

***Review of certain aspects of the
Regulatory framework for over-the-air television***

Broadcasting Notice of Public Hearing CRTC 2006-5:

16 interests?

Submission by the
Canadian Conference of the Arts

27 September 2006

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Diane Rhéaume
Secretary General
CRTC
Ottawa, Ontario
K1A 0N2

Dear Ms. Rhéaume,

Re: Broadcasting Notice of Public hearing CRTC 2006-5

The Canadian Conference of the Arts (CCA) is Canada's oldest and largest arts advocacy and cultural policy development organization. In 2005, the CCA celebrated its 60th anniversary. It currently represents the interests of over 250,000 Canadian artists, creators and arts professionals in matters of cultural policy and cultural content. We use the term, "cultural sector", to describe that part of our nation's economy which engages the many talented men and women whose ideas inform, enlighten and entertain Canadians and others, through literature, visual arts and audio-visual creations.

This proceeding places the interests of the thousands of men and women in Canada's cultural sector and millions of Canadians in general, in counterpoint to the interests of the companies that own or control Canada's privately-owned, over-the-air television stations.

Over-the-air television is one of the cultural sector's larger components. In 2005 Canada's licensed privately-owned conventional television broadcasting undertakings alone earned \$2.2 billion or approximately 0.16% of Canada's GDP. To the best of our knowledge, just over one hundred privately-owned, conventional, over-the-air television stations operate in Canada.¹ Based on the CRTC's ownership charts, these stations are ultimately controlled or owned by sixteen companies (Table 1)

¹ The precise number of licensed, over-the-air television stations operating in Canada is difficult to determine. The CRTC does not publish station lists by callsign or licensee, for one thing. The data the Commission does provide are contradictory. Its *Broadcast Policy Monitoring Report 2006* showed there were 101 privately-owned over-the-air television stations as of May 2006 (at p. 3). Then again, the CRTC's *Television Statistical and Financial Summaries: 2001-2005* provide financial data for August 2005 about 96 reporting units. Statistics on the CRTC's website are different, and not current: one CRTC webpage shows 127 over-the-air television stations with studio facilities as of 31 March 2004 (CRTC, "Radio and television stations with studio facilities, 1998-2004 as of March 31" <<http://www.crtc.gc.ca/eng/GENERAL/statistics/tab2004-4.htm>>). Another shows 119 over-the-air television stations that are not licensed to the CBC, educational, community or provincial stations, again at March 2004 (CRTC "Radio, television and network licences by type of station, network affiliation and province as of 31 March 2004" <<http://www.crtc.gc.ca/eng/GENERAL/statistics/tab2004-2.htm>>). Our figure, of 106 privately-owned, over-the-air broadcasters, is based on a review of the CRTC's online ownership charts (CRTC, "Detailed index of multiple ownership charts") <<http://www.crtc.gc.ca/ownership/eng/index.htm#T>>) and its licensing decisions.

Table 1: Privately-owned, over-the-air television stations in 2006 – 16 controlling interests								
BGM (25)	CFCF-TV	Montreal	CanWest (Asper family) (22)	CFRE-TV	Regina	CHUM (Waters family, in trust) (13)	CFPL-TV	London
	CFCN-TV	Calgary		CFSK-TV	Saskatoon		CHMI-TV	Portage La Prairie
	CFCN-TV-5	Lethbridge		CHAN-TV	Vancouver		CHRO-TV	Pembroke
	CFQC-TV	Saskatoon		CHBC-TV	Kelowna		CHRO-TV-3	Pembroke
	CFRN-TV	Edmonton		CHCA-TV	Red Deer		CHWI-TV	Wheatley
	CFRN-TV-3	Whitecourt		CHCH-TV	Hamilton		CITY-TV	Toronto
	CFRN-TV-4	Ashmont		CHEK-TV	Victoria		CIVI-TV	Victoria
	CFRN-TV-6	Red Deer		CHKL-TV	Kelowna		CKAL-TV	Calgary
	CFTO-TV	Toronto		CHKM-TV	Kamloops		CKEM-TV	Edmonton
	CHBX-TV	Sault Ste Marie		CICT-TV	Calgary		CKNX-TV	Wingham
	CICC-TV	Yorkton		CIFG-TV	Prince George		CKVR-TV	Barrie
	CICI-TV	Sudbury		CIHF-TV	Halifax		CKVU-TV	Vancouver
	CIPA-TV	Prince Albert		CIHF-TV-2	Saint John		CKX-TV	Brandon
	CITO-TV	Timmins		CIII-TV	Toronto	CFAP-TV	Quebec	
	CIVT-TV	Vancouver		CISA-TV	Lethbridge	CFJP-TV	Montreal	
	CJCB-TV	Sydney		CITV-TV	Edmonton	CFKM-TV	Trois Rivieres	
	CJCH-TV	Halifax		CITV-TV-1	Red Deer	CFKS-TV	Sherbrooke	
	CJOH-TV	Ottawa		CJNT-TV	Montreal	CFRS-TV	Jonquiere	
	CKCK-TV	Regina		CKBT-FM	Kitchener	CKRS-TV	Jonquiere	
	CKCO-TV	Kitchener		CKMI-TV	Montreal	CKSH-TV	Sherbrooke	
	CKCO-TV-3	Oil Springs		CKND-TV	Winnipeg	CKTM-TV	Trois Rivieres	
	CKCW-TV	Moncton		CKRD-TV	Red Deer	CKTV-TV	Chicoutimi	
	CKLT-TV	Saint John		CHEX-TV	Peterborough	CHNU-TV	Surrey	
	CKNY-TV	North Bay		CHEX-TV-2	Oshawa	CIIT-TV	Winnipeg	
	CKY-TV	Winnipeg		CKWS-TV	Kingston	CJMT-TV	Toronto	
Quebecor (Peladeau) (7)	CFCM-TV	Quebec	Corus (Shaw) (5)	CKWS-TV-1	Brighton	Dougall (2)	CMFT-TV	Toronto
	CFER-TV	Rimouski		CKWS-TV-2	Prescott		CHFD-TV	Thunder Bay
	CFTM-TV	Montreal		CFEM-TV	Rouyn	CKPR-TV	Thunder Bay	
	CHEM-TV	Trois Rivieres		CFGS-TV	Hull	CITL-TV	Lloydminster	
	CHLT-TV	Sherbrooke		CFVS-TV	Val D'Or	CKSA-TV	Lloydminster	
	CJPM-TV	Chicoutimi	CHOT-TV	Hull	CFTK-TV	Terrace		
	CKXT-TV	Toronto	CKRN-TV	Rouyn	CJDC-TV	Dawson Creek		
Tele Inter-Rives (Simard family) (4)	CFTF-TV	Riviere-Du-Loup	Pattison (3)	CFJC-TV	Kamloops	Lee, Ho, Lau (1)	CHMN-TV	Vancouver
	CHAU-TV	Carleton		CHAT-TV	Medicine Hat		Nfld Bg (Stirling) (1)	CJON-TV
	CIMT-TV	Riviere-Du-Loup		CKPG-TV	Prince George	Leblanc, Royle (1)	CJBN-TV	Kenora
	CKRT-TV	Riviere-Du-Loup		<i>Italics: multi-lingual broadcasters</i>				
Excludes CITS-TV and CJIL-TV (religious stations)								

