national access to Aboriginal points of view and opportunities for Aboriginal Peoples in television broadcasting.

Assessment

The Commission’s existing approach to the regulation of Aboriginal broadcasting in the radio and television sectors is already streamlined in that radio stations operating in more remote communities are exempted from licensing and most other regulatory requirements.

Other Aboriginal radio stations and Aboriginal Voices Radio must, however, apply for a licence and comply with the more stringent regulatory obligations set out in the *Radio Regulations, 1986*. The licensing requirement is triggered when there is any kind of alternative commercial radio service in a community – whether it originates locally or is a rebroadcast service. (Any redistribution of a commercial radio service by a local radiocommunication distribution undertaking or rebroadcast of a non-local service would trigger the licensing requirement.) Also, the licensing requirement is triggered if a new licensed commercial service, or a rebroadcast or redistributed commercial service, subsequently begins to operate in a community.

Parliament clearly intended for the Canadian broadcasting system to reflect the special place of Aboriginal peoples in Canadian society and to reflect Aboriginal culture.

In our view, progress has been made over the past decade to have the system better reflect these important objectives – but, as discussed above, there is an unevenness in the service provided to Aboriginal Canadians in different regions of the country.

We also believe that the Commission has gone too far in trying to regulate content on Aboriginal radio broadcasting services, and has not given Aboriginal-owned services enough leeway to decide how best to serve their target audience.

In our view, there has also been too much care taken to ensure that Aboriginal services do not affect the financial viability of commercial radio stations operating in the same community.

The existing policy also tends to support only non-profit Aboriginal broadcasters, which appears to be inconsistent with the Federal Government's policy of providing incentives to eligible Aboriginal-owned businesses.[347]

We believe that if the Commission were to relax some of these restrictive policies, there could be a much more vibrant Aboriginal broadcasting sector that could better satisfy the policy objectives of the *Broadcasting Act*.

Finally, the successes of the Commission's Aboriginal broadcasting policy would appear to be related to other, independent federal government programs. For example, the launch of APTN might not have happened without Television Northern Canada, which was supported directly by financial assistance provided by the federal government. Despite the close relationship between federal programs and Aboriginal broadcasting, there appears to be a lack of express co-ordination between the goals and implementation of federal government programs, and the Commission's own objectives in this area.

Recommendation 11(c)-1

We recommend that the Commission expand the scope of the exemption order for Native radio undertakings to include any community where there is no <u>local</u> commercial radio service. Rebroadcast and redistributed radio services would no longer be subject to "protection" from unregulated competition by Aboriginal-owned services in communities with no other locally licensed service. Consideration should also be given to exempting Aboriginal radio stations from licensing in markets that have a local station, but that are not already served by an Aboriginal-owned service, assuming that there is no shortage of available frequencies.

[347] See, for example, the Eligibility Policies for Aboriginal Business Canada administered by the Department of Indian and Northern Affairs (http://strategis.ic.gc.ca/epic/site/abc-eac.nsf/en/h_ab00229e.html).

Recommendation 11(c)-2

The Commission should give Aboriginal radio stations a greater degree of discretion to program their own services. Such an approach would be consistent with the Commission's stated policy that Aboriginal broadcasters themselves are best suited to determine the needs of their audiences.

Recommendation 11(c)-3

We recommend that once a licence exempt Aboriginal radio service begins operation, the entry of a local commercial radio service in the same local market should not result in the exclusion of the Commission's exemption order for Aboriginal radio services. Rather, services that otherwise meet the exemption criteria, should continue to be exempt.

Recommendation 11(c)-4

We recommend that the current exemption order be amended to require exempt undertakings to fulfill a reporting or registration requirement with the Commission. Currently, the Commission encourages licence exempt stations to register with the Commission, but it is not known how many do so.

Recommendation 11(c)-5

We recommend that the Commission provide greater leeway for Aboriginal-owned businesses to play a role in providing Aboriginal communities with broadcasting services. The Commission should reassess its policy of giving preferential treatment to only not-for-profit Aboriginal broadcasting undertakings. The Commission should leave it up to Aboriginal communities to decide themselves how best to structure their existing operations, and Aboriginal businesses should be treated in the same way as Aboriginal non-profit organizations in launching new services.

Recommendation 11(c)-6

We recommend that any review of the Commission's policies with respect to Aboriginal broadcasting take into account relevant federal government initiatives in the same sector – and work with those initiatives to produce more effective and transparent policy development.

11(d) Ethnic Broadcasting

The legislative origins of the Commission's ethnic broadcasting policy can be found in paragraph 3(d)(iii) of the *Broadcasting Act* which states, in part, that the Canadian broadcasting system should "reflect the circumstances and aspirations" of all Canadians, including the "multicultural and multiracial nature of Canadian society."

In fulfilling this statutory objective, the Commission had licensed by the late 1990s a large number of ethnic radio and television services that target their programming to a so-called "ethnic" audience. In fact, several of these ethnic services – specifically OTA radio and television services – had been licensed as long ago as the late 1970s as a result of the Commission's recognition of the increasing ethnic, racial and cultural diversity of Canadian society, particularly in the larger urban centres in Ontario, Quebec and Western Canada.

The Commission's then Vice-Chair, the late Réal Therrien, was especially instrumental in identifying the importance of providing broadcasting services in the languages of origin of these different ethnic communities. He clearly foresaw the growth of these communities and the requirement that they be served by, and form part of, the Canadian broadcasting system.[348]

In light of the size of these communities, and the legislative policy objectives in section 3 of the *Broadcasting Act*, the Commission has over the past twenty years issued two separate policy notices relating to ethnic broadcasting in Canada. The first *Ethnic Broadcasting Policy* was issued in 1985, and the second in 1999.[349] This second *Ethnic Broadcasting Policy*, which resulted from a series of public consultations held across Canada, revised and streamlined the earlier 1985 policy.

The Current Landscape of Services

Currently, some twenty-one ethnic radio stations serve third language communities in seven of Canada's larger cities. As Canada has become more ethnically diverse, the demand for such radio stations has grown. By way of example, as recently as July 2007, after a competitive licensing hearing, the Commission granted authority for the operation of the fifth ethnic-language radio station in the Montreal radio market.[350]

As a result, in major urban Canadian markets the availability of over-the-air radio services in a variety of third-languages has become an accepted feature of the local broadcasting system. In this way, these ethnic services can be said to have entered the "mainstream" of the Canadian broadcasting system.

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[348] For a breakdown of ethnic populations in Canadian metropolitan centres, please refer to the Commission's Report on the *Carriage of Ethnic Services by Canadians Broadcasting Distribution Undertakings*, January 2003. Statistics Canada will also be releasing updated ethnic population numbers from the 2006 census in December 2007.
[349] Public Notice CRTC 1999-117.
[350] Broadcasting Decision CRTC 2007-217.

Many licensed FM radio stations in Canada's larger urban areas have also leased their subsidiary communications multiplex operations ("SCMO") channel for use by an ethnic-language radio service. These SCMO channels are used to distribute "sideband" radio services in a variety of different ethnic languages, including Tamil, Indo-Pakistani, Chinese, Korean, Persian and Greek.

As for ethnic OTA television stations, there are currently four operating in Toronto, Montreal and Vancouver. The first Toronto station – OMNI.1 – was licensed by the Commission as CFMT-TV (Channel 47) in 1979, and has long been a significant player in the local Toronto television market. In 2002, the Commission licensed a second ethnic television station in Toronto, known as OMNI.2. Both OMNI stations are owned and operated by Rogers Broadcasting Limited.

In addition, the Montreal (CJNT-TV) and Vancouver (CHNM-TV, "Channel M") ethnic television stations, licensed in 1995 and 2002 respectively, have also been garnering increasing viewership numbers, and each has become a vital source for third language news, information and entertainment programming in those cities.

Finally, Rogers Broadcasting Limited, was recently licensed to operate new ethnic television stations in both Calgary and Edmonton.[351] It also recently announced its purchase, subject to CRTC approval, of CHNM-TV in Vancouver.

The Commission also licensed in the 1980s and 1990s several general-interest third-language specialty television services under its analog licensing regime. Five ethnic specialty services serve the Italian and Spanish, Cantonese, Mandarin, Hindi and Greek-speaking television audiences in Canada on an analog basis. These five licensed Canadian specialty services are, respectively, Telelatino Network, Fairchild Television, Talentvision, South Asian Television ("ATN"), and Odyssey Television Network.

In addition, various Category 2 Canadian ethnic specialty services are now available on a digital basis. These include digital services serving the Korean, Filipino, Vietnamese, Russian, German, Persian and Hebrew-speaking communities. In total, the Commission has approved over 189 Canadian ethnic Category 2 digital pay and specialty services, of which 26 specialty and 4 pay services have been launched.[352]

The Commission has also, over the years, authorized the distribution in Canada of various non-Canadian third-language television services. These foreign television services are authorized for distribution by means of being included on the CRTC's Lists of Eligible Satellite Services (the "Lists"). These Lists include separate sections for those non-Canadian third-language services that are authorized for either analog or digital distribution.

The Commission's rationale for making these foreign third language services available for distribution in Canada is to contribute to the overall programming

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[351] Broadcasting Decision CRTC 2007-166.
[352] CRTC *Broadcasting Policy Monitoring Report 2007*, July 2007.

diversity of the Canadian broadcasting system, and to respond to clearly demonstrated consumer demand for television services in viewers' mother tongue or "language of comfort". The Commission's tiering, linkage and buy-through rules also promote the "take-up" of Canadian third-language specialty services serving the same language groups as the non-Canadian third language services. These rules are discussed in greater detail in Chapter 10(d) respecting specialty services.

Finally, as a result of the Commission's Exemption Order in respect of "New Media Broadcasting Undertakings",[353] various foreign third-language television services are freely available for viewing in Canada through the Internet. These services, whose programming may not always be licensed for exhibition in Canada from the underlying copyright holders, represent a growing unregulated distribution channel for third-language services.

One such Internet service familiar to Canadians is JumpTV.com, a Canadian-owned, subscription-based service, based in Toronto that offers over 240 television channels from over 70 countries. JumpTV claims to be the "world's leading broadcaster of television over the Internet", allowing its subscribers to "remain connected to their homeland".

The Commission's 1999 changes to the then existing 1985 *Ethnic Broadcasting Policy* were expressly designed to lighten the regulatory burden imposed on ethnic broadcasters in Canada, and to ensure a continued role for such broadcasting undertakings within the Canadian broadcasting system. The Commission, however, chose to retain the fundamental framework of its earlier 1985 *Ethnic Policy*, which had worked well in fostering growth in the number and diversity of available Canadian ethnic broadcasting services.

The Commission began by simplifying the definition of an "ethnic program" which, under the 1985 policy, was quite cumbersome, being divided into five separate program categories. Henceforth, an ethnic program was defined simply as programming in "any language, that is specifically directed to any culturally or racially distinct group other than one that is Aboriginal Canadian or from France or the British Isles".

Level of Ethnic Programming

In order to ensure that ethnic broadcasting undertakings would continue to serve their respective "core" ethnic communities, the Commission's 1999 *Ethnic Broadcasting Policy* requires that at least 60% of the programming content of ethnic radio and television stations be devoted to ethnic programming.

In the case of ethnic radio stations, this 60% threshold requirement must be met during each broadcasting week, while ethnic television stations must do so over each broadcast month. When deemed appropriate, the Commission may increase this minimum level beyond 60% to be met as a condition of licence applicable to a particular ethnic broadcaster.

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[353] Public Notice CRTC 1999-197.

This 60% minimum amount of ethnic programming allows ethnic broadcasting undertakings to devote the remaining 40% of their broadcast time to non-ethnic programming – such as conventional English and French-language programming – that can usually more easily generate the advertising revenues needed to support the ethnic component of their entire broadcast schedules. In effect, the revenues generated by the non-ethnic programming can be used to cross-subsidize the ethnic portion of the station's programming.

This "60/40 formula" has been very effective in allowing many of these ethnic radio and television stations to defray the high costs associated with the production of local Canadian third-language programming. Without it, it is doubtful that many would have been able to generate the gross advertising revenues necessary to operate as ethnic services. We recommend that this programming (and funding) model be maintained, subject to review on a station-by-station basis.

Diversity of Language Groups Served

The Commission has always required that OTA ethnic radio and television stations serve more than a single ethnic or linguistic group because of the continuing scarcity of over-the-air broadcasting frequencies. This requirement reflects the reality that there are simply not enough OTA broadcasting frequencies available to permit single-language ethnic OTA services.

In imposing this requirement, the Commissions has also sought to ensure that the smaller ethnic communities could receive radio and television services in circumstances in which they might not otherwise be financially justified. In doing this, the Commission has seen to it that these smaller linguistic groups are served by the broadcasting system, while providing a "critical mass" of high-quality programming targeted to the larger ethnic groups.

In the end, in establishing the minimum number of groups that an ethnic broadcasting undertaking must serve, the Commission has attempted to find an appropriate balance between two often competing objectives: 1) maximizing the number of distinct ethnic groups to be served, and 2) maintaining high-quality ethnic programming overall.

Level of Third-Language Programming

The Commission has also continued to require that 50% of the total programming content of OTA ethnic radio and television stations be in a third-language. This is defined as a language other than English, French or those of Aboriginal Canadians. The purpose of this 50% minimum level is to ensure that ethnic radio and television stations broadcast a minimum amount of their programming in a variety of third-languages, regardless of whether particular programs qualify as ethnic programs (which, of course, are not defined in terms of the language used). Nonetheless, the Commission retains the ability to set a different minimum level – whether greater or lower than 50% – for individual stations, by way of condition of licence.

Canadian Content

Given the special programming mandate of ethnic over-the-air radio stations, and the relatively low availability of Canadian musical recordings that target third-languages audiences, the Commission has also imposed on such radio stations a reduced Canadian content – or "Cancon" – level of 7% with respect to musical selections aired each broadcast week during ethnic programming periods. During non-ethnic programming periods, however, this Canadian content requirement rises to at least 35% of musical selections from CRTC Category 2 (general music), and at least 10% from Category 3 (traditional and special interest music).

As for ethnic OTA television stations, the Commission requires that they broadcast the same level of Canadian content – 60% overall and 50% during the evening broadcast period – as required of conventional English or French- language stations. Even so, these levels can be varied by the Commission in light of special circumstances.

Ethnic Programming by Non-Ethnic Stations

While encouraging all non-ethnic radio and television stations to reflect their individual markets, including through ethnic programming, the Commission is also concerned about the impact that such programming may have on local ethnic stations that might face what might be characterized as unfair competition from these more "mainstream" stations.

In an effort to strike a balance the 1999 *Ethnic Broadcasting Policy* sets 15% as the maximum level of ethnic programming that non-ethnic radio and television stations may provide, regardless of the existence of ethnic stations in their local markets.

Following the release of its 1999 policy, the Commission made a number of amendments to the *Radio Regulations, 1986*, the *Television Broadcasting Regulations, 1987*, the *Pay Television Regulations, 1990* and the *Specialty Services Regulations, 1990* in order to implement the revised policy.

In our view, the Commission's ethnic broadcasting policies have acted as a strong catalyst for the introduction of a variety of different third-language radio and television services into the Canadian broadcasting market. As the 1999 policy already represents a more "streamlined" version of the earlier policy, we have not identified any further changes that we believe need be made to the 1999 *Ethnic Broadcasting Policy*.

Canadian Third-language Specialty Services

As noted above, since the early 1980s, the Commission has licensed five general interest third-language specialty and pay television services on an analog basis. These services consist of Telelatino, Fairchild, Talentvision, ATN and Odyssey.

When digital distribution systems became more widespread, the Commission moved towards a more "open entry" licensing system for Canadian third-language Category 2 specialty services. This has increased diversity and consumer choice in terms of third-language services. The Commission has seen these new services as an important vehicle to meet the "needs and interests of Canada's third-language ethnic communities and for fulfilling important objectives" set out in section 3 of the *Broadcasting Act*.[354]

Until very recently, the Commission assessed applications for these third-language Category 2 services on the basis of whether or not they would compete directly with any of the licensed Canadian analog third-language services. Then, in 2005, the Commission revised its licensing approach to Canadian third-language Category 2 specialty and pay services.[355] The Commission made a number of changes to its existing policies in an effort to maximize the availability of such third-language services within the Canadian broadcasting system while, at the same time, protecting the interests of incumbent licensed analog services which have more onerous Canadian content exhibition and spending requirements.

This balance between the increased licensing of new third-language digital Category 2 specialty services with the protection of existing analog services was accomplished by a "buy-through" requirement.

Under the open entry licensing approach, any new applicant for a third-language Category 2 service had to devote at least 90% of its program schedule to programming in languages other than English or French. In cases in which such a proposed service included more than 40% of its program schedule in the same language as those of the incumbent third-language analog ethnic services – i.e. Italian, Spanish, Cantonese, Mandarin, Hindi or Greek – BDUs wishing to distribute the new Category 2 service would have to link it with the existing analog service that operated in the same third language.

As for new applications for third-language Category 2 services which did not offer at least 90% of their programming in a third language, such services would continue to be assessed under the former policy contained in Public Notice CRTC 2000-6. This policy required a review of the applications on a case-by-case basis, and a determination by the Commission whether the proposed service would be directly competitive with any existing analog specialty or pay service, or any Category 1 specialty service.

Non-Canadian Third-Language Services

Closely linked to the issue of the licensing of Canadian third-language services is that of the authorization for distribution by BDUs of non-Canadian third-language television services. From very early on in the development of its various Lists, the Commission has grappled with the thorny question of which – and how

[354] Broadcasting Public Notice CRTC 2005-104.
[355] Ibid.

many – of these non-Canadian third-language television services should be permitted in the system.

The problem has, of course, been to reconcile the contribution to the overall diversity of the Canadian broadcasting system that such services make (along with their obvious responsiveness to consumer demand) with the potential threat they pose to licensed Canadian ethnic specialty services. To that end, the Commission has, until recently, had a policy that prevented the authorization of non-Canadian television services that are either totally or partially competitive with existing Canadian specialty services.

This policy was changed in light of a number of factors, including the growth in demand for third-language television programming, strong demand from Canadian viewers seeking greater access to diversity of sources of foreign third-language programming, the threat of the so-called "grey market" through Canadians subscribing to unauthorized non-Canadian third-language satellite services, and the anticipated launch of such unregulated web-based services as JumpTV.

This policy amendment did not, however, come easily to the Commission. Instead, it was precipitated by the consumer "backlash" that resulted from the Commission's denial of a request from the BDU industry to add the signal of Italy's public broadcaster, RAI International, to the Commission's Lists for digital distribution. The Commission had been concerned that allowing the RAI International service to enter the Canadian marketplace would present a serious threat to the twenty year old Canadian Italian and Spanish-language analog service, Telelatino, as well as to various unlaunched Category 2 ethnic services. In the political storm which subsequently followed, the Commission amended its policy.

Consequently, the Commission revised its longstanding approach to the assessment of requests to add new non-Canadian third-language television services to its Lists.[356]

While liberalizing its previous policy relating to the distribution of foreign satellite services (subject to the "buy-through" requirement in respect of incumbent analog services) the Commission has underscored its belief that the licensing of Canadian third-language services still provides the best way to deliver third-language television programming to Canadian viewers.

Recommendation 11(d)-1

We recommend that the Commission pay more attention to consumer demand for ethnic services, rather than protecting the financial viability of incumbent "Canadian" third-language specialty services.

The JumpTV Internet distribution model provides a viable alternative to Canadian ethnic third-language services as it offers linear programming from more than 240 television broadcasters in over 70 countries. Certainly the JumpTV model

[356] Broadcasting Public Notices CRTC 2004-96 and 2005-51.

would suggest that, one way or another, television viewers are going to access the programming that they, and not the Commission, will choose.

In our view, the current policy of requiring a 1:1 linkage with a Canadian analog specialty service in the same third-language could dampen demand for BDU-delivered services.

BDU subscribers already have to buy through the basic tier of Canadian television services to gain access to third-language ethnic services, and are therefore already obtaining access to a relatively large number of Canadian programming services. In other chapters of this report, we are recommending ways to improve the carriage rights of Canadian programming services with high levels of Canadian content.

The current regulatory system has allowed the creation of a wide range of domestic Canadian specialty services in a variety of third-languages. Some of these services have been available for close to 25 years. We believe that the Canadian third-language specialty market is sufficiently mature that services which have garnered demand over time should continue to be attractive to this viewership.

We fear that if Canadians are not given more freedom to access discretionary services of their choice, the Canadian broadcasting system may become less relevant to some segments of the population and the Canadian broadcasting system will lose viewership to other more consumer-friendly media.

Recommendation 11(d)-2

We recommend that the Commission consider eliminating the linkage and buy-through rules respecting analog third-language services and to permit Canadians to select the third-language service of their choice once they have purchased the basic service of a BDU.

11(e) Cultural Diversity on Television

Related to the Commission's ethnic broadcasting policy is the question of the reflection of Canada's cultural diversity on television. In this regard, the Commission has long recognized the pivotal role that television can play in allowing Canadians to see – and come to know – each other.

Like the issue of ethnic broadcasting, the legislative origins of the Commission's regulatory overview of cultural diversity on television arise from paragraph 3(d)(iii) of the *Broadcasting Act* which states, in part, that the Canadian broadcasting system should "reflect the circumstances and aspirations" of all Canadians, including the "multicultural and multiracial nature of Canadian society."

In an effort to ensure that Canadian television stations reflect the ethnic reality of Canadian society on the nation's television screens, in 2001 the Commission began to impose licensing expectations on its television licensees relating to cultural diversity

In addition in August, 2001 the Commission requested that the CAB create a task force consisting of industry and community representatives to develop a set of "best practices" to be adopted by television broadcasters with respect to issues of cultural diversity, as well as to help define practical means to ensure a more accurate portrayal of the cultural diversity of Canada on the nation's television screens. [357]

For the next three years, the CAB Task Force for Cultural Diversity on Television conducted empirical research and content analysis on the on-screen representation of Canada's ethnocultural and Aboriginal diversity, reviewed the corporate best practices of companies that had been independently recognized for their commitment to the goals of diversity, and met with a broad spectrum of interested parties to discuss their impressions of the portrayal on Canadian television of Canada's cultural diversity.

The report of the Task Force was filed with the Commission in July 2004. Having reviewed the report of the Task Force, the Commission issued its response.[358] The Commission stressed its conclusion that mainstream television broadcasters continued to portray an inaccurate representation of cultural diversity in Canada, particularly in news and drama programs. This conclusion arose directly from the Task Force's content analysis which indicated that ethnocultural groups and Aboriginal peoples only represented 9% of all informed "expert" role appearances on English-language news programs, relative to a benchmark expectation of 19.3%. The comparable figure for French-language news programming was an appearance rate of 1.6%, against a benchmark expectation of 8%.

In the case of cultural diversity on English-language drama television, only 13.5% of all appearing roles were by members of visible minorities. As for primary

[357] Public Notice CRTC 2001-88.
[358] Broadcasting Public Notice CRTC 2005-24.

or lead roles, this number slipped to 10.3%. As for Aboriginal peoples, they were virtually non-existent on Canadian drama programming, whether it be English or French-language.

Overall, it was apparent to the Commission that problems of cultural misrepresentation and stereotyping abound on Canadian television. As such, the Commission expressed its view that significant work lay ahead for Canadian television broadcasters in addressing this problem, particularly in relation to news and English-language drama programs "due to their influence on how viewers perceive themselves and one another".

Another important element of the Task Force's report included a comprehensive list of recommended best practices that could be adopted by Canadian radio and television broadcasters in pursuit of the goal of improving the on-screen representation of Canada's cultural and racial diversity.

Because the Task Force had concluded that what is seen on-screen is affected to a significant degree by what goes on in a broadcasting undertaking's corporate offices, as well as by those working "behind the cameras", the best practices report dealt with virtually all aspects of a television broadcaster's operations. Principal among the corporate best practices identified by the Task Force were:

- the commitment of a company's senior management to the goals of cultural and racial diversity;

- the recognition within a company's workforce of the relationship that exists between the company's ultimate financial success and its pursuit of diversity goals;

- the ongoing measurement of the progress made towards the achievement of diversity goals consistent with the maxim that "what gets measured, gets done";

- the linking of executive compensation packages with the meeting of pre-identified diversity hiring targets.

In response to the best practices developed by the CAB's Task Force, the Commission noted that these practices constituted an "instructive package" for Canadian broadcasters who intend to create a new corporate action plan, or who were augmenting their existing plans.

Although the Task Force had asked in its final report that CAB members be relieved of any requirement to file annual progress reports relating to their individual corporate diversity plans, the Commission concluded that, because of the problems identified by the Task Force's research, television broadcasters should continue to file these annual reports with the Commission.

The Commission plans to use these annual reports to monitor the progress made to close the systemic gaps identified by the Task Force, particularly those

relating to the level of on-screen cultural and racial diversity reflected in news and English-language drama programming.

Finally, the Commission ordered that the CAB itself file annual reports relating to its implementation of various industry initiatives set out in the Task Force's final report. These included such proposals as creating annual awards for specific achievements in Aboriginal programming, as well as achievements for diversity in other programming areas. This requirement was meant to ensure that the various initiatives proposed by the Task Force were, in fact, undertaken in a timely manner. The CAB filed its first annual report in April, 2006 and its second report in May, 2007.

Depending on the results that the Commission sees reflected in the annual corporate action plans filed by individual broadcasters, as well as in the annual reports received from the CAB with respect to industry initiatives, the Commission will assess whether any future study should be undertaken so as to replicate the Task Force's content analysis for the purposes of "before and after" comparisons.

We believe that the collaborative manner in which the Commission's policy relating to the portrayal on television of Canada's cultural diversity has been developed and implemented, with the active participation of the CAB and its members, is commendable. The Commission and the industry now have a well researched "base line" study (prepared by the CAB Task Force) and will have a series of annual reports to review with all television licensees at the time of licence renewal. It is too early to comment on the effectiveness of this approach to regulation, but it certainly would appear to be preferable to a rigid "top down" command style of regulation.

11(f) Educational Broadcasting

"Consistency is the last refuge of the unimaginative"
Oscar Wilde

The CRTC could never be accused of being either consistent or unimaginative in respect of its policies on educational broadcasting. Indeed it is difficult to discern a consistent overriding CRTC policy or approach to the subject of educational broadcasting.

This is so notwithstanding the specific policy objective in paragraph 3(1)(j) of the *Broadcasting Act* that states:

> 3.(1)(j) educational programming, particularly where provided through the facilities of an independent educational authority, is an integral part of the Canadian broadcasting system.

It is also true notwithstanding the existence of two specific Cabinet Directions to the CRTC which relate specifically to educational broadcasting and which have each been in effect for more than three decades.

The first Direction to the CRTC directs that the CRTC may not issue broadcasting licences to persons of the following classes:[359]

(a) Her Majesty in right of a province;
(b) Agents of Her Majesty in right of any province; and
(c) Municipal governments.

That Direction then goes on to outline, in some detail, the qualifications of an "independent corporation" that might be eligible to hold a licence to operate an educational broadcasting undertaking in a province notwithstanding that a particular "independent corporation" might receive provincial funding.

The second Cabinet Direction directs the CRTC to ensure that there will be distribution capacity available on all licensed broadcasting receiving undertakings (i.e., then only cable television systems) for the distribution of provincial educational programming services that may be licensed to one of these independent corporations.[360]

That second Cabinet Direction also contains, in an Appendix, a definition of what constitutes "educational programming".[361]

Thus there is a legislated regulatory framework, created by Orders in Council promulgated pursuant to the *Broadcasting Act*, that establishes the qualification criteria for the type of "independent corporation" (public or private) that may operate

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[359] Direction to the CRTC (Ineligibility to Hold Broadcasting Licences).
[360] Direction to the CRTC (Reservation of Cable Channels).
[361] Ibid Appendix, Paragraph 1.

an educational broadcasting service in a province. It also guarantees access to the Canadian broadcasting system for such provincial educational broadcasting services.

Today such educational broadcasting authorities exist in five provinces viz., Ontario, Quebec, Alberta, British Columbia and Saskatchewan. In Ontario there are now two separately licensed educational broadcasting services – TV Ontario (TVO) and its French language counterpart – TFO.

There is also one national specialty programming television service, Canadian Learning Television (CLT), that styles itself as Canada's first national educational service. It is privately owned, and operates on a "for profit" basis.

In addition some educational programming is provided within the system by the CBC, and by a number of non-commercial radio stations, which were originally licensed as educational broadcasting stations.

However, as noted, there is little consistency as to the nature of the programming provided by these various undertakings, the methods by which their respective operations are financed, or their corporate and governance structures.

Some are privately-owned and operated for profit, others receive direct provincial government financing, some are permitted by condition of licence to accept sponsorship revenues, while others may solicit commercial advertising.

There is no set of CRTC regulations that apply to educational broadcasting undertakings as a class. Each separate educational broadcasting undertaking is regulated by a set of conditions of licence which has been carefully tailored to reflect the circumstances of that particular licensee.

The principal rationale for this apparent lack of consistency in the regulation of the educational broadcasting sector in Canada is that although broadcasting, for constitutional purposes, is an exclusive area of federal jurisdiction, education is a provincial head of power. Different provinces have different priorities and policies in respect of educational broadcasting.

After the federal Government agreed in the early 1970s to back off from its contentious plan to establish a national educational broadcasting entity, through the two above-noted Orders in Council a legislated regulatory structure was created to allow designated independent provincial educational broadcasting authorities to obtain broadcasting licences, and also to have guaranteed access to cable distribution facilities in the regulated Canadian broadcasting system.

However, as noted, there is not one consistent model as to how those educational broadcasting undertakings are structured, governed, financed or programmed.

In light of the highly contentious nature of this area of divided jurisdiction, and given that the existing "patchwork quilt" system of educational broadcasting

undertakings in Canada seems to work quite well, we would not recommend that the Commission embark upon a major policy review in this sector. There are no CRTC educational broadcasting regulations to review, and the two existing Cabinet Directions to the CRTC have been in effect since the 1970s, and seem to work quite well.

However we would note that when the *BDU Regulations* are reviewed, the principle of mandatory access for provincial educational broadcasting undertakings to the distribution system that currently applies in respect of cable television distribution systems, should be extended to all BDUs, including DTH distribution systems.

Through an apparent oversight in the *BDU Regulations* the guarantee of priority carriage for the signals of all provincial educational television broadcasters within their respective provinces was not extended to DTH distribution undertakings.[362] In other words, priority carriage protection for provincial educational broadcasting authorities on cable, as guaranteed in paragraph 17(1)(b) of the *BDU Regulations*, is not reflected in a symmetrical fashion for DTH distribution undertakings in section 37 of those same Regulations. It would appear to be not only equitable, but also in conformity with the spirit of the 1970 Cabinet Direction to the CRTC (Reservation of Cable Channels), to apply the principle of priority carriage for educational broadcasting services consistently to all distribution platforms.