Canada's privately-owned, over-the-air television broadcasters and the thousands of men and women in the cultural sector work interdependently. The content that is created, written, developed, produced, directed, performed and broadcast, along with the content from other countries, attracts millions of viewers and millions of dollars in revenue for Canada's privately-owned, over-the-air television broadcasters. The content provided by the cultural sector is critical to private television. Without this content, there would be no need for TV broadcasting undertakings: broadcast distribution undertaking could simply serve Canadians by importing foreign signals, in most cases from our big neighbour down south.

Apart from their mutual interdependence – broadcasters rely on the cultural sector for content, the cultural sector relies on broadcasters for income, employment and access to audiences – Canada's privately-owned, conventional, over-the-air broadcasters and cultural workers share several other characteristics.

One characteristic that both sectors share is competitiveness. Since the late 1980s more entrants have been allowed access to Canada's communications sector in areas such as pay and specialty. Simultaneously, however, the CRTC has granted a number of small and large acquisition applications by Canada's privately-owned, over-the-air television broadcasters, so that the number of companies that control Canadian over-the-air television stations now stands at 16, down from 40 companies in 1968. Many of these 16 companies simultaneously compete against themselves, since they also hold pay, specialty and other broadcast licences.

Canada's several hundred thousand cultural sector workers – many of whom provide the content transmitted using our nation's communications system – also compete against each other, as well as non-Canadians, to create and produce the content desired and accessed by Canadians. In broadcasting, the programming content of these workers competes for the attention of their prospective audiences, and for the financial support necessary to produce new content. The highly competitive nature of this sector is evidenced by the fact that no one in the cultural sector enjoys the dominant position enjoyed by just a few of Canada's large communications companies. Four companies (Bell Globemedia, CanWest, CHUM and Quebecor) currently control 85 of the country's 106 conventional, over-the-air television stations and in 2005 earned 86% of Canada's privately-owned, over-the-air television total broadcasting revenue.

Another characteristic shared by privately-controlled broadcasters and cultural workers, is the legitimate desire to earn a profitable income. Those who own and/or control Canada's over-the-air television broadcasters operate businesses with the reasonable expectation of earning income, not charitable enterprises where non-profitability and volunteerism are expected. Broadcasters do not operate as charities – and neither do Canada's cultural workers. Those who work in private television broadcasting seek employment by broadcasters, or business for their own companies.

It has become somewhat trite to note that change is occurring in this sector of the economy (see Appendix 1). At times, it seems that 'change' is a mantra that one can find behind almost every major regulatory intervention to support Canadian broadcasters since the 1930s. In the past, for instance, changes in technology have been repeatedly highlighted at the detriment of programming content:

1965: "Today, (...) 94% [of the population of Canada] can receive television signals. Steady advance is being made each year in the extension of television and radio coverage, not only to remote areas but also to those Canadians whose principal language is English or French

and for whom broadcast services are not available in the language they use for everyday purposes and understand best. The closing of these gaps in the national broadcasting system is of an urgency and importance second only to improvements in programming.” Committee on Broadcasting, *Report*, (Ottawa: Queen’s Printer, 1965) at 67.

1967: “... within five years CTV may be out of business and the CBC reduced to the status of educational television in the United States. This is the threat from new horizons opening to cable TV and the imminent arrival of domestic satellite broadcasting. These fears were expressed openly ... by [the] president of CTV and [the] general manager of the private network.” *House of Commons Debates* (3 November 1967) at 3860-3861 (Mr. Prittie), citing an article from 21 October 1967. [According to Mr. Prittie, *The Globe and Mail* expressed similar views.]

1982: “... the CAB and CCTA were of one opinion in urging that cultural objectives be looked at in broader terms than just those of Canadian program content. One of the objectives mentioned most often was the progressive extension of more and more complete broadcasting services to all parts of Canada. ...” Cultural Policy Review Committee, *Summary of briefs and Hearings* (Ottawa: January 1982) at 221.

1983 “Technological change represents perhaps the most important element of uncertainty in the broadcasting environment of the 1980’s as it relates to the programming and financial position of conventional television broadcasters. Satellite-to-cable delivery systems and the future development of direct-to-home broadcast satellites will make possible a very large expansion in programming alternatives The effect on conventional television broadcasting of these and other developments, such as videocassettes, is uncertain.” CRTC (31 January 1983) *Notice CRTC 83-18, Policy Statement on Canadian Content in Television*, p. 10.

Faced with apparently imminent and dire consequences absent intervention, there can be little wonder that Canada’s regulatory authorities have consistently taken change very seriously. They have responded to ensure that Canada’s over-the-air television services are able to work from a strong financial base. The effect is that Canadian public policy has supported Canada’s privately-owned, over-the-air television broadcasters’ financial base for decades, not only by granting applications that result in more concentrated ownership, but also through more ‘streamlined’ regulation and incentive programs that grant broadcasters more advertising time (see Appendix 2).

The apparent *quid pro quo* offered by licensees that obtain this support has been high-quality Canadian content. “More Canadian content”, “improved Canadian programs”, “higher-quality Canadian programming” are seasonal phrases with which keen CRTC observers will be most familiar at the time of broadcasters’ licence applications, licence renewals and licence transfer proceedings.

In fact, despite many promises that the strength of privately-owned broadcasters would trickle downhill to support Canadian cultural content, Canada’s cultural sector has yet to benefit from years of regulatory flexibility and consolidated ownership granted to Canada’s privately-owned, over-the-air television broadcasters in the name of ‘change’.

It is noteworthy that from 2001 to 2005 privately-owned television broadcasters' gross revenues increased by over 15%.² Meanwhile, average weekly earnings in the arts, entertainment and recreation sector decreased from \$429 in 2001, to \$421 in 2005.³ The number of dramatic program hours purchased by and broadcast by Canada's privately-owned, over-the-air television broadcasters has also decreased.