A second issue that may be addressed at the time of the renewal of the licences of the various educational broadcasters is that of restrictions on advertising. It does not appear equitable that provincial educational broadcasters such as Télé-Québec and Access Media Group (ACCESS) Alberta should be permitted to solicit advertising revenues whereas TV Ontario, TFO, Saskatchewan Communications Network, and the Knowledge Network of B.C. may not.

Recommendation 11(f)-1

We recommend that the principle of mandatory access for provincial educational broadcasting undertakings to the distribution system that currently applies in respect of cable television distribution systems should be extended to all BDUs, including DTH distribution systems.

Recommendation 11(f)-2

Restrictions on advertising by provincial educational broadcasters should be removed.

[362] There is a possibility that this was not an oversight: perhaps the Commission did not wish the signal of an educational broadcasting authority in one province being available via satellite in another province?

11(g) Services for Persons with Disabilities and their Portrayal in Broadcasting

The CRTC has pursued a number of regulatory initiatives focused on increasing access to programming for persons with disabilities, particularly sensory disabilities (hearing and vision). More recently, with the assistance of the CAB, the CRTC has begun to direct its attention to the issue of portrayal in broadcast media of persons with disabilities.

Both areas of activity: access and portrayal, are rooted in section 3 of the *Broadcasting Act*. Subparagraph 3(1)(d)(iii) of the Act provides that the broadcasting system should:

> through its programming and employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples in that society; (emphasis added)

Although there is no specific reference in that subparagraph to persons with disabilities, the reference to "equal rights" reflects Parliament's intention to include, within the *Broadcasting Policy for Canada*, respect for the fundamental equality rights of all people.

More specific than that general reference to equality rights, paragraph 3(1)(p) states that:

> programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose;

This provision obviously speaks directly to the issue of accessibility of programming for disabled persons. It includes the idea that accessibility to programming should increase "as resources become available for the purpose," but does not, we note, provide guidance on which resources are to "become available," or how a determination is to be made as to when such resources are available.

Closed Captioning

Closed captioning of television programming began in the late 1970s. Much of it was provided as a result of financing for captioning being included in benefits packages associated with transfers of ownership and control of large cable television systems. Captioning technology improved greatly over the years, as did reliance on captioned services by hearing impaired Canadian television viewers.

In 1995, the Commission clearly stated its rationale for requiring television broadcasters to provide a significant level of closed captioning:

> Television has become an essential tool in the robust debate and free exchange of ideas that nourish a democratic society. When deaf and hard-of-hearing persons, most of whom are unable to hear radio broadcasts, are also unable to receive television broadcasts in a form that is comprehensible to them, they are largely cut off from this essential aspect of citizenship. [363]

In that Public Notice the Commission imposed more ambitious closed captioning requirements on English-language private television broadcasters, and adopted an approach that took into account the differing financial resources available to small, medium and large stations. Larger stations (those having annual revenue in excess of $10 million) were required to meet a 90% closed captioning requirement, while medium and small sized stations were, respectively, "expected" and "encouraged" to do the same.

The Commission has recognized that captioning in the French-language is more difficult. This is due partly to the fact that captioning technology was developed in English first, and partly due to the relative shortage of trained captioning personnel. Nonetheless, when the Commission reviewed its 1999 *Television Policy*, it stated that the requirements for French-language broadcasters should be the same as those for English-language broadcasters.[364] Since then, the Commission has required larger French-language television broadcasters to meet the 90% threshold required of larger English-language stations, while exempting in specific circumstances certain smaller stations from this requirement.

Other modes of television service, such as specialty and pay television, have been treated similarly, with allowances for programming differences.[365]

The Commission recently updated and increased the level of closed captioning to be provided by television services in the context of its 2006/07 OTA Television Review. Under its new policy, the Commission has decided that the industry, as a whole, is now capable of providing closed captioning in <u>all</u> of its programming.[366] No exception has been made for smaller broadcasters.

The Commission noted that the 90% requirement had been in place for more than a decade and that many broadcasters had been successful in leveraging sponsorship opportunities associated with captioning. Most importantly it noted that complaints made to the Canadian Human Rights Commission had resulted in two large broadcasters (the CBC, in respect of both English and French-language programming, and CanWest Global) already committing to achieve 100% closed captioning by a certain date. As a result, the Commission concluded that the 100%

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[363] *Introduction to Decisions Renewing the Licences of Privately-Owned English-Language Television* Stations, Public Notice CRTC 1995-48.
[364] *Building on Success – A Policy Framework for Canadian Television*, Public Notice CRTC 1999-97.
[365] *Introduction to Broadcasting Decisions CRTC 2004-6 to 2004-27 renewing the licences of 22 specialty services*, Broadcasting Public Notice CRTC 2004-2.
[366] *A new policy with respect to closed captioning*, Broadcasting Public Notice CRTC 2007-54.

level was now an "achievable goal" with allowance for occasional (but not systemic) technical failures to provide captioning.

Other television broadcasting sectors, such as pay and specialty television, will be measured against the 100% requirement at the time their performance is reviewed (typically, at licence renewal and upon the issuance of new licences). Also, the Commission has again recognized that the English-language and French-language environments are different for closed captioning. The Commission has stated that it could modify the requirement for full captioning on a case-by-case basis based on "specific and detailed supporting evidence, including financial information" to demonstrate that it is "impossible" to caption all programming.[367]

It should be noted that the Commission's requirements do not apply to broadcast advertisements.

Closed captioning in languages other than English and French has been treated much differently by the Commission. The Commission has not required closed captioning for such programming; although multilingual services that provide some English and French-language programming in addition to programming in other languages are usually required to meet the generally applicable threshold (previously 90%) in their English- and French-language programming. This difference in treatment for third-language programming is attributable to the difficulties inherent in using existing technologies to caption programs in languages that do not use the Western alphabet. The Commission stated that it would review with licensees at the time of licence renewal the feasibility of providing closed captioning in different languages.

Apart from the volume of captioning to be provided, advocates for the deaf and hard-of-hearing have pointed out for some time that there is much room to improve the quality of captioning that is provided. These advocates have noted frequent errors in captioning, delays, gaps and interruptions in captioning (due, for example, to the insertion of advertisements).

To address these issues, the CRTC has called on all broadcasters, principally through the offices of the CAB, to establish a working group with input from all concerned parties to improve the quality of closed captioning. As a first step, the broadcasting industry is expected to propose universal standards for the quality of closed captioning, which could then be used as a measure for performance.

In summary, therefore, the CRTC has stated that it will require all television broadcasters to close caption all of their English and French-language programming (other than advertisements). The Commission has stated that it is prepared to consider exceptions to this policy on a case-by-case basis, particularly with respect to French-language broadcasters, based on specific evidence demonstrating the impossibility of captioning all programming. The Commission has initiated a process that should lead to universal standards for closed captioning (with the broadcasting

[367] *A new policy with respect to closed captioning*, Broadcasting Public Notice CRTC 2007-54.

industry itself being tasked with the role of proposing initial standards for the Commission's consideration). The Commission to date has not imposed specific requirements with respect to programs in languages other than English or French.

Described Programming

Regulation of described audio and described video services on television and other services is not as clear cut as the regulation of closed captioning.[368] Rather, the Commission has developed and implemented a number of different approaches regarding the accessibility of television programming for these audiences.

First, with respect to described audio, the Commission has, since its 1999 *Television Policy*, noted its “expectation” that all television broadcasters should provide described audio in relation to textual and graphic information provided on screen. This expectation was noted specifically in the 2001 licence renewals for the larger broadcast television groups (CTV, Global and TVA), and also in the context of the 2004 renewals of a number of specialty television services.

Described video has been regulated on a case-by-case basis by way of COLs. It is said that some kinds of programming, such as drama, are well suited to described video; whereas others, like sports programming (which already contains play-by-play description) and news and public affairs programming (which conveys information largely in spoken format) are not.

The Commission's requirements for described video have focused on the number of hours of described video programs to be offered per week, requiring, typically, between two and four hours of described video programming per week (on average) in primetime for conventional stations and two hours per week for specialty services.

The limited number of hours of described video programming (in comparison, for example, to closed captioned programming) is due to a number of factors including: the relatively recent introduction of this type of programming, production costs, the limited availability of described video shelf-product, the suitability of different programming genres to descriptive video, and, perhaps, the technological changes required to accommodate larger volumes of described video programming. The Commission has not, however, undertaken a comprehensive review of this kind of programming with a view to determining what is possible, and desirable, on a system-wide basis.

In addition to the number of hours of described video that television broadcasters must provide, the Commission has supported the distribution of

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[368] "Described audio" refers to the voice-over in real time of textual information displayed on screen by a television service. For example, when an address is displayed onscreen in a textual format, a voice over would read out that address. "Described video" refers to a separate audio-feed for a television program, which could include descriptions of on-screen action to supplement dialog. The separate audio feed is accessed using the "SAP" control on the television or converter which enables the receipt of a different audio feed for a single video channel.

services specifically intended for blind and visually-impaired audiences. In 1990, the Commission licensed National Broadcast Reading Service (NBRS) and La Magnétothèque to provide audio services in English and French.[369] These services consist primarily of information programming from a variety of news and information sources. Voiceprint, the NBRS English-language service is distributed pursuant to a mandatory distribution order by larger BDUs and DTH undertakings in English-language markets to all subscribers. Terrestrial analog BDUs use an SAP channel adjacent to CBC Newsworld for this purpose. Voiceprint is permitted to charge a wholesale fee of up to $0.04 per month per subscriber and may also carry up to four minutes of advertising per hour. No similar provisions apply to La Magnétothèque.

Very recently, the Commission licensed NBRS to offer a new specialty television service, The Accessibility Channel, that will compile available described video programming and make it available on a single channel.[370] This service will be distributed as part of the digital basic service pursuant to a mandatory distribution order applicable to larger BDUs. It will be supported by a permitted wholesale fee of up to $0.20 per subscriber per month in applicable English-language markets. The service may also distribute up to twelve minutes of advertising and is subject to other conditions of licence directly related to its service.

The licensing and mandatory distribution of The Accessibility Channel reflects the limited amount of described programming available even though it is provided by numerous licensees, and the failure by some BDUs to pass-through described programming, notwithstanding the CRTC's requirements. The Accessibility Channel will provide "open format" described video programming which is distributed in the same technology as other programming services, without the need for transmission of a separate SAP channel.

In summary, therefore, the Commission's approach to providing service to blind and visually impaired audiences consists of an expectation that all television broadcasters will provide descriptive audio (without any binding regulatory obligation to do so), case-by-case requirements for broadcasters to offer specific but limited levels of described video programming each week, the licensing of news reading services together with the mandatory distribution of the English-language news reading service, and the very recent licensing of The Accessibility Channel to operate as a "single source" for described video programs.

Portrayal of Persons with Disabilities in Broadcasting

The Commission's policies regarding the portrayal of persons with disabilities are a work in progress. But, to continue the analogy, the foundation has been laid and the Commission, together with numerous interested parties, are now working together to build a house.

The Commission's work in this area is comprehensively reviewed in its response to a report commissioned by the CAB which focuses on the portrayal of

[369] Decision CRTC 90-1060.
[370] Broadcasting Decision CRTC 2007-246.

persons with disabilities in television programming and their participation in the broadcasting industry.[371] The CRTC has noted the findings of the CAB study that persons with disabilities are profoundly under-represented in television broadcasting, are frequently portrayed in stereotypical roles, and do not participate adequately in the employment and other opportunities present in our broadcasting system.

The Commission accepted the CAB's proposed course of action to address these problems which include: the production and broadcast of on-air public service announcements, updating the CAB's voluntary codes regarding programming content to reflect concerns surrounding the presentation of persons with disabilities on screen, increasing information available for and regarding the employment of persons with disabilities, increasing training of prospective employers in the broadcasting sector regarding accommodation issues for persons with disabilities, and increasing the level and quality of communication among broadcasters regarding disability issues.

The more specific tasks identified by the CAB's report have already been acted on, or are in the process of implementation. At the same time, the CRTC noted in its response to the CAB report that responsibility to implement many of the CAB's recommendations would ultimately reside with individual broadcasters. Accordingly, the CRTC noted that it expects broadcasters to include with their annual corporate reports reference to specific initiatives those broadcasters have taken in this regard. The CRTC stated that the CAB's study and proposed plan of action would be used as a reference point to evaluate the individual reports made by broadcasters and the progress made in improving the portrayal and participation of persons with disabilities.[372]

Overview

The Commission's policies regarding access for deaf and hard-of-hearing audiences, and for blind and visually-impaired audiences, are each "up to date" in the sense that they have been amended recently by the Commission. The Commission's policy – which places the onus on broadcasters to justify any deviation from the "gold" standard of full closed captioning – reflects the spirit of the broadcasting policy which requires service to be provided to persons with disabilities "to the extent of available resources."

The Commission's policies surrounding descriptive video have been less successful, as the Commission has itself recognized in its decision to licence and require distribution of The Accessibility Channel. At the same time, what appears to be lacking in the Commission's policy for all broadcasters is an "up front" evaluation of how much described video programming all broadcasters should be required to include in their programming schedules (from the most suitable genres of programming). Is the Commission's objective, for example, that all drama

[371] *Commission's response to the Canadian Association of Broadcasters' final report on the presence, portrayal and participation of persons with disabilities in television programming*, Broadcasting Public Notice 2006-77.
[372] Broadcasting Public Notice CRTC 2006-77.

programming should include described video? Is the only barrier to implementing this policy the cost of production for that programming? What is the cost and what is the equation the Commission uses to determine what is "too costly" for broadcasters to bear? The answers to these questions are not apparent in the Commission's policy documents and licensing decisions.

In the area of portrayal and the provision of employment opportunities to persons with disabilities in broadcasting, it has been just over a year since the Commission's response to the CAB report on that subject. It is probably premature to expect a "concrete" progress report. Nonetheless, it should be kept in mind that the CAB's report to the CRTC arose as the result of the Commission's observation, more than three years ago, that persons with disabilities were poorly represented on screen.

During the intervening period, broadcasters have filed annual reports with the Commission detailing their activities in responding to the Commission's noted concerns regarding the portrayal and participation of persons with disabilities. It is not known whether the Commission's expectations, coupled with a broadcaster self-reporting mechanism, have been effective in advancing the Commission's objectives, as set out in its 2006 Public Notice.

11(h) Religious Broadcasting

There is no specific broadcasting policy objective in section 3(1) of the *Broadcasting Act* which mentions the subject of religious broadcasting.

There is nothing elsewhere in the *Broadcasting Act* that obliges the Commission to have a policy on religious broadcasting, or to issue broadcasting licences to religious organizations.

However there has understandably always been public demand for religious programming in the Canadian broadcasting system and the CRTC has wrestled with this difficult area of broadcasting policy over the years. It has amended its policy on religious broadcasting several times, and there have been big swings in the direction of that policy.

The Commission quite appropriately considers religious issues to be "matters of public concern," as those words are used in subparagraph 3(1)(i)(iv) of the *Broadcasting Act*.

The specific broadcasting policy objective which provides the basis for the Commission's constantly evolving religious broadcasting policy reads:

> 3(1)(i) the programming provided by the Canadian broadcasting system should:
>
> (iv) provide a reasonable opportunity for the public to be exposed to the expression of <u>differing views on matters of public concern</u> (emphasis added)

That subparagraph of the *Broadcasting Policy for Canada* is the touchstone for not only its religious broadcasting policy but also for the CRTC's general policy which requires "balance" in programming when matters of public concern are being discussed on the public airwaves.

The current CRTC *Religious Broadcasting Policy* is contained in a public notice published in June 1993.[373] It has been interpreted and expanded upon in subsequent licensing decisions relating to religious television stations.

That public notice was published following a public hearing in October 1992 in which the Commission received over 2,600 written submissions, and at which 56 individuals and organizations appeared to speak to their respective submissions. Religion is a subject on which there is a diverse and broad range of (often strongly held) opinions.

The 1993 *Religious Broadcasting Policy* made substantial revisions to the Commission's previous *Religious Broadcasting Policy*, which had been developed a decade earlier.[374]

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[373] Public Notice CRTC 1993-78 on *Religious Broadcasting Policy*.

In its 1983 *Religious Broadcasting Policy*, the Commission had concluded that the most appropriate means to achieve the balanced programming objectives of section 3 of the Act was to require that the programming of each individual station be balanced. It then went on to conclude that it was most unlikely that "single faith" broadcasting undertakings i.e., those focused on the beliefs of a particular religion, denomination or sect, would be likely to pursue a policy of open and balanced religious programming. Consequently the Commission decided to continue its then existing policy of simply not licensing any single faith AM, FM or television broadcasting undertakings.

There was, of course, some religious programming in the system. For example, live broadcasts of Sunday morning church services on over-the-air television or radio stations, but no simple faith radio or television stations were licensed.

The 1983 policy did open the door for the licensing in 1987 of the multi-faith satellite-to-cable religious specialty programming television service which we have come to know as Vision TV.[375]

The strong, vocal demand for more religious television programming in the system – particularly from Western Canada – was however too much for the Commission to ignore.

The Commission therefore decided in 1992 to revisit its 1983 policy, in part because of strong viewer and listener demand for more religious programming, and in part because intervening technological developments relating to satellite and cable distribution technologies had made cable to satellite programming services an option.

It is apparent from a review of Public Notice CRTC 1993-78, and particularly from a reading of the strong dissenting opinion of no less than six Commissioners, that the Commission was openly divided on the contentious issue of licensing what the six dissenting Commissioners referred to as "single point of view religious broadcasters." (We would note, in passing, that we have come across no other CRTC decision that had as many as six dissenting Commissioners.)

The compromise that was offered in the 1993 *Religious Broadcasting Policy*, presumably in an attempt to reach accommodation on the balanced programming issue, was that single point of view religious organizations would only be licensed to operate television programming services that transmit their signals in an encrypted mode, and distribute them to subscribers/viewers on a purely discretionary basis. That is to say that the subscribers who elect to receive such single point of view religious television services must be prepared to pay to receive such services.[376]

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[374] Public Notice CRTC 1983-112.
[375] Decision CRTC 87-900.
[376] See Broadcasting Decision CRTC 2006-608.

Any unencrypted, conventional OTA television service licensed to provide a religious programming service is subject to strict conditions of licence relating to the issue of balance in the programming it broadcasts.

The balance requirements stemming from the CRTC's interpretation of the policy objective in subparagraph 3(1)(i)(iv) are complex. They reflect the fact that the Commission's balance policy "… seeks to ensure that a reasonably consistent viewer or listener [to a given station] will be exposed to a spectrum of differing issues of public concern within a reasonable period of time." The idea is that if one elected to view only one Christian OTA religious television station, one would over time on that station be exposed not only to Christian theology, but also to what the Commission has euphemistically referred to as "a spectrum of differing issues of public concern."

This pre-occupation on the part of the Commission with the issue of balance in free over-the-air programming provided by OTA religious broadcasting stations is an issue which we believe should be revisited. The current religious broadcasting policy has its roots in the concept of scarce bandwidth, and a concern that the public airwaves not be exploited by any person or entity to proselytize any particular religious point of view. Recent developments in digital distribution technology have lessened concerns based on spectrum scarcity, and have provided licensing options (such as Category 2 religious specialty services) that will make it possible to allow for more single faith religious broadcasting undertakings – whatever the preferred religion may be.

Currently there are three OTA religious television stations operating, in Toronto, Vancouver and Winnipeg, and in a recent decision two more were licensed, one in each of Calgary and Edmonton.[377] At least one of these three stations has been utilizing popular family entertainment syndicated programs, including "Everybody Loves Raymond", "Friends" and "Full House" to satisfy its regulatory requirements to provide so-called balanced programming.

The argument put forth by the OTA religious broadcaster serving the Fraser Valley in B.C. (CHNU-TV) is that such programs are reflective of "broadly accepted religious, spiritual, ethical or moral values" and should be treated as so-called "balance" programming.

This form of regulatory sophistry was discussed recently in a decision that arose from a complaint from a rival broadcaster against religious station CHNU-TV Fraser Valley.[378] That decision found that nine of the syndicated programs broadcast on the station were not consistent with the conditions of licence as they relate to balance programming. This decision exposes the weakness of the balance programming aspect of the Commission's religious broadcasting policy.

We do not believe it is realistic for the Commission to expect that the licensee of a religious broadcasting station, whether it be an OTA unencrypted television, or a

[377] Broadcasting Decision CRTC 2007-167.
[378] Broadcasting Decision CRTC 2007-210.

radio broadcasting station, will satisfy the Commission's current expectations in respect of balance programming.

It is not consistent with common sense to expect that Christian, or Hindu, or Muslim licensees of an OTA religious television or radio broadcasting station will provide listeners/viewers with a meaningful exposure to "a spectrum of differing issues of public concern." We believe, for example, that when Christians tune to their preferred religious broadcasting station, they expect to receive programming that predominantly reflects Christian values and teachings. We do not think it is realistic for the Commission to expect that its balance requirement will be met by each individual religious OTA radio or television religious broadcasting station.

It is certainly appropriate for the Commission to have a *Religious Programming Policy*, and to seek to attain balance of programming and differing views on matters of public concern in the system (emphasis added). But given the technological developments that have occurred in the past fourteen years, we recommend that the Commission revisit its 1993 *Religious Broadcasting Policy* in order that it may accommodate more single faith stations within the Canadian broadcasting.

Recommendation 11(h)-1

We recommend that the Commission review its 1993 *Religious Broadcasting Policy* in order to accommodate more single faith stations, on both radio and television.

12. APPLICATION AND LICENSING PROCESSES, RULES OF PROCEDURE, INFORMATION RETURNS AND LICENCE FEES

12(a) Application and Licensing Processes

Statutory Requirements

Section 19 of the *Broadcasting Act* requires the Commission to give public notice of (i) applications for the issuance, amendment or renewal of a licence, (ii) decisions to issue, amend or renew a licence, and (iii) any public hearing to be held under section 18. Such notices are to be published in both the *Canada Gazette* and one or more newspapers of general circulation in the area to which the hearing relates.

Paragraph 18(1)(a) of the Act provides that the Commission must hold a public hearing in connection with the issuance of a licence, the suspension or revocation of a licence, establishing performance objectives for licensees on which the payment of fees will be based, and the making of a mandatory order. Subsection 18(2) also requires that the Commission hold a public hearing in connection with an amendment or renewal of a licence, "unless it is satisfied that such a hearing is not required in the public interest." Subsection 18(3) gives the Commission the discretion to hold a public hearing on other matters "if it is satisfied that it would be in the public interest to do so."

Subsection 32(1) of the Act provides the foundation for the application and enforcement of most of the substantive provisions of the Act. It provides that a person who is not subject to an exemption and carries on a broadcasting undertaking without a licence issued by the Commission commits a criminal offence punishable on summary conviction.[379]

Apart from the matters dealt with in section 18 of the Act, the Commission is not required by statute to hold a public hearing or to give public notice of applications. Section 21 confirms that the Commission may make rules concerning its procedures, both in relation to public hearings and "for making representations and complaints to the Commission." (Part (b) of this chapter discusses the *CRTC Rules of Procedure*.)

In considering the process that applies to the issuance, amendment or renewal of licences, it is important to note some broadcasting undertakings may be carried on without a licence. Subsection 9(4) of the Act *requires* the Commission to exempt persons who carry on a broadcasting undertaking of a given class from compliance with requirements of the Act "where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy." Appendix B to this report contains a list of exemption orders already in force.

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[379] If found liable, the person is subject to a fine not exceeding $20,000 (in the case of an individual) or $200,000 (in the case of a corporation) for each day the offence continues.

Current Regulations, Policies and Mechanisms

In Broadcasting Circular CRTC 2007-4, the Commission has described its processes for dealing with broadcasting applications, including those that are not subject to public hearings and are processed either administratively or following the issuance of a public notice. The Circular describes the steps involved in each route, from the initial review of the application to publication of the decision. In addition, the Circular describes the Commission's general approach to policy proceedings, including the factors that may lead the Commission to hold such a policy proceeding, and the steps that are generally followed.

The first two stages of processing applications are identical in all three processing options. The first stage is reception and distribution of the application, which involves registering it and sending copies to appropriate Commission staff analysts for review. At the second stage of initial review and completeness, the staff determines whether all necessary information has been filed and sends requests to the applicant for any missing information or clarification. (This stage is typically characterized in the industry as the "deficiency process".) While the Circular suggests that an application will not be processed further until all necessary information has been filed, and states that an incomplete application will be returned to the applicant, it is apparent that the Commission does not always follow this practice. There have been cases, for example, in which deficiency requests by the Commission for additional information were made after gazetting of an application. There have also been cases in which the Commission has permitted applicants to make substantial amendments to an application at the public hearing of the application.

In any event, after the Commission decides to proceed with an application it may do so in one of three ways.

Applications dealt with "administratively" make up only 20% of all applications processed by the Commission. The Commission states in the Circular that such applications deal mainly with less complex requests, such as extensions of time to launch a licensed broadcasting undertaking, minor changes to the share structure of a licensee company, or minor changes to the authorized contours of an over-the-air station. Processing an application administratively usually takes between one and three months. The Commission has stated in its 2007 *Broadcasting Policy Monitoring Report* that in 2006-2007 the average processing time for such applications was one month.

The second alternative, the public notice route, accounts for approximately 40% of applications processed by the Commission. This processing route is designed to invite written comments or interventions from interested parties. The Commission states that the public notice route typically deals with applications that pertain to licence amendments, and to the majority of licence renewals. (Following the intervention process, the Commission may determine that an application being processed by way of public notice has raised concerns that warrant an appearance at a public hearing, but this is relatively rare.) In 2006-2007, the average processing time for applications by way of public notice rather than public hearing was three to

five months, depending on whether the application attracted significant opposing interventions.

The third option, the public hearing route, covers the remaining 40% of applications filed with the Commission. The level of complexity will dictate whether an application is to be scheduled as a "non-appearing item" (where there is no requirement for the applicant to actually attend the hearing), or is scheduled as an appearing item at a public hearing, with an oral evidence phase. The current *CRTC Rules of Procedure* provide for a minimum period of thirty to fifty days between the date of publication in the *Canada Gazette* and the date of a public hearing to consider the application. Generally, the Commission will use the thirty-day notice period in cases of applications that do not raise policy concerns. In 2006-2007, the average processing time was 7.3 months for appearing items, and 17.1 months for appearing items that triggered a call for competing applications. For non-appearing items, the average processing time was 11.5 months.

Since August 1, 2005, the Commission has required that all applications be submitted only in electronic form via e-pass.[380] Electronic application and intervention forms are available on the CRTC's website.[381]

While the Commission emphasizes its commitment to "timeliness", there continues to be dissatisfaction in the industry with the long periods of time often taken by the Commission in processing applications. Since the Act generally requires public hearings only in respect of the issuance, suspension or revocation of a licence, and in a few other relatively rare instances, the Commission should consider methods by which the number of licensing matters, and hence the number of public hearings, may be reduced.

Exemption orders may be made subject to conditions that are similar to conditions of licence that are imposed following a licensing process. Instead of a prior review by the Commission of an application for a licence, the Commission could instead conduct an ongoing or complaint-based review of a class of undertakings operating pursuant to an exemption order. Note that exemption orders could be used for a wide variety of programming undertakings that may offer programming to the public only via BDUs. In that circumstance, enforcement of the exemption conditions could also occur at the level of the BDUs by prohibiting distribution of the programming of a non-compliant licence exempt programming undertaking.

Recommendation 12(a)-1

We recommend that the Commission consider more extensive use of exemption orders to obviate the need for certain applications to be dealt with through the licensing process.

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[380] Broadcasting Circular CRTC 2005-466.
[381] Broadcasting Circular CRTC 2003-450.

One of the circumstances in which the Commission's current policies require the issuance of a licence, and hence a public hearing, occurs when a transfer of control of a broadcasting undertaking is effected by a transfer of assets. As discussed in Chapter 11(a), dealing with ownership issues, the Commission could allow for the administrative or public notice processing of applications involving transfers of assets if it were to amend the standard condition of licence to permit a transfer of licence *with* prior approval of the Commission (as opposed to the current blanket prohibition on any transfer of a licence). A specific recommendation in respect of this matter is contained in Chapter 11(a).

If that recommendation were implemented, this would mean that only non-controversial applications for licences would be scheduled as non-appearing items on the agenda of a public hearing. Furthermore, we recommend that the time delays associated with non-appearing hearing items be shortened to the extent possible, having regard to the requirement in section 19 of the Act to give public notice of a hearing. We believe that an average processing time of 11.5 months for an application that conforms to existing policies and does not raise concerns – the Commission's definition of a non-appearing item – is unreasonably long. We also note that any application set down as a non-appearing item must be approved by the Commission on the terms proposed by the applicant. It is our view that a failure to do so without giving the applicant an opportunity to appear before the Commission at an oral hearing would be a breach of natural justice.

We believe that the Commission should make more extensive use of the administrative processing route for applications. However, it is important that all interested persons have an opportunity to make their views known on applications that are to be processed administratively, and that the decisions made on such applications be made available to the public.

Recommendation 12(a)-2

We recommend that the Commission consider including on its website a list of all applications that CRTC staff has determined should be processed by the administrative route, and also consider establishing a policy that no such application will be dealt with prior to ten days following such publication (to allow comments to be received from the public within such time period) and including all decisions on applications dealt with administratively on its website on the same day that such decision is released to the applicant.

In respect of those applications in which the Commission expressly invites public comment through the issuance of a public notice, or notice of public hearing, we believe that the Commission should, as a general practice, prohibit an applicant from amending its application in any material respect following the date of such notice. At the very least, the Commission should severely restrict the circumstances in which any such amendment could be made. It is our view that natural justice for interested parties seeking to intervene in the Commission's processes is not served by the current practice of posing additional deficiency requests after an application has been gazetted, or by permitting amendments to be proposed by the applicant

after notice of the application has been given to the public. We believe that this practice also encourages "gaming" by applicants who may seek to manipulate the Commission and interested parties through releasing or amending information late in the process.

Recommendation 12(a)-3

We recommend that the Commission strictly enforce the *CRTC Rules of Procedure* which require that applications be complete in all material respects before they are gazetted and included in a Public Notice or Notice of Public Hearing.

While we commend the steps taken by the Commission to allow electronic filing of applications and interventions, the e-pass system used for filing applications is subject to a great deal of criticism by members of the Canadian broadcasting industry and their advisors. We understand that the e-pass system is outside the control of the Commission since it is a process employed by the Government of Canada generally.

Recommendation 12(a)-4

We recommend that the Commission consult with frequent users of the e-pass system for broadcasting matters and communicate their observations and concerns with e-pass to the appropriate agency of the Government of Canada.