There is little question that true financial weakness in privately-owned, over-the-air television weakens and harms the financial situation of those in the cultural sector who create, develop, write, produce, direct and act in the programming aired by this medium. Unfortunately, based on the empirical evidence of the past, there is doubt as to whether financial strength in the private broadcasting sector improves the production of elusive Canadian content or the economic position of artists and cultural workers.

The CCA therefore noted with some interest – and some disappointment – the Commission's preliminary question at paragraphs 17 and 18 concerning Canada's privately-owned, over-the-air television broadcasters:

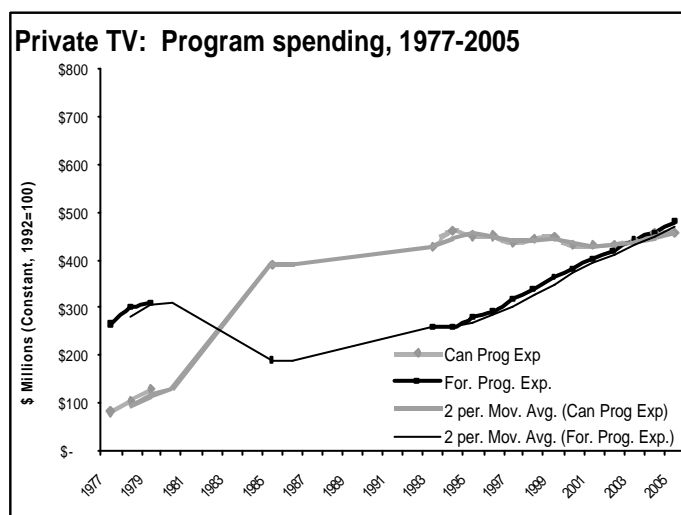
“How will broadcasters react to evolving consumer requirements for programming services that deliver content anytime, anywhere and on multiple platforms?”

“... how [should] Canadian television ... respond to the pressures for change?”

Like the commitments at CRTC hearings, the warnings about change are familiar, and drive the CCA to ask, admittedly somewhat bluntly: **however interesting broadcasters' reactions to change in the future may be in discussing Canadian broadcasting, how relevant are these questions in this hearing, at this time?**

After all, the CRTC's mandate under section 5.(1) of the *Broadcasting Act, 1991* is not to predict broadcasters' reactions to change, but to “regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy ... and ... the regulatory policy” of this legislation. Unlike the recession period of the very early 1990s, Canada's privately-owned, over-the-air television broadcasters have been and continue to enjoy healthy revenues and profits. Have they not had at least a decade and a half⁴ to respond to the shift from analog to digital broadcasting?

Indeed, based on the available empirical evidence, Canada's privately-owned over-the-air television broadcasters' response to stable or growing profitability levels and the shift from analog to digital broadcasting, appears to have been to spend more money on foreign



² From \$1.903 billion in 2001, to \$2.198 billion in 2005 (current dollars). CRTC, *Television: Statistical and Financial Summaries, 2001-2005* <<http://www.crtc.gc.ca/eng/publications/reports/BrAnalysis/tv2005/tv2005.pdf>> at 1.

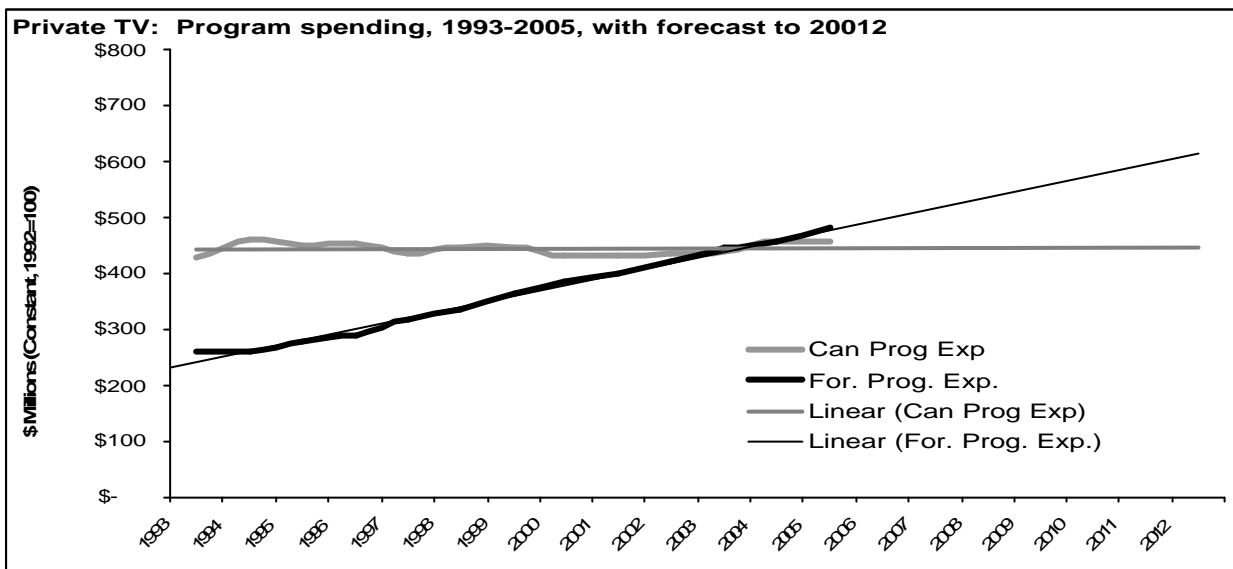
³ Statistics Canada, “Earnings, average weekly, by industry” CANSIM, table 281-027 and Cat. no. 72-002-X.

⁴ In 1993 the CRTC held its ‘Structural Hearing’, to consider the future of the broadcasting system in the face of new changes in broadcast distribution technology, including the shift to digital content.

programming, and less on Canadian programming.⁵

Without intervention by the CRTC, what will stop current spending patterns of Canada's privately-owned, over-the-air television broadcasters from continuing?

The CCA estimates that in the three areas of specific concern to the CCA – script and concept



development, Canadian drama and local programming – decisions to move away from the status quo in 1994 have resulted in the re-allocation of \$808 million away from these areas, presumably to serve interests other than those of Canadians and Canada's cultural sector.

One is left to wonder what empirical evidence supports arguments that more consolidation, more deregulation and more incentives will result in more and better Canadian programming being made available to millions of Canadians by Canada's privately-owned, over-the-air television broadcasters?