12(b) ***CRTC Rules of Procedure***

Section 21 of *the Broadcasting Act* empowers the Commission to make rules in relation to broadcasting licence applications, the form of representations and complaints to the Commission, and in respect of the conduct of public hearings.

In July 1971 the CRTC promulgated the *CRTC Rules of Procedure*[382] to replace the *BBG Procedure Regulations*.[383] In the past thirty-six years these rules have been amended twice – in 1978 and in 2000.

The Commission's broadcasting *Rules of Procedure* are intentionally designed to make the Commission's regulatory processes accessible to members of the general public, and to encourage direct participation by interested persons in broadcasting proceedings, usually without the assistance of legal counsel.

For example, although the *CRTC Rules of Procedure* do not preclude the placing of witnesses under oath, or the cross-examination of witnesses, because of the manner in which the Commission has elected to administer its *Rules of Procedure*, such measures tend to be the exception that proves the general rule.

Those *Rules of Procedure* are in many respects unexceptional for a quasi-judicial administrative tribunal such as the CRTC. Those whose professional lives involve regular interface with the Commission and its processes have become comfortable with the Rules, and heated disputes before the Commission on issues of procedure in broadcasting related matters are rare.

Moreover, there has not to our knowledge since 1977 been a successful court challenge to a CRTC broadcasting decision on procedural grounds.[384]

The *CRTC Rules of Procedure* for broadcasting are considerably less formal than those that pertain to the exercise of the Commission's regulatory jurisdiction over telecommunications.

Although the current broadcasting *Rules of Procedure* have generally contributed to an open and transparent regulatory process, we nevertheless believe that it is time that they be reviewed and updated.

Digital technology has had a significant impact on the way in which the CRTC exercises its regulatory jurisdiction over the Canadian broadcasting system. For example, the Commission maintains an accessible, up-to-date, electronic "public examination room" on its website at www.crtc.gc.ca. It also uses that website as its principal means of communicating with the public in respect of the publication of decisions, notices, and other public documents.

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[382] C.R.C. in 1978, c. 375 as amended by SOR/2000-357.
[383] SOR/61-262.
[384] *Canada (Canadian Radio-television and Telecommunications Commission) v. London Cable TV Limited* [1976] 2 F.C. 621.

However the current *CRTC Rules of Procedure* do not even contemplate the electronic filing of applications and interventions, a procedure that the Commission encourages all interested persons to follow. (We would note that the Rules do provide, at subsection 3(3), that an application for a temporary network operation may be filed "by sending a telegram to the Secretary".)

As a further example of a rule that should be reviewed, section 20 of the Rules outlines the very limited circumstances in which confidentiality may be afforded to documents filed in connection with an application. That those circumstances are much too limited has been recognized by the Commission in CRTC Circular No. 429 in which it set forth the "informal guidelines in place for many years that [the Commission] has used to ensure the uniform and consistent treatment of requests for confidentiality under section 20 of the Rules." In that Circular, the Commission stated that section 20 "will continue to be the principal regulatory mechanism for treating confidentiality requests," but also acknowledged that requests for confidentiality concerning information not listed in section 20 would be assessed on a case-by-case basis. The only test enunciated by the Commission for granting confidentiality on a case-by-case basis is that the applicant will have demonstrated clearly that the public interest will be best served by treating the material as confidential in the context of the application under consideration. The result of this combination of Rules enacted pursuant to a specific provision in the Act, as amplified by "informal guidelines" published in a Circular, is that sometimes the Commission relies solely on section 20 to deny a claim for confidentiality, and sometimes grants confidentiality on a rational assessment of the public interest and private harm that would result from disclosure of the information.

Also, in respect of the conduct of competitive licensing hearings, and hearings regarding applications for authority to transfer control of licensed broadcasting undertakings, we believe the Commission might consider revising its rules and procedures as they relate to oral presentations by intervenors.

At such hearings the Commission often makes available to non-applicant intervenors many hours, even days, of costly public hearing time. Many supporting intervenors, in particular, have little new evidence to add to the public record over and above what the applicant has already said on his/her own behalf, or that another earlier appearing intervenor has said. Moreover, most of the evidence that is presented orally by supporting intervenors has already been placed on the public record in their respective written interventions.

One way for the Commission to curb this abuse of the public process, and to strengthen public respect for the integrity of the broadcasting regulatory process, is for the Commission to exercise more frequently its discretion not to hear from each intervenor who asks to appear. (Admittedly the Commission sometimes asks applicants in advance of a public hearing to designate a given number of its supporting intervenors who will be asked to appear or to request their supporting intervenors who share a particular point of view to appear as a group and to co-ordinate their presentations).

It may not be necessary for the Commission to amend its broadcasting *Rules of Procedure* for this streamlining of public hearings to occur, but we believe it would be advisable for the Commission to issue a Broadcasting Public Notice or Circular to all licensees outlining its intentions in this regard.

Recommendation 12(b)-1

We recommend that the Commission review the *CRTC Rules of Procedure* with a view to making them more consistent with, and reflective of, the manner in which it currently regulates and supervises the Canadian broadcasting system.

12(c) Information Returns and Licence Fees

Statutory Requirements

Paragraph10(1)(i) of the Act grants the Commission the power to make regulations requiring licensees to submit such information regarding their programs and financial affairs or that otherwise relate to the conduct and management of their affairs as the regulations may specify.

Paragraph 11(1)(a) of the Act allows the Commission to make regulations "with the consent of the Treasury Board, establishing schedules of fees to be paid by the licensees of any class." Subsection 11(2) permits the Commission to select the criteria for such fees, including criteria that relate to revenues, performance of objectives set by the Commission and the markets served by the licensees. In addition, paragraph 11(1)(c) allows the Commission to make regulations providing for the payment of fees by a licensee, including the time and manner of payment.

It should be noted that the establishment of regulations for the collection of information and the payment of fees, and hence the activities of collecting information and fees, is within the discretion of the Commission and is not dictated by the Act.

Current Regulations, Policies and Mechanisms

The *Broadcasting Information Regulations, 1993* require licensees to submit an annual return to the Commission on or before November 30 of each year. The regulations also require a licensee to respond to any inquiry from the Commission "regarding the licensee's programming or ownership or any other matter within the Commission's jurisdiction that relates to the licensee's undertaking."[385]

CRTC Circular No. 404 provides more detailed information as to the type of financial statements that are to be included with annual returns under the *Broadcasting Information Regulations, 1993*. Cable television, television, pay and specialty service and radio licensees must file by November 30 each year audited financial statements at the licensee level for each twelve-month period ending the previous August 31. Those licensees that are not public companies and who meet additional requirements, such as a lower figure in advertising and subscription revenues, may file non-audited financial statements in lieu of audited financial statements. These non-audited financial statements must be prepared in accordance with generally accepted accounting principles.

Section 3 of the *Broadcasting Information Regulations, 1993* confirms that there is no requirement to file information under these regulations that a licensee is already required to file under any other regulation under the Act.

The *Broadcasting Licence Fee Regulations, 1997* require every licensee (with a few exceptions identified in section 2 of such regulations) to pay (i) a Part I licence

[385] SOR/93-420, August 6, 1993, as amended.

fee, which is payable thirty days after the date of the invoice from the Commission; and (ii) a Part II licence fee, which is payable on or before November 30 in each year.[386]

Section 5 of the *Broadcasting Licence Fee Regulations, 1997* requires a licensee whose fee revenue for the previous year ended August 31 exceeds the exemption level in the regulations to file with the Commission on or before November 30 in each year a licence fee return with respect to each of the licensee's broadcasting undertakings. The exemption levels vary from $175,000 for a distribution undertaking to $4 million for certain combined AM and FM radio undertakings.

The Part I licence fee is calculated by the Commission, using two general formulae to determine the initial amount and the annual adjustment amount pursuant to section 8. These formulae are outlined in the regulations and involve (i) the licensee's fee revenues less the exemption level, (ii) the aggregate fee revenues of all licensees less the aggregate exemption level, (iii) the estimated total regulatory costs of the Commission, and (iv) the actual total regulatory costs of the Commission.

Section 11 of the *Broadcasting Licence Fee Regulations, 1997* provides for a Part II licence fee equal to 1.365 % of the amount by which a licensee's fee revenue exceeds the applicable exemption level.

In 2005, the CAB challenged the validity of section 11 and the authority of the Commission to collect Part II licence fees. The Federal Court (Trial Division) concluded that (i) the Part II fees are *ultra vires* section 11 of the Act (the section permitting the Commission to make regulations to collect fees) if the fees imposed are considered to be a tax, and (ii) section 11 of the Act constitutes an ineffective delegation of Parliament's taxation authority if the fees imposed are considered to be a tax. The case is currently under appeal to the Federal Court of Appeal. The Federal Court decision did not order the return of fees paid, but instead suspended its declaration of illegality, and gave the Government of Canada up to nine months to respond to the situation. The CAB subsequently appealed this part of the judgment to the Federal Court of Appeal, and this appeal is also in process.

Recommendation 12(c)-1

We understand that the information supplied to the Commission in annual returns of licensees pursuant to *Broadcasting Information Regulations, 1993* is not always sufficient to meet the needs of the Commission, and that supplemental information is often requested. Some licensees, understandably, object to the requests for the additional information. If the annual returns do not require the submission of all information that the Commission considers it requires for the performance of its statutory responsibilities and duties, we recommend that the Commission amend the annual return.

[386] SOR/97-144, March 12, 1997.

Recommendation 12(c)-2

We recommend that the basis for the exemption levels in the *Broadcasting Licence Fee Regulations, 1997* be explained and that the Commission consider revising such exemption levels on a regular basis.

APPENDIX A

LIST OF RECOMMENDATIONS

Chapter 4 - Framework for Evaluating Regulation

Recommendation 4-1

We recommend that the Commission apply the following approach to regulating the Canadian broadcasting sector:

(a) clearly identify the policy objective being pursued;

(b) assess whether the policy objective in question can be adequately addressed in the absence of regulatory intervention – whether by market forces or the regulated undertaking's own self-interest;

(c) if regulatory intervention is required, select a regulatory mechanism that will adequately fulfill the policy objective in the least intrusive manner possible having regard to any distortionary effects on competitive markets, the regulatory burden associated with the mechanisms considered and other unintended impacts of the regulatory intervention.

Recommendation 4-2

We recommend that the Commission move more towards a regulatory model in which it sets performance-based standards for the industry to meet and enforces those standards. In our view, the Commission should move away from detailed regulatory measures that dictate precisely how licensees are required to comply with the standards set and should leave it more up to the regulated entities to decide on the best way to satisfy the requirements.

Recommendation 4-3

Where incentive-based regulatory measures are prescribed, care should be taken to ensure that the incentives will in fact motivate the desired response and results should be monitored in order to judge the effectiveness of the measure.

Recommendation 4-4

In general, regulatory measures should be applied in a uniform manner to regulated undertakings that compete with each other. This is more likely to be accomplished through regulations or policies of general application rather than through conditions of licence. Where deviation from this principle is necessary, care should be taken to ensure that the measure adopted does not harm the ability of the regulated entity in question to compete in the market.

Recommendation 4-5

Given the importance of the Canadian broadcasting system to Canada's cultural identity, and given the fact that our broadcasting system is affected by other externalities beyond the jurisdiction of the CRTC (such as copyright laws, cultural policies and fiscal and trade policies), we recommend that the Commission explore the creation of a multi-disciplinary committee to address important issues of common concern and to bring to bear in a coordinated manner all the levers of government and regulation.

Chapter 5 - The Role of Competition in the Broadcasting Sector

Recommendation 5-1

We recommend that the Commission stop enforcing genre protection among Canadian programming services, unless there is reason to believe that competition in respect of specific genres would not advance the policy objectives in subsection 3(1) of the Act, and also that it allow market forces to play a greater role in responding to consumer demand for discretionary programming services.

Recommendation 5-2

We recommend that genre protection be maintained with respect to non-Canadian services except in specific genres, such as third language ethnic services, in respect of which the Commission has already taken steps to allow competitive entry.

Recommendation 5-3

We recommend that the Commission consider the feasibility of collapsing some of the existing licence classes that are starting to exhibit similar characteristics and permit the market to decide whether it wants more subscription-based specialty or VOD services, more pay-per-view services, or more advertising-based services. Any such changes in licence classes should be accompanied by a new set of regulatory obligations that apply evenly within the class.

Recommendation 5-4

We recommend that the Commission reassess the current restrictions on advertising that apply to various classes of television services, in light of the realities of the market and new trends in narrowcast advertising, and consider whether the existing restrictions limit the revenues available to the broadcasting system. It should then consider the feasibility of removing the restrictions and allowing broadcasting undertakings to decide how best to offer their services to the public – whether through an advertising-based model, a subscription service, or on a transactional basis.

Recommendation 5-5

We recommend that the Commission consider rationalizing the regulatory structure for specialty services in advance of the completion of digital migration in the 2010 to 2013 time period. We recommend that consideration be given to moving to a new system that rewards services that make significant contributions to furthering the objectives of the Act (through higher levels of Canadian content, significant Canadian programming expenditures or public safety initiatives), with greater carriage and access rights, and that relies more on consumer demand for discretionary services, and less on tiering and linkage rules, to govern the distribution and packaging of discretionary services.

Recommendation 5-6

We recommend that consideration be given to allowing competitive entry into OTA broadcasting markets where spectrum is available (particularly by new entrants who are unaffiliated with incumbent broadcasters in the same local market). In our view, less weight should be given to economic arguments in favour of protecting the incumbent broadcaster's market share and more weight should be given to letting market forces decide which broadcasters respond best to consumers' needs.

Recommendation 5-7

We recommend that the Commission give greater flexibility to BDUs to market discretionary services to the public in order to better respond to consumer demand.

Chapter 6 - Canadian Content

Recommendation 6-1

We believe it is imperative to develop more targeted and effective measures to incent the exhibition of Canadian content during peak viewing periods where market forces will not achieve this goal. Consideration should be given to targeting peak programming obligations to a narrow class of programs, such as drama, which are not adequately supported by the marketplace, and imposing targeted exhibition obligations which require television services to broadcast a minimum number of hours of these types of Canadian programs between 7 and 11 pm during each six month period over the course of a licensee's broadcast year to ensure that they will be exhibited during months when Canadians are watching significant amounts of television.

Recommendation 6-2

We recommend that consideration be given to rationalizing exhibition and expenditure requirements both within and across different categories of television services.

Recommendation 6-3

We recommend that the Commission reassess the net impact that simultaneous substitution has on the Canadian broadcasting system and assess whether there are other regulatory mechanisms that might break the very strong economic incentives for Canadian broadcasters to schedule American television programs in peak viewing periods, to the detriment of Canadian programming.

Recommendation 6-4

We recommend that the Commission study the pros and cons of reducing the requirements on broadcasting undertakings to use high percentages of independently produced programming. This review should include consideration of economies of scale and scope in production, rights management issues, and incentives to maximize

returns from Canadian programming. At the same time, the Commission should consider rationalizing the independent production requirements of different classes of television undertakings and, in the absence of clear regulatory distinctions, imposing common obligations on these services. This would improve the transparency and competitive neutrality of the regulatory regime. We recommend that this be done in a staged manner and that following any such reduction or rationalization, the CRTC should carefully monitor the impact of the changes on Canadian content production and independent producers.[387]

Chapter 7 - Access

Recommendation 7-1

We recommend that the Commission consider supplementing its access and carriage rules with a new regime that incents broadcasters to increase their Canadian content levels in discretionary services, to invest in certain types of Canadian content, such as drama, or to provide a service that fulfills a public interest function, such as public safety, in order to achieve more favourable access and carriage rights.

Recommendation 7-2

The Commission should assess the importance of channel placement to the success of programming services. If it is determined that channel placement is still important to the success of programming services, consideration should be given to requiring that Canadian services, particularly those that satisfy high Canadian content thresholds, receive better placement in the BDU channel line-up than other services.

Recommendation 7-3

We recommend that the Commission move to a simple preponderance rule (51%) for Canadian programming services subscribed to by consumers and that it eliminate many of the

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[387] If the CRTC decides to vary the requirements to source programming from independent producers, commensurate changes should be made to the manner in which the Canadian Television Fund (CTF) is administered. We note that such changes are beyond the CRTC's jurisdiction since the CTF is under the jurisdiction of Heritage Canada. It is also beyond the scope of our mandate to make recommendations to Heritage Canada. We simply note that these types of reform must involve a coordinated approach by all of the governmental agencies and departments involved in regulating the sector.

additional tiering and linkage rules that are currently in place. Detailed recommendations on the application of these principles are provided in other chapters of this report.

Recommendation 7-4

We recommend that the existing undue preference rules be amended to provide that once an allegation of discriminatory conduct has been substantiated, the onus shifts to the BDU that is alleged to have engaged in the discriminatory conduct to establish that any preference or disadvantage is not "undue".

Recommendation 7-5

We recommend that consideration be given to requesting that the Department of Canadian Heritage propose revisions to the *Broadcasting Act* establishing administrative monetary penalties for breach of the undue preference requirement and other regulatory obligations.

Chapter 8 - Relationship between Copyright and Broadcasting Regulations

Recommendation 8-1

We recommend that, to the extent that private licensing agreements amongst producers, distributors, and broadcasters continue to find ways to provide new business models and new platforms from which Internet users can access programming, the Commission be wary of interfering in this nascent market by attempting to introduce regulatory measures that could disrupt existing and developing business models.

Chapter 9 - New Media

Recommendation 9-1

Canada is in need of a national policy for electronic media, and needs to have available all of the tools of government to give effect to it. This likely includes copyright, fiscal measures, and new programs to incent Canadian participation in new media ventures. While it is beyond the jurisdiction of the CRTC to implement this national policy on its own, we urge the Commission to consult with other Governmental agencies and departments to begin such a process.

Recommendation 9-2

Consideration should be given by the Government of Canada to establishing restrictions on deductibility of advertising expenses on non-Canadian Internet sites in order to encourage more investment in Canadian sites in a manner similar to Bill C-58. Again, this recommendation cannot be implemented by the CRTC. It needs the involvement of other government departments.

Recommendation 9-3

The Commission should continue to apply its exemption order to New Media services.

Recommendation 9-4

We recommend that, rather than regulate Internet content, the Commission should explore ways of ensuring that the Canadian broadcasting system adapts to some of the new trends that the Internet has spawned in order to remain relevant and also to respond to consumer demand. These trends include a desire on the part of many consumers for content "anywhere, anytime", the desire of younger consumers to have an interactive experience with digital media, the desire of advertisers to be able to target relevant audiences with interactive media, and the development of new "communities of interest" that are not necessarily tied to local or regional geographic areas.

Chapter 10 - Classes of Broadcasting Undertakings – and their Regulation

10(a) Private conventional (OTA) Television

Recommendation 10(a)-1

We recommend that the Commission reassess the net benefit of simultaneous substitution to the Canadian broadcasting system. The Commission should seek to determine whether there are other more direct means that would permit Canada to retain the revenues associated with program substitution while at the same time regaining Canadian control over prime time schedules of Canadian OTA television broadcasters, as well as enhancing the prospect for exhibition of Canadian content when most Canadians are watching television and when the revenues are likely greatest.

Recommendation 10(a)-2

We recommend that the Commission revisit the definition of priority programming. Priority programming is currently defined to include a variety of types of programs – Canadian drama, music and dance, Canadian long-form documentaries, Canadian entertainment magazines, and regionally-produced programming in all categories except news, information and sports. It is not at all apparent that the economics of producing Canadian entertainment magazine or reality television programming suffers from the same challenges as Canadian drama programming, or that these types of programs merit regulatory incentives. Consideration should therefore be given to targeting peak programming obligations to a narrower genre of Canadian programming which will not be supported by the marketplace.

Recommendation 10(a)-3

We recommend that peak period priority programming requirements be expressed as a requirement to broadcast a minimum number of hours of Canadian priority content during each six month period to ensure that it is not broadcast primarily in lower viewing periods, such as summer months.

Recommendation 10(a)-4

We recommend that the Commission undertake a detailed investigation of the requirement for incentives for specific genres of programming and of more effective mechanisms of incenting, if necessary, the exhibition and production of specific program genres. This analysis should consider the costs of producing various genres of programming, the availability of funds to support Canadian programming, and the likelihood that, if programming is available, market forces can be expected to ensure the programming is broadcast during peak viewing periods.

Recommendation 10(a)-5

We recommend that the Commission rationalize obligations to use independent production across television programming undertakings and to consider lowering the 75% threshold as discussed in Chapter 6 of this report. There appears to be scope for a lower threshold while still respecting the objective of ensuring "significant" use of independent production. Any reductions in the use of independent production should be introduced in stages over a transitional period and the impact on the independent production

sector, and on the level of Canadian content developed, should be closely monitored.

Recommendation 10(a)-6

We recommend that the Commission remove the cap on advertising minutes by OTA television licensees immediately.

Recommendation 10(a)-7

We recommend that consideration be given to allowing competitive entry into OTA broadcasting markets where spectrum is available (particularly by new entrants who are unaffiliated with incumbent broadcasters in the same local market). In our view, less weight should be given to economic arguments in favour of protecting the incumbent broadcaster's market share and more weight should be given to letting market forces decide which broadcasters respond best to consumers' needs.

Recommendation 10(a)-8

We recommend that the Commission undertake regular reviews of its data reporting requirements to eliminate reporting that is no longer necessary and to add data requirements in order to properly monitor the impact of new regulatory initiatives.

10(b) Community Television

Recommendation 10(b)-1

We recommend that the Commission remove the advertising restrictions and limits on community broadcasting on television.

Recommendation 10(b)-2

We recommend that the Commission monitor the development of cable community channels and third party community-based television services to determine how its new rules are working and whether removal of restrictions on regional and national advertising for independent stations stimulates more applications for community-based services.

Recommendation 10(b)-3

We recommend that the Commission consider authorizing DTH BDUs to create a form of "community" programming service that provides an outlet for the exchange of regional views and expression.

10(c) Pay Television

Recommendation 10(c)-1

We recommend that the Commission review the advertising rules applicable to various classes of broadcasting licences, including pay television undertakings, and consider rationalizing them in a manner that maximizes the potential value of programming services to advertisers. As the traditional boundaries between licence classes breaks down, the rules designed to define them become less meaningful and possibly counter-productive.

Recommendation 10(c)-2

We recommend that the Commission begin to reduce the prohibition on pay television licensees producing their own Canadian programs. We recommend that the Commission implement this recommendation in stages and that it carefully monitor the impact of this measure both on the independent production sector and on the level of Canadian content produced.

Recommendation 10(c)-3

We recommend that section 6.1 of the *Pay Television Regulations* be amended to shift the onus onto the licensees to demonstrate that discriminatory conduct has not resulted in an "undue" preference or disadvantage to any person.

Recommendation 10(c)-4

We recommend that genre protection between Canadian pay television services be removed (except in exceptional cases where the Commission wishes to protect a specific service that it considers to be essential to the attainment of one or more of the objectives in section 3(1) of the *Broadcasting Act*).

10(d) Specialty Television Services

Recommendation 10(d)-1

We recommend that the Commission establish a set of conditions for exempting certain Canadian specialty services with little or no Canadian content, and no guaranteed access rights, from the requirement to obtain a broadcasting licence.

Recommendation 10(d)-2

We recommend that the wording of section 10.1 of the *Specialty Services Regulations* be amended to place the onus on licensees to demonstrate that any preferences they grant or disadvantages they confer are not "undue."

Recommendation 10(d)-3

We recommend that genre protection between Canadian specialty programming services be removed (except in exceptional cases where the Commission wishes to protect a specific service that is considered to be essential to attainment of one or more objectives in subsection 3(1) of the *Broadcasting Act*, such as 9(1)(h) services). This may also necessitate a review of the existing regulatory obligations imposed on undertakings that currently benefit from genre protection.

Recommendation 10(d)-4

We recommend that the Commission investigate whether varying restrictions on advertising by the different types of services, including specialty services, remain appropriate in the current marketplace and also that it consider removing the existing caps and limitations on specialty services.

Recommendation 10(d)-5

We recommend that the Commission consider supplementing its access and carriage rules with a new regime that incents broadcasters to increase their Canadian content levels, invest in certain types of Canadian content, such as drama, or provide a service that fulfills a public interest function, such as public safety, in order to achieve priority access or carriage rights, and possibly placement in the basic service or preferred channel placement.

Recommendation 10(d)-6

We recommend that if the Commission collapses licence classes to reflect the fact that licensees of existing classes are competing with each other, the Canadian program expenditure requirements for competitors in the same class be examined and rationalized to the extent possible, given the nature of service each provides.

10(e) Pay-Per-View and Video-on-Demand

Recommendation 10(e)-1

We recommend that the Commission review the advertising rules applicable to various classes of broadcasting licences, including VOD and PPV licensees, and consider rationalizing them in a manner that maximizes the potential value of programming services to advertisers, and revenues for the Canadian broadcasting system.

Regulation 10(e)-2

We recommend that the restrictions on VOD and PPV licensees' in-house production of Canadian programming be relaxed in stages, and that the Commission carefully monitor the impact of this measure on the production of Canadian content and on the independent production sector in Canada.

Recommendation 10(e)-3

We recommend that section 6.1 of the *Pay Television Regulations* be amended to place the onus on the licensee to demonstrate that any preference conferred by it or disadvantage it has subjected a third party to is not "undue".

Recommendation 10(e)-4

We recommend that the Commission rationalize the current classes of broadcasting licences to take account of the changes that have occurred since the original classes of licence were established. This process may require that Canadian content requirements also be rationalized in order to level the playing field between licensees in a newly-collapsed class.

Recommendation 10(e)-5

We recommend that, if the Commission collapses licence classes to reflect the fact that licensees of existing classes are competing with each other in the same licence class, the Canadian content, program expenditure and other similar requirements of competitors in the same licence class be rationalized.

10(f) Broadcasting Distribution Undertakings

Recommendation 10(f)-1

We recommend that section 9 of the *BDU Regulations* be amended to shift the onus to the party alleged to have engaged in the discriminatory conduct, once it has been established that they have given a preference or subjected any person to a disadvantage, to show that such preference or disadvantage is not "undue."

Recommendation 10(f)-2

We recommend that the Commission adopt a more transparent decision-making process when it employs the expedited Commission determination procedure outlined in Public Notice CRTC 2000-65. Unless a party to the proceeding can demonstrate that information is confidential, all documents relating to the proceeding, including the document containing the Commission's final determination, should be placed on a public file.

Recommendation 10(f)-3

We recommend that the Commission adopt rules to preserve the status quo when a dispute resolution process has been initiated.

Recommendation 10(f)-4

We recommend that the Commission investigate the relationship between channel placement and potential viewership. While many specialty services claim that their position on the dial is critical to their ratings, BDUs appear to disagree. If it is found that there is a direct correlation between channel position and viewership, the Commission may want to use this as another element of an incentive-based access policy designed to reward programming services with high Canadian content levels or other attributes that advance the objectives in subsection 3(1) of the Act.

Recommendation 10(f)-5

We recommend that the Commission delete from section 18 of the *BDU Regulations*, the provisions in subsection 18(6) to 18(10) that are no longer relevant to the terrestrial BDUs to which they apply.

Recommendation 10(f)-6

We recommend incorporating requirements relating to the distribution of the House of Commons programming service into Distribution Order 2006-1.

Recommendation 10(f)-7

We recommend that the 5:1 linkage rule for affiliated Category 2 services be deleted from the *BDU Regulations*.

Recommendation 10(f)-8

We recommend that the Commission adopt a more precise, market-based approach to authorizing the addition of non-Canadian satellite services to the Lists.

Recommendation 10(f)-9

We recommend that the requirement for terrestrial BDUs to obtain the signals of the U.S. OTA television stations from a licensed SRDU be deleted as a requirement.

Recommendation 10(f)-10

We recommend that the Commission modify its access policy to reward services that have higher levels of Canadian content, enhanced Canadian programming requirements, or that serve to advance a particular policy objective, such as increased drama, with commensurate access rights. If this approach is adopted, section 20(1) of the *BDU Regulations* and the relevant Distribution Rules will have to be modified accordingly.

Recommendation 10(f)-11

We recommend deletion of the rule prohibiting Category 1 services from being distributed on a stand-alone basis.

Recommendation 10(f)-12

We recommend elimination of the 5:1 linkage rule for Canadian pay television services and the 1:1 linkage rule applicable to specialty services.

Recommendation 10(f)-13

We recommend eliminating the buy-through and linkage rules for ethnic services and giving Canadian services with high levels of Canadian content other advantages through access rights.

Recommendation 10(f)-14

We recommend that the 1:1 access rule for exempt programming services in section 21 of the *BDU Regulations* be deleted.

Recommendation 10(f)-15

We recommend that the Commission delete the linkage rules in sections 24 and 41 of the *BDU Regulations*.

Recommendation 10(f)-16

We recommend that the Commission permit DTH BDUs to provide a forum for inter-regional expression by Canadians and for participation in inter-regional communities of interest.

Recommendation 10(f)-17

We recommend that the Commission eliminate the winback restrictions on cable BDUs.

Recommendation 10(f)-18

We recommend that the Commission consider a more market-oriented policy for the use of local availabilities – a policy which might generate revenue to support the production of Canadian programming.

Recommendation 10(f)-19

We recommend that the Commission undertake a review of its distant signal policy and consider amending the carriage rules for distribution of distant signals to ensure that the programming rights of OTA television stations are adequately protected.

10(g) Commercial Radio

Recommendation 10(g)-1

We recommend that the Commission, as a matter of urgency, clarify with Industry Canada when its standard for the implementation of In-Band-On-Channel (IBOC) technology will be complete and also clarify its own intentions in respect of future licensing of applications involving the use of IBOC technology.

Recommendation 10(g)-2

We recommend that the Commission not devote a significant amount of time at competitive public hearings for the licensing of new FM radio broadcasting stations on the issue of proposed programming formats, in recognition of the fact that FM licensees are no longer required by regulation or condition of licence to program their stations according to a particular format.

Recommendation 10(g)-3

We recommend that the Commission reconsider all of the marketplace and broadcasting policy implications of both its hits policy and the continued application, in the markets of Montreal and Ottawa, of its 65/55 French-language vocal music policy.

Recommendation 10(g)-4

We recommend that the Commission encourage representatives of the Canadian music industry and the Canadian radio broadcasting industry to work together to develop workable definitions of the terms “emerging artists” and “emerging music” that would be suitable for regulatory purposes in each of the French and English language sectors of the Canadian broadcasting system.

10(h) Community Radio

Recommendation 10(h)-1

We recommend that all community and campus radio stations be permitted more flexibility in offering music from different genres – including more music from the Pop, Rock and Dance subcategory, if that is considered appropriate by the licensee for its community.