Since spending on foreign programming now exceeds spending on Canadian programming, and Canada's privately-owned, over-the-air television broadcasters are airing far fewer hours of original Canadian drama than in the last decade – is it not appropriate to ask what has led the CRTC to foreclose debate on its current regulatory framework for Canada's privately-owned, over-the-air television broadcasters?:

The Commission considers that those aspects of the 1999 Policy not identified for review in this notice remain appropriate.⁶

⁵ Spending data from 1977-1979 in Raymond, Cabot, Martin, ParSource:e & cie, *Private Canadian Television Stations: Selected Financial Data, 1972-1980* (November 1981); from 1985 in Task Force on Broadcasting Policy, *Report*, at 436; and from 1993-2005 in CRTC, *Television: Statistical and Financial Summaries* (various years). CPI deflator data from Statistics Canada.

⁶ Broadcasting Notice of Public Hearing CRTC 2006-5 at para. 19.

The CCA suggests that by closing the door on debate, the CRTC has also closed the door on discussions about the fundamental assumptions on which its television policy is now based. For instance:

- Why does the CRTC continue to assume that technological change necessarily requires regulatory reaction and flexibility even though Canada's broadcasting legislation was specifically designed to be technologically neutral?
- Why does the CRTC continue to assume that standard competitively marketplace economic theory applies to the oligopoly that is Canadian broadcasting?
- Does the CRTC itself buy into the view that Canadian programming constitutes quasi-charitable "contributions" from the private sector in its never-ending quest for profits?
- Does the CRTC continue to believe, in the face of evidence to the contrary, that aggregated concentration of ownership and resources serves the public interest?
- Are the interests of Canadians and those in the cultural sector well-served by working so carefully to tailor a regulatory framework to meet the self-professed needs and interests of 16 companies?
- What has led the CRTC to hold yet another proceeding to determine how best to support 16 companies operating at a profitable level, perhaps by granting yet more regulatory flexibility or relieving this sector of its existing transmission and/or programming obligations, while simultaneously closing the door on debate and failing to give participants in this proceeding useful, empirical data on which to base their assessments and recommendations?

We do not know the answers to these questions, but we think it is appropriate we take the opportunity of this process to ask them.

In this intervention, the CCA asks the CRTC, the federal government and Parliament to implement quantitative, well-financed and verifiable programs that express the principles of Canada's broadcast policy and serve the interests of millions of Canadians.

These principles involve

1. a stable financial relationship with Canada's cultural sector, based on enforceable *and enforced* spending requirements, and increased resources for Canadian programming through a rationalization of licence fee levels;
2. opportunities for access to Canadian audiences by Canada's cultural sector, based on enforceable *and enforced* programming requirements;
3. rational regulation to ensure Parliament's objects are met through enforceable *and enforced* requirements, and competitive licensing when licensees breach these requirements;
4. jurisdictional sovereignty that maximizes Canadians' access to Canadian programming about Canadian ideas, stories and values.

The CCA's comments on Broadcasting Notice of Public Hearing 2006-5 address these four principles in greater detail.

We anticipate the opportunity to review others' comments, and would like to appear at the CRTC's hearing in November, to continue the dialogue between Canada's federal broadcast and telecommunications regulatory authority, and Canada's cultural sector. We may take advantage of the CRTC's offer to allow interested parties to file brief, final, written comments after the hearing. Should the Commission specifically request additional information before, during or following the hearing, the CCA also requests the opportunity to review and reply to new submissions, arguments or information.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alain Pineau', written in a cursive style.

Alain Pineau
National Director
Canadian Conference of the Arts

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Executive Summary

Response to CRTC's specific questions about 'appropriate aspects' of its television policy

1. The CCA has noted the CRTC's emphasis on receiving submissions about the four areas of specific interest to the Commission. A summary of the CCA's responses to the CRTC's questions appears in the table below.

Response regarding other aspects of the CRTC's television policy

2. At the same time, the CCA has concerns that the CRTC has foreclosed debate on important questions of public policy concerning its regulation of the sixteen companies that own or control Canada's privately-owned, over-the-air television broadcasters.
 - a. The CRTC has explicitly told the public that it considers that the aspects of its 1999 *Television Policy* that it does not itself raise "remain appropriate" and does not seek comment on these aspects. If aspects of the CRTC's 1999 *Television Policy* which are not raised in the CRTC's notice are demonstrably appropriate, no harm would ensue if participants were allowed to comment on them. It is a well-known aphorism that the answer is in the question: the CRTC's limited questions therefore greatly reduce the scope for a real debate about the Television Policy. It is CCA's position that administrative agencies charged to serve Parliament and the public interest should not arbitrarily restrain public comment and debate in proceedings dealing with such fundamental issues as providing Canadian programming to Canadians.
 - b. The CRTC has provided inadequate documentary support to enable the public to participate effectively in this proceeding. It has asked questions, for instance, about measures to maintain and improve local programming in 'small markets', but has not offered the public any empirical information necessary for an informed discussion about this issue. Yet it is difficult for participants outside Canada's privately-owned, over-the-air television broadcasters to answer questions such as this without financial and programming data about past and current levels of local programming offered by those 'small market broadcasters'. The activities of administrative agencies charged to serve Parliament and the public interest should be sufficiently transparent to ensure that the public interest is demonstrably being served.
3. Two areas that the CRTC's notice does not specifically address but that the CCA believes warrant serious discussion and consideration are script and concept development, and dramatic program production.
 - a. It is trite to point out that script and concept development are the 'research and development' expenditures necessary to create high-quality, high-audience programming.

The data published annually by the CRTC suggest that Canada's privately-owned, over-the-air television broadcasters' script and concept development expenditures decreased from \$59 million in 1994, to two hundred thousand dollars in 2005.

The CCA estimates that if Canada's privately-owned, over-the-air television broadcasters had continued to spend from 1995 to 2005 only the same amount they spent in 1994 (i.e. without increasing spending to account for inflation), they would have spent approximately \$442 million more on script and concept development than the CRTC's data now show for that period.

If this is the case, then is it not legitimate to ask if it has been in the interests of Canadian audiences or Canada's cultural sector to have these \$442 million allocated on something other than script and concept development?

The CCA notes that it may be that Canada's privately-owned, over-the-air television broadcasters have continued to spend money on scripts and concept development, but no longer report these expenditures to the CRTC. Since script and concept development are critical to Canadian television drama and other programs – based on the US experience, for every ten programs that are developed, only one succeeds – the CCA believes it is important to know just how much has been allocated to script and concept development, and what funds will be allocated to this area during the course of the CRTC's next television policy initiative and consequent to Canada's privately-owned, over-the-air television broadcasters' licence renewals.

Whose interests are served when key data about this fundamental aspect of Canadian broadcasting are not disclosed?