Recommendation 10(h)-2

We recommend that the Commission consider lowering the spoken word programming requirement for community and campus radio stations to a level that would ensure community access and reflection in spoken word programming, but not necessarily to the exclusion of other programming as determined by the community station itself.

Recommendation 10(h)-3

We recommend that the advertising restrictions for campus stations be removed.

Chapter 11 - Major CRTC Broadcasting Policies

11(a) Ownership

Recommendation 11(a)-1

We recommend replacing the standard condition of licence that simply prohibits any transfer of that licence with a standard condition prohibiting such a transfer "without the prior approval of the Commission."

Recommendation 11(a)-2

We recommend that the Commission amend the ownership provisions in the regulations to adopt the approach that is consistently used in corporate and securities law, which deems a person to own beneficially securities that are owned by entities controlled by that person.

Recommendation 11(a)-3

We recommend that the Commission consider the broader use of exemption orders for broadcasting undertakings and that any ownership concerns that would apply to exempted undertakings be merely stated as a condition of exemption. Enforcement of compliance with such conditions could be subject to periodic monitoring by the Commission, or be complaints-based.

Recommendation 11(a)-4

We recommend that the Commission establish a regulation, pursuant to a revised Direction, that states that licensee must at all times be "Canadian" within the meaning of the Direction and that

provides for the filing of information to support such eligibility "as and when requested by the Commission," as opposed to being collected routinely.

11(b) Benefits

Recommendation 11(b)-1

We recommend that the Commission conduct a public process to review its overall benefits policy, including its rationale, the manner in which the policy is implemented, the classes of undertakings to which the benefits requirement should apply on transfers, and the type of entities that should benefit from the policy. Any replacement policy should strive for more even-handed and rational application amongst competing undertakings and a more consistent and predictable funding of the intended recipients.

11(c) Aboriginal Broadcasting

Recommendation 11(c)-1

We recommend that the Commission expand the scope of the exemption order for Native radio undertakings to include any community where there is no local commercial radio service. Rebroadcast and redistributed radio services would no longer be subject to "protection" from unregulated competition by Aboriginal-owned services in communities with no other locally licensed service. Consideration should also be given to exempting Aboriginal radio stations from licensing in markets that have a local station, but that are not already served by an Aboriginal-owned service, assuming that there is no shortage of available frequencies.

Recommendation 11(c)-2

The Commission should give Aboriginal radio stations a greater degree of discretion to program their own services. Such an approach would be consistent with the Commission's stated policy that Aboriginal broadcasters themselves are best suited to determine the needs of their audiences.

Recommendation 11(c)-3

We recommend that once a licence exempt Aboriginal radio service begins operation, the entry of a local commercial radio service in the same local market should not result in the exclusion of the

Commission's exemption order for Aboriginal radio services. Rather, services that otherwise meet the exemption criteria, should continue to be exempt.

Recommendation 11(c)-4

We recommend that the current exemption order be amended to require exempt undertakings to fulfill a reporting or registration requirement with the Commission. Currently, the Commission encourages licence exempt stations to register with the Commission, but it is not known how many do so

Recommendation 11(c)-5

We recommend that the Commission provide greater leeway for Aboriginal-owned businesses to play a role in providing Aboriginal communities with broadcasting services. The Commission should reassess its policy of giving preferential treatment to only not-for-profit Aboriginal broadcasting undertakings.

Recommendation 11(c)-6

We recommend that any review of the Commission's policies with respect to Aboriginal broadcasting take into account relevant federal government initiatives in the same sector – and work with those initiatives to produce more effective and transparent policy development.

11(d) Ethnic Broadcasting

Recommendation 11(d)-1

We recommend that the Commission pay more attention to consumer demand for ethnic services, rather than protecting the financial viability of incumbent "Canadian" third-language specialty services.

Recommendation 11(d)-2

We recommend that the Commission consider eliminating the linkage and buy-through rules respecting analog third-language services and to permit Canadians to select the third-language service of their choice once they have purchased the basic service of a BDU.

11(f) Educational Broadcasting

Recommendation 11(f)-1

We recommend that the principle of mandatory access for provincial educational broadcasting undertakings to the distribution system that currently applies in respect of cable television distribution systems should be extended to all BDUs, including DTH distribution systems.

Recommendation 11(f)-2

Restrictions on advertising by provincial educational broadcasters should be removed.

11(h) Religious Broadcasting

Recommendation 11(h)-1

We recommend that the Commission review its 1993 *Religious Broadcasting Policy* in order to accommodate more single faith stations, on both radio and television.

Chapter 12 - CRTC Broadcasting Procedures

12(a) Application and Licensing Processes

Recommendation 12(a)-1

We recommend that the Commission consider more extensive use of exemption orders to obviate the need for certain applications to be dealt with through the licensing process.

Recommendation 12(a)-2

We recommend that the Commission consider including on its website a list of all applications that CRTC staff has determined should be processed by the administrative route, and also consider establishing a policy that no such application will be dealt with prior to ten days following such publication (to allow comments to be received from the public within such time period) and including all decisions on applications dealt with administratively on its website on the same day that such decision is released to the applicant.

Recommendation 12(a)-3

We recommend that the Commission strictly enforce the *CRTC Rules of Procedure* which require that applications be complete in all material respects before they are gazetted and included in a Public Notice or Notice of Public Hearing.

Recommendation 12(a)-4

We recommend that the Commission consult with frequent users of the e-pass system for broadcasting matters and communicate their observations and concerns with e-pass to the appropriate agency of the Government of Canada.

12(b) *CRTC Rules of Procedure*

Recommendation 12(b)-1

We recommend that the Commission review the *CRTC Rules of Procedure* with a view to making them more consistent with, and reflective of, the manner in which it currently regulates and supervises the Canadian broadcasting system.

12(c) Information Returns and Licence Fees

Recommendation 12(c)-1

We understand that the information supplied to the Commission in annual returns of licensees pursuant to *Broadcasting Information Regulations, 1993* is not always sufficient to meet the needs of the Commission, and that supplemental information is often requested. Some licensees, understandably, object to the requests for the additional information. If the annual returns do not require the submission of all information that the Commission considers it requires for the performance of its statutory responsibilities and duties, we recommend that the Commission amend the annual return.

Recommendation 12(c)-2

We recommend that the basis for the exemption levels in the *Broadcasting Licence Fee Regulations, 1997* be explained and that the Commission consider revising such exemption levels on a regular basis.

APPENDIX B

CRTC EXEMPTION ORDERS

EXEMPTION ORDER RESPECTING/FOR	APPENDIX TO	DATE
Resource Development Installations	Public Notice CRTC 2000-10	January 24, 2000
Master Antenna Television Systems	Broadcasting Public Notice CRTC 2002-35	July 9, 2002
Parliamentary and Provincial or Territory Legislature Proceedings	Broadcasting Public Notice CRTC 2002-73	November 10, 2002
Radio and Television Temporary Network Special Event Type 1 Undertakings	Public Notice CRTC 2000-10	January 24, 2000
Cable Temporary Network Special Event Type 2 Undertakings	Public Notice CRTC 2000-10	January 24, 2000
Closed Circuit Video Programming Undertakings	Broadcasting Public Notice CRTC 2006-132	October 16, 2006
Still Image Programming Service Undertakings	Public Notice CRTC 2000-10	January 24, 2000
Community Programming Network Undertakings	Public CRTC 2000-10	January 24, 2000
Terrestrial Relay Distribution Network Undertakings	Public Notice CRTC 2000-10	January 24, 2000
Teleshopping Programming Service Undertakings	Broadcasting Public Notice CRTC 2003-11	March 6, 2003
New Media Broadcasting Undertakings	Appendix A to Public Notice CRTC 1999-197 *See also*: Broadcasting Public Notice CRTC 2003-2	December 17, 1999 January 17, 2003
Small Cable Undertakings	Broadcasting Public Notice CRTC 2002-74	November 19, 2002
Radiocommunication Distribution Undertakings	Public Notice CRTC 2002-45	August 12, 2002
Low-Power Encrypted Television: Limited Duration Special Event Facilitating Programming Undertakings	Broadcasting Public Notice CRTC 2003-35	July 10, 2003
Cable Broadcasting Distribution Undertakings that Serve Between 2,000 and 6,000 Subscribers	Appendix II to Broadcasting Public Notice CRTC 2006-5	January 19, 2006
Network Operations	Broadcasting Public Notice	November 10,

	CRTC 2006-143	2006
Mobile Television Broadcasting Undertakings	Broadcasting Public Notice CRTC 2007-13	February 7, 2007
Third - Language Television Programming Undertakings	Broadcasting Public Notice CRTC 2007-33	March 30, 2007

EXEMPTION ORDERS (RADIO)

EXEMPTION ORDER RESPECTING/FOR	PUBLIC NOTICE	DATE
Certain Shortwave Broadcasting Undertakings	Public Notice CRTC 1991-105	October 8, 1991
Low-Power Radio: Temporary Resource Development Distribution Undertakings	Public Notice CRTC 2000-10	January 24, 2000
Low-Power Radio: Limited Duration Special Event Facilitating Undertakings	Public Notice CRTC 2000-10	January 24, 2000
Low-Power Radio: Ultra Low-Power Announcement Service (LPAS) Undertakings	Public Notice CRTC 2000-10	January 24, 2000
Carrier Current Undertakings Whose Services are not Carried on Cable Systems	Public Notice CRTC 2000-10	January 24, 2000
Radio and Television Temporary Network Special Event Type 1 Undertakings	Public Notice CRTC 2000-10	January 24, 2000
Low-Power Radio Programming Undertakings Providing Traffic, Weather Conditions, Highway Construction and Closures, Conditions on Bridges and in Mountain Passes, and Information, Broadcast Without Consideration, Relating to Attractions of Interest to Tourists	Broadcasting Public Notice CRTC 2004-92	November 29, 2004
Certain Native Radio Undertakings	Public Notice CRTC 1998-62	July 9, 1998
New Media Broadcasting Undertakings	Public Notice CRTC 1999-197	December 17, 1999
Public Emergency Radio Undertakings	Public Notice CRTC 2000-11	January 24, 2000
Radiocommunication Distribution Undertakings	Public Notice CRTC 2002-45	August 12, 2002
Low-Power Radio Programming Undertakings Providing Tourist and	Broadcasting Public Notice CRTC 2003-35	July 10, 2003

Traffic Information in National and Provincial Parks and on Historic Trails		
Low-Power Radio Programming Undertakings Providing Atmospheric Environment Services from Environment Canada, and Information Concerning Local and Marine Weather, Road and Boating Conditions, Ferry Schedules and Traffic Control	Broadcasting Public Notice CRTC 2003-35	July 10, 2003
Very Low-Power FM Radio Programming Undertakings Providing Traffic Advisories in Remote Areas Concerning Approaching Logging, Construction, Road Maintenance and Other Large Vehicles	Broadcasting Public Notice CRTC 2002-35	July 10, 2003
CBC Radio Licence (Partial Exemption Order)	Public Notice CRTC 1991-93	August 30, 1991

APPENDIX C

PROGRAMMING SCHEDULES

Global Prime Time
Toronto Schedule: Week of July 22 - July 28, 2006
Global, heures de grande écoute
Horaire de Toronto: Semaine du 22 juillet au 28 juillet 2006

Heure	Time	Samedi Saturday	Dimanche Sunday	Lundi Monday	Mardi Tuesday	Mercredi Wednesday	Jeudi Thursday	Vendredi Friday
19 h 00	7:00	Champ Car World Series Racing	Malcolm in the Middle	ET Canada	ET Canada	ET Canada	ET Canada	ET Canada
19 h 30	7:30		King of the Hill	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight
20 h 00	8:00	Train 48	The Simpsons	House	Fear Factor	Rock Star: Supernova	My Name is Earl	Zoe Bassier Wild Card
20 h 30	8:30	Train 48	American Dad				The Office	
21 h 00	9:00	Rodeo from Calgary	Family Guy	Treasure Hunters	Rock Star: Supernova	Vanity Insanity	The Office	Las Vegas
21 h 30	9:30		The War at Home				The Jane Show	
22 h 00	10:00		Crossing Jordan	Rock Star: Supernova	House	Without a Trace	Windfall	NUMB3RS
22 h 30	10:30			Big Screen Top Ten				

	** Canadian Drama/ Scripted Comedy	** Émission dramatique ou comédie scénarisée canadienne	
	Canadian Newsmagazine/ Reality Programs/Sports/ Comedy	Magazine d'actualités, émission de téléréalité, émission de sports ou comédie canadiens	
	U.S. / Foreign Co-Productions	Coproductions américaines ou étrangères	
	U.S. and other foreign programs	Émissions américaines et autres émissions étrangères	
	U.S. Stories Produced in Canada	Histoires américaines produites au Canada	

*** CRTC Certified Canadian*
*** Certifiée canadienne par le CRTC*

Source: http://www.canada.com/globaltv/index.html
http://www.crtc.gc.ca/canrec/eng/canrec.htm

TV Prime Time
ronto Schedule: Week of July 22 - July 28, 2006
TV, heures de grande écoute
raire de Toronto: Semaine du 22 juillet au 28 juillet 2006

Heure	Time	Samedi Saturday	Dimanche Sunday	Lundi Monday	Mardi Tuesday	Mercredi Wednesday	Jeudi Thursday	Vendredi Friday
9 h 00	7:00	In Pursiut of Happiness	Alice, I Think	eTalk Daily	eTalk Daily	eTalk Daily	eTalk Daily	eTalk Daily
9 h 30	7:30		Degrassi: The Next Generation	Jeopardy	Jeopardy	So You Think You Can Dance 2	Jeopardy	Jeopardy
0 h 00	8:00	Law and Order	Law & Order: CI	Canadian Idol	Canadian Idol		CSI	CTV MOVIE: The Man Who Lost Himself
0 h 30	8:30				Instant Star	America's Got Talent		
1 h 00	9:00	Jeff Ltd.	Cold Case	Whistler	Criminal Minds		So You Think You Can Dance 2	
1 h 30	9:30	Comedy Now!						
2 h 00	10:00	Comedy Now!	Whistler	CSI: Miami	Law and Order SVU	CSI New York	America's Got Talent	Law and Order
2 h 30	10:30	Comedy Inc.					So Notorious	

** Canadian Drama/ Scripted Comedy

** Émission dramatique ou comédie scénarisée canadienne

Canadian Newsmagazine/ Reality Programs/Sports/ Comedy

Magazine d'actualités, émission de téléréalité, émission de sports ou comédie canadiens

U.S. / Foreign Co-Productions

Coproductions américaines ou étrangères

U.S. and other foreign programs

Émissions américaines et autres émissions étrangères

U.S. Stories Produced in Canada

Histoires américaines produites au Canada

** CRTC Certified Canadian
** Certifiée canadienne par le CRTC

Source: http://www.ctv.ca/generic/generated/tvlist/CFTOtvlist.html
http://www.crtc.gc.ca/canrec/eng/canrec.htm