- b. Canadians like to watch programs in the drama category – fictional television programs that may be dramatic or comedic in nature. From 1995 to 2006, Canada's privately-owned, over-the-air television broadcasters' foreign dramatic program spending increased by an average of 7% per year – and by 110% or \$3,560 million for the entire decade. Over the same period, Canadian dramatic spending increased by an average of 4.6% per year – and by a total of 24% or \$781 million over the entire decade.

The CCA estimates that if Canada's privately-owned, over-the-air television broadcasters had increased their spending on Canadian dramatic production only by the same rate by which they increased their spending on foreign dramatic productions, they would have spent an additional \$178 million on Canadian drama.

Has it been in the interests of Canadians or Canada's cultural sector for these \$178 million to be allocated outside of Canadian dramatic program production?

4. The CCA also comments about local programming. Parliament requires, and the CRTC has traditionally encouraged, local programming that reflects non-news community programming. Local programming provides communities' cultural participants with an opportunity to engage with their neighbours, as well as valuable opportunities to develop in a professional broadcast medium.

Between 1995 and 2005, Canada's privately-owned, over-the-air television broadcasters allocated \$4,583 million to local programming. Yet community program spending is declining. A decade ago, local program spending increased by 7.3% between 1994 and 1995. Between 2004 and 2005, however, it decreased by 1%.

The CCA estimates that if spending on local programming by Canada's privately-owned, over-the-air television broadcasters increased from 1995 to 2005, at the 1994-1995 growth rate of a decade ago, local program spending would have been \$188 million higher.

Impact of the CRTC's regulatory approach to Canada's privately-owned, over-the-air television broadcasters since 1995

5. The CCA's analysis of these three issues suggests that over all, decisions about re-allocating resources have left the Canadian broadcasting system \$808 million poorer. Neither Canadian audiences nor Canada's cultural participants have been well-served by this re-allocation of broadcast resources: Canadian drama programming has decreased, more money is now being spent on foreign programming than on programs for, by and about Canadians, and the currently free, over-the-air local programming now available to Canadians may soon be replaced by local programming produced by and available only to those subscribing to broadcast distribution undertakings.

Program spending decisions			
1995-2005	Actual expenditures	Expenditures revisited	Difference
Script and concept development	\$97 million	\$539 million If spent the 1995 amount (no inflation)	\$442 million
Canadian drama	\$781 million	\$959 million If grew at same rate as non-Canadian drama	\$178 million
Local programming	\$3,705million	\$3,893 million If grew at the same rate as 1994 to 1995	\$188 million
Total	\$4,583 million	\$5,391	\$808million

6. HOW HAS THIS HAPPENED?

Five flawed assumptions appear to guide the CRTC's decision-making:

7. The CCA's comments are prefaced with a review of five assumptions that appear to underlie the CRTC's approach to broadcast regulation, but also appear to lack the empirical support valid assumptions typically enjoy. These assumptions appear to underlie the implicit and sometimes explicit promise that if Canada's privately-owned, over-the-air television broadcasters thrive economically, so too will Canadian audiences, Canadian programming and those who create, write, produce and direct this programming content.
- a. *"Technological change automatically requires regulatory reaction"*: Change does not necessarily require regulatory reaction. Yet 'change' has been used to justify regulatory shifts and particularly regulatory "streamlining", for decades. The assumption that technological change justifies deregulation and the non-

enforcement of existing regulations is not supported in law. Parliament explicitly designed the *Broadcasting Act, 1991* to be neutral with respect to technology. The shift from analog to digital does not require development and imposition of a new regulatory framework. A new regulatory approach is required, however, to address the current framework's inability to achieve Parliament's objects for broadcasting – and in particular, to address the current reality of reduced levels of new, well-financed Canadian programs.

- b. *“Canadian broadcasting operates in a competitive environment”*: The ‘invisible hand’ of the competitive marketplace really is invisible in Canadian broadcasting. A competitive marketplace has large numbers of suppliers selling products or services to large numbers of buyers, at the marginal cost of production. Canada’s conventional, privately-owned broadcasting system is not a competitive marketplace: there are only 16 suppliers (Canada’s privately-owned, over-the-air television broadcasters), of which 4 own 86% of the revenue; Canadian audiences are not ‘buyers’, and it is unclear whether marginal pricing applies to the sale of advertising time or opportunities. Misconstruing the basic nature of Canada’s privately-owned broadcasting system is to misconstrue the true nature of Canada’s privately-owned, over-the-air television broadcasters. Their proper role is to maximize returns to their shareholders or owners; the CRTC’s proper role is to implement Parliament’s objectives for the broadcasting system. Deregulation in a non-competitive marketplace means that private interests will be maximized, at the expense of all other interests.
- c. *“Broadcasters must make a contribution to Canadian programming”*: Parliament requires that each element of the broadcasting system “contribute in an appropriate manner” to creating and presenting Canadian programming. The CRTC’s notice for this proceeding refers sixteen times to the “contributions” made by Canada’s privately-owned, over-the-air television broadcasters to Canadian programming. Constant reference to ‘contributions’ mischaracterizes what is essentially a standard business expense: unless privately-owned broadcasters are computing their taxable income by deducting their Canadian programming expenditures as provided for by section 110.1 (“Deduction for gifts [by corporation]”) of the *Income Tax Act*,⁷ Canadian programming is neither a gift, nor a donation or a ‘contribution’. The effect of mischaracterizing business expenses as ‘contributions’ is to give credence to the notion that when revenues decline, fail to grow, or fail to grow to a desirable level, such expenditures are discretionary and dispensable.
- d. *“Ownership consolidation will automatically lead to high quality Canadian programming”*: No evidence supports the assumption that aggregated resources serve the public interest by maximizing expenditures and scheduling of high-quality Canadian programming. Although ownership of Canada’s privately-owned, over-the-air television broadcasters is now more highly concentrated than at any other time in the CRTC’s history, Canada’s privately-owned, over-the-air television broadcasters in 2005 spent more on foreign programming than on Canadian programming. The negative effects of the ‘benefits policy’ established by the CRTC outweigh its financial impact: the ‘benefits’ are unpredictable and

⁷ R.S.C. 1985, c. 1(5th Suppl.), as am. to 2004, cc. 26.

do not provide the production of Canadian programming with the business-like stable financing necessary to any business' success; the 'benefits' principle creates conflicts of interest for those in the cultural sector and for the CRTC; and a 'benefits policy' reinforces the incorrect idea that Canadian programming constitutes quasi-charitable beneficence on the part of Canada's privately-owned, over-the-air television broadcasters.