FRANCOPHONES DU QUÉBEC - TOUS 2 ANS +

samedi, 22 juil. au 28 juil. 2006

TVA nedi, 22 juil. 2006	TVA dimanche, 23 juil. 2006	TVA lundi, 24 juil. 2006	TVA mardi, 25 juil. 2006	TVA mercredi, 26 juil. 2006	TVA jeudi, 27 juil. 2006	TVA vendredi, 28 juil. 2006
é-Extra (début 18:30) ethoven IV"	Facteur de risques	Côté cours... Côté j	De bouche à oreille	Par-dessus le marché	Ça tient la route	Dans ma caméra
		Où sont passées nos	Michèle Richard	Prise 2 : Symphorien	Km/h	Drôles d'animaux
	Ciné Dimanche "Mercure à la hausse"	Peter MacLeod - Libé	Caméra café	Histoire Vraie "Coeur est à prendre"	Las Vegas	Histoire d'amour "L'amour à coup"
émax meo doit mourir"		Monk	Les Gags		Destination Nor'Ouest	
			100 détours			
	Juste pour rire en direct (22:15)	TVA 22 heures, Le	TVA 22 heures, Le	TVA 22 heures, Le	TVA 22 heures, Le	TVA 22 heures, Le
	TVA réseau, Le (22:45)	Juste pour rire en direct	Juste pour rire en direct	Juste pour rire en direct	Juste pour rire en direct	Juste pour rire en direct

Émission d'origine - Canadienne

Émission d'origine - autre que Canadienne

Global Prime Time
Toronto Schedule: Week of October 26 - November 1, 2006
Global, heures de grande écoute
Horaire de Toronto: Semaine du 26 octobre au 1er novembre 2006

Heure	Time	Samedi Saturday	Dimanche Sunday	Lundi Monday	Mardi Tuesday	Mercredi Wednesday	Jeudi Thursday	Vendredi Friday
19 h 00	7:00	Stamp Fishery - Loss of a Dream	The Simpsons	ET Canada	ET Canada	ET Canada	ET Canada	ET Canada
19 h 30	7:30		Family Guy	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight
20 h 00	8:00	Very Bad Men	The Simpsons	Prison Break	Standoff	Bones	Survivor: Cook Island	1 vs. 100
20 h 30	8:30		American Dad					
21 h 00	9:00	Final 24	Family Guy	Heroes	House	Six Degrees	Deal or No Deal	Las Vegas
21 h 30	9:30		The War at Home					
22 h 00	10:00	ReGenesis	Brothers & Sisters	Without a Trace	Gilmore Girls	TBA	Shark	NUMB3RS
22 h 30	10:30							

** Canadian Drama/ Scripted Comedy	** Émission dramatique ou comédie scénarisée canadienne	Canadian Newsmagazine/ Reality Programs/Sports/ Comedy	Magazine d'actualités, émission de téléréalité, émission de sports ou comédie canadiens
U.S. / Foreign Co-Productions	Coproductions américaines ou étrangères	U.S. and other foreign programs	Émissions américaines et autres émissions étrangères
U.S. Stories Produced in Canada	Histoires américaines produites au Canada		

** *CRTC Certified Canadian*
** *Certifiée canadienne par le CRTC*

Source: http://www.canada.com/globaltv/index.html
http://www.crtc.gc.ca/canrec/eng/canrec.htm

TV Prime Time
oronto Schedule: Week of October 26 - November 1, 2006
TV, heures de grande écoute
oraire de Toronto: Semaine du 26 octobre au 1er novembre 2006

Heure	Time	Samedi Saturday	Dimanche Sunday	Lundi Monday	Mardi Tuesday	Mercredi Wednesday	Jeudi Thursday	Vendredi Friday
19 h 00	7:00	W-FIVE	Cold Case	eTalk Daily	eTalk Daily	eTalk Daily	eTalk Daily	eTalk Daily
19 h 30	7:30			Jeopardy	Jeopardy	Jeopardy	Jeopardy	Jeopardy
20 h 00	8:00	CSI New York	The Amazing Race	Corner Gas	30 Rock	Lost	CSI	Ghost Whisperer
20 h 30	8:30			The Class	Twenty Good Years			
21 h 00	9:00	Dancing with the Stars	Desperate Housewives	Justice	Law and Order	Criminal Minds	CSI	Close to Home
21 h 30	9:30							
22 h 00	10:00		Law & Order: CI	CSI: Miami	Law and Order SVU	CSI New York	Criminal Minds	Law and Order
22 h 30	10:30	Jeff Ltd.						

** Canadian Drama/ Scripted Comedy

** Émission dramatique ou comédie scénarisée canadienne

Canadian Newsmagazine/ Reality Programs/Sports/ Comedy

Magazine d'actualités, émission de téléréalité, émission de sports ou comédie canadiens

U.S. / Foreign Co-Productions

Coproductions américaines ou étrangères

U.S. and other foreign programs

Émissions américaines et autres émissions étrangères

U.S. Stories Produced in Canada

Histoires américaines produites au Canada

** *CRTC Certified Canadian*
** *Certifiée canadienne par le CRTC*

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http://www.crtc.gc.ca/canrec/eng/canrec.htm

FRANCOPHONES DU QUÉBEC - TOUS 2 ANS +

Jeudi, 26 oct. au 1 nov. 2006

TVA udi, 26 oct. 2006	TVA vendredi, 27 oct. 2006	TVA samedi, 28 oct. 2006	TVA dimanche, 29 oct. 2006	TVA lundi, 30 oct. 2006	TVA mardi, 31 oct. 2006	TVA mercredi, 01 nov. 2006
naîne d'artistes ar système	J.E.	Ciné-Extra (début 18:30) "Harry Potter et la chambre des secrets"	École des fans, L'	Occupation double	Fièvre du mardi soir	On n'a pas toute la soirée
				Sketch Show, Le		Poule aux oeufs d'or
ccupation double	Du talent à revendre		On n'a pas toute la soirée	Annie et ses hommes	Caméra café	Poupées russes, Les
					Histoires de filles	
etit monde de Laura adieux	Juste pour rire		Négociateur, Le	Négociateur, Le	Promesse, La	Lance et compte : La revanche
A 22 heures, Le	TVA 22 heures, Le	Cinémax (début 21:45) "Folies de graduation 2"	TVA réseau, Le	TVA 22 heures, Le	TVA 22 heures, Le	TVA 22 heures, Le
			Cinéma-Maison "Fiction pulpeuse"			

evendre - Version française de la série américaine *America's Got Talent*

rdi soir - Version française de la série américaine *So you think you can dance*

Émission d'origine - Canadienne

Émission d'origine - autre que Canadienne

l Prime Time
to Schedule: Week of April 20 - April 26th, 2007
l, heures de grande écoute
e de Toronto: Semaine du 20 avril au 26 avril 2007

Time	Samedi Saturday	Dimanche Sunday	Lundi Monday	Mardi Tuesday	Mercredi Wednesday	Jeudi Thursday	Vendredi Friday
7:00	Rich Nation	Brothers & Sisters	ET Canada	ET Canada	ET Canada	ET Canada	ET Canada
7:30			Entertainment Tonight	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight
8:00	Faith without Fear	The Simpsons	Heroes	Accident Investigator	Bones	Survivor: Fiji	House
8:30		The Simpsons					
9:00	Blue Murder	Family Guy	24	House	Crossing Jordan	Are you smarter than a fifth grader?	Bones
9:30		Family Guy					
10:00	Making the Cut	The Apprentice: Los Angeles	The Real Wedding Crashers	Gilmore Girls	The Jane Show	Shark	NUMB3RS
10:30							

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Magazine d'actualités, émission de téléréalité, émission de sports ou comédie canadiens

U.S. / Foreign Co-Productions

Coproductions américaines ou étrangères

U.S. and other foreign programs

Émissions américaines et autres émissions étrangères

U.S. Stories Produced in Canada

Histoires américaines produites au Canada

*** CRTC Certified Canadian*

*** Certifiée canadienne par le CRTC*

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http://www.crtc.gc.ca/canrec/eng/canrec.htm

Prime Time
nto Schedule: Week of April 20 - April 26th, 2007
heures de grande écoute
ire de Toronto: Semaine du 20 avril au 26 avril 2007

ıre	Time	Samedi Saturday	Dimanche Sunday	Lundi Monday	Mardi Tuesday	Mercredi Wednesday	Jeudi Thursday	Vendredi Friday
00	7:00	W-FIVE	Medium	eTalk	eTalk	Lost	eTalk	eTalk
30	7:30			Jeopardy	Jeopardy		Jeopardy	Jeopardy
00	8:00	Cold Squad (RERUN)	The Amazing Race	Dancing with the Stars	American Idol	American Idol	Grey's Anatomy	Ghost Whisperer
00	9:00	Robson Arms	Desperate Housewives		Dancing with the Stars		CSI	Drive
30	9:30	Jeff Ltd.		Degrassi: The Next Generation				
00	10:00	Nip/Tuck	Criminal Minds	CSI: Miami	Law and Order SVU	CSI: New York	ER	Law and Order
30	10:30							

** Canadian Drama/ Scripted Comedy	** Émission dramatique ou comédie scénarisée canadienne	Canadian Newsmagazine/ Reality Programs/Sports/ Comedy	Magazine d'actualités, émission de téléréalité, émission de sports ou comédie canadiens
U.S. / Foreign Co-Productions	Coproductions américalnes ou étrangères	U.S. and other foreign programs	Émissions américaines et autres émissions étrangères
U.S. Stories Produced in Canada	Histoires américaines produites au Canada		

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http://www.crtc.gc.ca/canrec/eng/canrec.htm

FRANCOPHONES DU QUÉBEC - TOUS 2 ANS +

vendredi, 20 avr. au 26 avr. 2007

TVA endredi, 20 avr. 2007	TVA samedi, 21 avr. 2007	TVA dimanche, 22 avr. 2007	TVA lundi, 23 avr. 2007	TVA mardi, 24 avr. 2007	TVA mercredi, 25 avr. 2007	TVA jeudi, 26 avr. 2007
E	Ciné-Extra (début 18:30) "Les dangereux"	On n'a pas toute la soirée (début 18:30)	Qui a tué?	Sketch Show, Le	On n'a pas toute la soirée	Drôles de vidéos
			L'Imposteur	Caméra café	Poule aux oeufs d'or	Les Gags
istoire Vraie A coeur ouvert"	Cinémax (début 20:45) "Le fugitif"	Ciné Dimanche "Le négociateur"	Ma maison Rona	Histoires de filles	Qui perd gagne	Cinéma destination "Le mariage de mon milieu"
			Anges de la rénovation	Promesse, La	Dr House	
VA 22 heures, Le			TVA 22 heures, Le	TVA 22 heures, Le	TVA 22 heures, Le	TVA 22 heures, Le

énovation - Version française de la série américaine *Extreme Makeover - Home Edition*

Émission d'origine - Canadienne

Émission d'origine - autre que Canadienne

Prime Time
o Schedule: Week of June 21 - June 27th, 2007
, heures de grande écoute
e de Toronto: Semaine du 21 juin au 27 juin 2007

Time	Samedi Saturday	Dimanche Sunday	Lundi Monday	Mardi Tuesday	Mercredi Wednesday	Jeudi Thursday	Vendredi Friday
7:00	Global Currents: The Homefront	King of The Hill	ET Canada	ET Canada	ET Canada	ET Canada	ET Canada
7:30		The Simpsons	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight	Entertainment Tonight
8:00	Andromeda	The Simpsons	Age of Love	Very Bad Men	1 vs. 100	Are You Smarter Than A Fifth Grader?	Bones
8:30		American Dad					
9:00	Pow Wows, Partners & The Calgary Stampede	Family Guy	Age of Love	House	American Inventor	From the Ground Up With Debbie Travis	Standoff
9:30		Family Guy					
10:00	Andromeda	Brothers and Sisters	Without a Trace	The Best Years	Friday Night Lights	Shark	NUMB3RS
10:30							

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Canadian Newsmagazine/ Reality Programs/Sports/ Comedy

Magazine d'actualités, émission de téléréalité, émission de sports ou comédie canadiens

U.S. / Foreign Co-Productions

Coproductions américaines ou étrangères

U.S. and other foreign programs

Émissions américaines et autres émissions étrangères

U.S. Stories Produced in Canada

Histoires américaines produites au Canada

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Prime Time
nto Schedule: Week of June 21 - June 27th, 2007
heures de grande écoute
ire de Toronto: Semaine du 21 juin au 27 juin 2007

re	Time	Samedi Saturday	Dimanche Sunday	Lundi Monday	Mardi Tuesday	Mercredi Wednesday	Jeudi Thursday	Vendredi Friday
00	7:00	W-FIVE	Degrassi: The Next Generation	eTalk	eTalk	eTalk	eTalk	eTalk
30	7:30		Degrassi: The Next Generation	Jeopardy	Jeopardy	Canadian Idol	Jeopardy	Jeopardy
00	8:00	America's Got Talent	Corner Gas	Canadian Idol	Canadian Idol	So You Think You Can Dance	Pirate Master	CTV Movie: Doomstown
30	8:30		Robson Arms					
00	9:00		Cold Case	Degrassi: The Next Generation	Instant Star		So You Think You Can Dance	
30	9:30							
00	10:00	Comedy Now!	Law and Order SVU	CSI: Miami	On The Lot	Traveler	CSI	Law and Order
30	10:30	Comedy Inc.						

** Canadian Drama/ Scripted Comedy

** Émission dramatique ou comédie scénarisée canadienne

Canadian Newsmagazine/ Reality Programs/Sports/ Comedy

Magazine d'actualités, émission de téléréalité, émission de sports ou comédie canadiens

U.S. / Foreign Co-Productions

Coproductions américaines ou étrangères

U.S. and other foreign programs

Émissions américaines et autres émissions étrangères

U.S. Stories Produced in Canada

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FRANCOPHONES DU QUÉBEC - TOUS 2 ANS +

Jeudi, 21 juin au 27 juin 2007

TVA udi, 21 juin 2007	TVA vendredi, 22 juin 2007	TVA samedi, 23 juin 2007	TVA dimanche, 24 juin 2007	TVA lundi, 25 juin 2007	TVA mardi, 26 juin 2007	TVA mercredi, 27 juin 2007
olumbo	Caméra témoin	Ciné-Extra (début 18:30) "Méchant menteur"	Bête et surdouée	Drôles de vidéos	Sketch Show, Le	Par-dessus le marché
	Chaine d'artistes		Désastres naturels	Les Gags	Caméra café	Poule aux oeufs d'or
	Histoire Vraie "L'héritier"	Cinémax (début 20:15) "Seabiscuit"	Tout pour toi	Juste pour rire	Histoires de filles	Qui perd gagne
					Km/h	
n'a pas toute la soirée			Ciné Dimanche "La vie après l'amour"	Deux filles en vacances	Grande évasion, La	Dr House
VA 22 heures, Le	TVA 22 heures, Le			TVA 22 heures, Le	TVA 22 heures, Le	TVA 22 heures, Le
ucré Salé	Sucré Salé			Sucré Salé	Sucré Salé	Sucré Salé

ne - Version française de la série américaine *The Biggest Loser*

asion - Version française de la série américaine *Prison Break*

Émission d'origine - Canadienne

Émission d'origine - autre que Canadienne

APPENDIX D

SELF REGULATORY CODES OF APPLICATION TO THE PRIVATE BROADCASTING INDUSTRY

- CAB Code of Ethics
- CAB Sex-Role Portrayal Code for Television and Radio Programming
- CAB Voluntary Code Regarding Violence in Television Programming
- Advertising Standards Canada Canadian Code of Advertising Standards
- Broadcast Code for Advertising to Children
- Code for Broadcast Advertising of Alcoholic Beverages
- Industry Code of Programming Standards and Practices governing Pay, Pay-Per-View and Video-On-Demand Services
- Pay Television and Pay-Per-View Programming Code Regarding Violence
- Radio-Television News Directors Association of Canada Code of Ethics
- Cable Television Community Channel Standards
- Industry Code of Programming Standards and Practices governing Pay, Pay-Per-View and Video-On-Demand Services

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