- e. *"The best regulation is no regulation"*: Excessively-detailed regulation is wasteful and inefficient when it fails to generate expected outcomes. Inadequate regulation is, however, just as wasteful and inefficient when expected outcomes are still not achieved. The same is true for regulations and conditions of licence that are clear, but not enforced. Notwithstanding the colourful *Broadcast Policy Monitoring Reports* now being issued annually by the CRTC, what evidence exists to demonstrate that the Commission's regulatory framework for Canada's privately-owned, over-the-air television broadcasters is achieving Parliament's objects for the broadcasting system, particularly in light of Canada's privately-owned, over-the-air television broadcasters' decisions to spend more money on foreign programming than on Canadian programming? After two decades of deregulation, is Canada's cultural sector better off – or not?
8. Relying once again on assumptions that lack empirical support would appear to be either naïve, or cynical.

Recommendations by the CCA

9. Culture enhances our lives and defines our national identity. It also gives many Canadians a living. Those in Canada's cultural sector require the same businesslike treatment that Canada's privately-owned, over-the-air television broadcasters desire from the CRTC. Accordingly, **the CCA recommends:**
 - a. that the CRTC adopt a streamlined regulatory approach to Canadian content and Canadian drama which would focus on simple and straightforward quantitative funding and scheduling commitments – not the continuation of a detailed, complicated, difficult-to-monitor incentives-based approach that is neither businesslike nor effective;
 - b. that the CRTC ensure that Canada's 16 privately-owned, over-the-air television broadcast groups allocate more financial resources to Canadian script and concept development, Canadian programs and Canadian drama, than to their foreign equivalents;
 - c. that the CRTC initiate a public proceeding to consider how telecommunications service providers that offer audio-visual programming content to their clientele and subscribers should contribute to the objects set out for Parliament in the *Broadcasting Act, 1991*;
 - d. that the licence fees now paid by telecommunications companies to exploit the communications spectrum owned by Canadians, be raised to provide a base of stable and predictable financial backing for Canada's cultural businesses.

10. In addition to stable funding, Canadians and Canada's creators, writers, producers, directors and actors require 'shelf space' to access and present Canadian programs. Therefore, **the CCA recommends:**
 - a) that the CRTC increase the 'shelf space' available for the products of Canada's cultural sector;
 - b) that Canada's privately-owned, over-the-air television broadcasters that seek to profit from local communities be required to provide local news, information and entertainment programs. Reducing the existing local programming requirements of Canada's licensed broadcasters effectively requires local communities to subsidize privately-owned broadcasters' profitability;
 - c) that if the CRTC allows Canada's privately-owned, over-the-air television broadcasters to cease their over-the-air transmissions in favour of carriage by broadcast distribution undertakings, effective means be found to compensate those Canadians who do not want, cannot obtain or cannot afford to subscribe to these services. In particular, **the CCA recommends** that a 'lifeline' tier consisting of all publicly-funded programming services be made available to all subscribers without charge.
11. An inadequate or unenforced regulatory framework is as wasteful and inefficient as an excessively-detailed framework. **The CCA recommends:**
 - a. that the CRTC ensure that its regulations and conditions of licence are met;
 - b. that the CRTC apply a competitive marketplace approach to Canada's privately-owned, over-the-air television broadcasters: if a broadcaster breaches the CRTC's regulations or its own conditions of licence, that licence should not be renewed automatically or renewed for a shorter-than-normal licence term. Rather, the licensee and any other party interested in the licence should be invited to apply to the use the licence.
12. Parliament enacted a single policy for broadcasting in Canada. In the last several years the CRTC's decisions to forbear from regulating new media have created several parallel broadcasting systems. Insufficient data exists to demonstrate whether these new media could contribute to Parliament's objects for its broadcasting policy. **The CCA recommends:**
 - a. that the CRTC revisit its decisions to forbear from regulating new media, and other elements of the broadcasting system that use the spectrum owned by all Canadians as a natural resource.
13. Canadians require and want a broadcasting system that serves their needs and interests. Parliament has established a broadcasting policy to meet Canadians' public interest. Establishing regulatory frameworks that simply mimic regulatory action or inaction of other countries constitutes the abandonment of sovereign jurisdiction over a natural resource whose value has grown, is growing and will only continue to grow in the future. **The CCA recommends:**

- a. that the CRTC's regulatory framework for Canada's 16 privately-owned, over-the-air television broadcasters serve Parliament and the public interest by focussing on the issues of concern to this country.

Summary of CCA's responses to CRTC questions

Objective A: privately-owned, over-the-air broadcasters and Canadian programming	
CRTC questions	CCA response
<i>a) What are the most effective regulatory mechanisms to ensure an appropriate contribution to the production, acquisition and broadcast of Canadian programs?</i>	The most effective regulatory mechanism is one that is enforceable <i>and enforced</i> . The CCA therefore supports mechanisms that are quantitative: these must specify both the expected weekly and total hours of original program productions, acquisitions and broadcasts, as well as total program expenditures.
<i>b) Is the Commission's current approach to independent production appropriate to ensure that the broadcasting system includes "a significant contribution from the Canadian independent production sector," as required by the Act?</i>	Unfortunately, the CRTC publishes insufficient data to assess the effectiveness of its current approach. The CRTC's annual <i>Statistical and Financial Summaries</i> should expand on the information they now provide regarding spending on independent production, to include annual hours of independently-produced programs, broken down by program category.
<i>c) Should OTA licensees be subject to an expenditure requirement?</i>	Yes. Without specified commitments from Canada's 16 privately-owned, over-the-air broadcasters, Canada's cultural sector will not be able to plan in the same businesslike fashion that privately-owned, over-the-air broadcasters employ. The CCA prefers regulations rather than conditions of licence. A regulation that applies to all sixteen privately-owned, over-the-air broadcasting groups offers a level playing field to all participants. Conditions of licence tailored to suit the interests of each broadcasting undertaking maximize the interests of those undertakings, but effectively treat all broadcasters unequally, without necessarily offering Canadians commensurate return on their property (the broadcast spectrum).
<i>d) Should any spending requirement be based on a percentage of revenues, of total program spending, or some other measure? How might any spending requirement account for year-to-year variations in revenues or program spending? Please be as specific as possible in describing any proposed expenditure formula.</i>	The Canadian program expenditures of each privately-owned conventional television ownership group for a given year (Year) should be a proportion of the gross revenues of that group in [Year – 2]. This would 1) maximize the benefits that are supposed to accrue from increased consolidation of ownership; 2) allow broadcasters to plan their spending requirements in a businesslike manner, and 3) establish a businesslike and stable environment for programmers to plan on the basis of a known and stable level of funding required to produce high-quality programming.

Objective A: privately-owned, over-the-air broadcasters and Canadian programming	
CRTC questions	CCA response
<p><i>e) What changes, if any, should be made to the Commission's benefits policy?</i></p>	<p>It is interesting that this question presupposes that the CRTC will continue to allow ownership in Canada's broadcasting sector to become more consolidated.</p> <p>What clear, significant and unequivocal data demonstrates the existence of stable, ongoing benefits to Canadians and the cultural sector from consolidation in the past, and stands as evidence that the Commission could use to allow more consolidation now?</p> <p>The CCA's view is that consolidation has yet to deliver ongoing, stable funding to support more, high-quality Canadian programming and Canadian drama and should therefore be dealt with accordingly.</p>

Objective B: adding to the income of privately-owned, over-the-air broadcasters	
<p>a) <i>In light of changes to the form and delivery of advertising messages on television, should the Commission consider amendments to the Regulations respecting advertising? For instance, should the Commission consider restricting its limitation of 12 advertising minutes per hour to traditional commercial messages inserted as breaks in the program schedule (15, 30, 60 seconds etc.)?</i></p>	<p>It would be irrational for privately-owned, over-the-air broadcasters that derive profits from their use of Canada's broadcast spectrum not to seek to maximize this income.</p> <p>The CCA believes that the CRTC must regulate all forms of advertising used to derive benefits from privately-owned, over-the-air broadcasters' use of the broadcast spectrum. This information is necessary to determine how the broadcasting system functions, and whether Parliament's objects for the system are being met.</p> <p>The CRTC should undertake this regulation in the public interest and in line with the <i>Act</i>.</p> <p>With this in mind, is it in the best interests of Canadian audiences for no limits at all to be placed on non-traditional advertising? We would argue it is not: in defining the basic concept of a 'program', Parliament specified that programs consist of sounds and/or images that are intended to "inform, enlighten <u>or</u> entertain", not sounds and/or images that inform <u>and</u> advertise, enlighten <u>and</u> advertise, and entertain <u>and</u> advertise. Allowing – and therefore encouraging – the introduction of potentially thousands of advertising opportunities in all of the over-the-air television programs now freely available to Canadians generates new revenue for privately-owned, over-the-air broadcasters, but radically diminishes the quality and nature of these programs, while constraining the creativity of Canadian authors, directors, producers and actors. When CTV next carries a performance of Yo Yo Ma, may we expect to see the Exxon logo prominently displayed on his violin?</p>
<p>b) <i>What other amendments to the Regulations respecting advertising would be an appropriate response to current and anticipated changes in the way advertising messages are transmitted to television audiences?</i></p>	<p>At a minimum, the CRTC must ensure that its privately-owned, over-the-air broadcasters submit accurate data on the revenues non-conventional advertising yields, and must also publish these results.</p>
<p>c) <i>Should the Commission consider permitting a subscriber fee for the carriage of certain OTA television signals by broadcasting distribution undertakings (BDUs)?</i></p> <p><i>If so, what stations and under what circumstances?</i></p>	<p>No – if such a fee is merely intended to be used to pay for the shift from analog to digital transmission. Canadians should not have to pay for privately-owned, over-the-air broadcasters' decision not to plan for a technical change that has been known for over ten years.</p> <p>No – if it is claimed that such a fee will be used for new, more and higher-quality original Canadian programming – past experience demonstrates that this revenue may simply allow revenues used for</p>

<p>Objective B: adding to the income of privately-owned, over-the-air broadcasters</p>	<p>Canadian programming to be diverted either into the shift from analog to digital transmission, or the acquisition of more foreign programming, or both.</p> <p>Yes, if the CRTC</p> <ul style="list-style-type: none"> a) established a lifeline BDU tier consisting of publicly-funded broadcasters that subscribers would automatically receive free of charge; b) regulated the new privately-owned, over-the-air broadcasters' fee either by regulation or condition of licence; c) collected financial data about the fee's revenues and the use to which these revenues is put; and d) determined how Canadians who cannot afford, do not want, or cannot obtain BDU service are to be compensated for their loss of over-the-air transmissions
<p><i>d) If such a fee were to be considered, should it be restricted to services that offer new or significantly improved services to subscribers – for instance, services that provide a program schedule that is predominantly in HD?</i></p>	<p>No, unless the CRTC establishes a financing mechanism to ensure that the CBC's services are all available in HD. (Private broadcasters, of course, are free to make their own financial arrangements to pay for this conversion, including bank loans and/or bonds.)</p>
<p><i>e) Are there other criteria that the Commission should use in determining whether a subscription fee for OTA television services is warranted?</i></p>	<p>Past compliance with CRTC regulations and conditions of licence</p>
<p><i>f) If such a fee were to be considered, on what basis should it be calculated?</i></p>	<p>The CCA opposes such a fee.</p> <p>Regardless, the CRTC should ensure that such a fee covers the costs to offer all subscribers a free, lifeline tier of publicly-funded programming services as well as the costs for publicly-funded services to shift from analog to digital.</p>
<p><i>g) If a subscription fee were introduced, what changes to the Broadcasting Distribution Regulations (the Distribution Regulations) would be necessary or appropriate?</i></p>	<p>The CCA has no comment at this time.</p>
<p><i>h) Is the apparent failure to monetize out-of-market tuning a serious problem? If so, what regulatory measures could be introduced to address the problem?</i></p>	<p>The CRTC has not published sufficient data for the CCA to provide a response.</p>

Objective C: subsidizing Canada's privately-owned, over-the-air television broadcasters decisions not to proceed with HDTV	
a) Describe the public policy implications of a decision not to require OTA transmission of digital/HD signals, including the implications for the Canadian Broadcasting Corporation/Société Radio-Canada, educational and OTA community television services.	Is the CRTC prepared to tell Canadians that they may now lose these services unless they pay for them through a new BDU fee?
b) For those Canadians who continue to rely on OTA transmission, what reasonable and cost-effective alternatives could be proposed?	Reasonable for whom? Cost-effective for whom? (From a Canadian over-the-air viewer's perspective, is it not most <i>reasonable</i> and <i>most cost-effective</i> to require OTA transmission to continue as is?)
c) How would licensees make local and regional programming available to the appropriate communities if there were no OTA digital transmission?	The CCA has no comment at this time.
d) What changes to CRTC regulations and/or policies would be required to accommodate a change resulting in no OTA digital transmission?	Consistent with the CRTC's current policy, the CCA assumes that broadcasters that do not provide local programming, will no longer seek local advertising income.
e) If such an approach were taken, at what point should analog over-the-air services be shut down, or should the Commission specify such a point?	The CCA has no comment at this time.

Objective D: is this the end of local programming?	
a) <i>What has been the impact of out-of-market tuning on stations in small markets?</i>	The CCA has no comment at this time.
b) <i>Are the measures set out in Public Notice 2003-37 to assist independently owned small market broadcasters in maintaining and improving local programming having their desired effect? Should they be continued or altered? If the latter, how?</i>	The CCA has no data on which to base an answer.
c) <i>Should independently owned small market broadcasters be obliged to broadcast a minimum amount of local programming? If so, what amount should that be?</i>	Yes. The CCA suggests that all broadcasters seeking local advertising income must offer not only local news and information, but also non-news programs.
d) <i>What measures may be appropriate to ensure that small market stations controlled by larger broadcast ownership groups continue to fulfil their local programming obligations?</i>	Enforceable <i>and enforced</i> quantitative conditions of licence.
e) <i>Should the Commission expect broadcast ownership groups with profitable stations in the largest Canadian markets to subsidize their stations in small markets?</i>	Yes. To paraphrase Thomas Aquinas, to whom much is given, much is demanded.

I Promises made Promises broken.

1. In the immense landscape that is our home, Canadians have overcome the challenges of a thinly-spread population, harsh weather and multiple time zones – often thanks to scientific innovation. Due to public and private sector support for research, development and capital expenditure investment decisions, Canada has been on the forefront in developing new communications technologies: from the telegraph in 1846,⁸ wireless radio-telegraphy in 1901,⁹ amplitude-modulated radio broadcasting in 1906,¹⁰ electrically-powered radio in 1925,¹¹ frequency-modulated radio in 1940,¹² television and cable television in 1952¹³ and satellites in 1962¹⁴... to coast-to-coast internet service in 1990.¹⁵
2. Throughout, Canadian legislators have sought to maximize the benefits available to Canadians from these new technologies, emphasizing the public interest even as they acknowledged the private interest. They In the case of broadcasting, for instance, Prime Minister Bennett in the spring of 1932 established the principles underlying legislators' concerns: sovereign jurisdiction, equality of experience, and public control over natural resources:

First of all, this country must be assured of complete control of broadcasting from Canadian sources, free from foreign interference or influence. Without such control, radio broadcasting can never become a great agency for communication of matters of national concern and for the diffusion of national thought and ideals, and without such control it can never be the agency by which national consciousness may be fostered and sustained and national unity still further strengthened

⁸ On December 19, 1846, the first telegraph company in what later became Canada began operations (the Toronto, Hamilton & Niagara Electric Telegraph Co.) Online <http://members.tripod.com/morse_telegraph_club/images/newpage1.htm>.

⁹ In 1901, after his facilities in the United States were destroyed by storms, the Canadian federal government granted Guglielmo Marconi space in an abandoned military hospital in Newfoundland from which he transmitted the first international wireless communication. Wade Rowland, *Spirit of the Web: The Age of Information from Telegraph to Internet*, (Toronto: Key Porter Books, 1999), "Some Milestones in Communications Technology" (np.) at 121-122.

¹⁰ Canadian Reginald Fessenden made the world's first radio broadcast from the American East coast, carrying human voices and music to ships at sea. Media Awareness "radio in Canada: a timeline" <<http://www.media-awareness.ca/eng/indux/radio/timeline.htm#1800s>> (24 February 2003).

¹¹ In 1925, Canadian Edward S. Rogers invented radios that operated using ordinary household electrical current, rather than the large, acid-based, wet batteries then used to power radios. Frank Foster, *Broadcasting Policy Development* (Frank Foster Communications, Ltd.: Ottawa, 1982) at 20.

¹² In 1933 in the United States, Edwin Howard Armstrong imparted information to a radio signal by changing the frequency of the transmitter: this was the birth of the FM (frequency-modulated), high fidelity band. John Charles Clifford, *Content Regulation in Private FM Radio and Television Broadcasting: A Background Study about CRTC Sanctions and Compliance Strategy*, (October 1983: Ottawa, Ontario) at para. 118. Canada's first FM station (CFRB-FM in Toronto) went on air in 1940; audience interest in this new medium was somewhat limited, not only because consumers had to buy a new receiver to hear the programming, but also because the new FM stations (operated by the same people running the AM stations) offered only the programming already available on their 'sister' AM stations (a practice known as simulcasting).

¹³ Five years after the CBC made its first proposals for developing television in Canada, two television stations go on air, in 1952. CBC, *CBC Fact Book, 1989* (November: 1989) at B-2. In 1952 in London, Ontario Mr. E.R. Jarman built a special rhombic antenna to capture the nearest television signals available (from Cleveland, Ohio) and distributed them to 15 test subscribers (14 of whom didn't have TV sets and were loaned one).

¹⁴ In 1962, Canada became the third nation in space to launch a satellite – the Alouette 1 – into space.

"Friends of CRC" online <<http://friendsofcrcc.ca/Articles/Blevis-Pursuit%20of%20Equality/BertBlevis.html>>..

¹⁵ In 1990, the CA*net was formed, linking Canadians coast-to-coast to the Internet "CA*net" online: Canarie <<http://www.canarie.ca/advnet/history.html>>.

Secondly, no other scheme than that of public ownership can ensure to the people of this country, without regard to class or place, equal enjoyment of the benefits and pleasures of radio listening. Private ownership must necessarily discriminate between densely and sparsely populated areas. This is not a correctable fault in private ownership; it is an inescapable and inherent demerit of that system. It does not seem right that in Canada the towns should be preferred to the countryside or the prosperous communities to those less fortunate. ... Happily, however under this system [of broadcasting being proposed by the government], there is no need for discrimination; all may be served alike. ...

Then there is a third reason to which I might refer, and one which I believe must commend itself to every hon. member in this chamber. The use of the air, or the air itself, (...) is a natural resource over which we have complete jurisdiction under the recent decision of the Privy Council [and which] the crown holds ... in trust for all the people. ... I cannot think that any government would be warranted in leaving the air to private exploitation and not reserving it for development for the use of the people.¹⁶

3. From the beginning, therefore, Parliament's guiding objective was to ensure that Canadians reap the benefits possible from exploiting Canada's publicly-owned broadcast spectrum. The legislature established and dismantled several regulatory agencies as it gained experience in the regulation of this communications sector.¹⁷ It settled on the CRTC in 1968 to implement its broadcasting policy for the country.
4. Since 1968, the CRTC has offered Canadians the appealing vision of high-quality Canadian programming. Like its predecessor, the Board of Broadcast Governors, the Commission enacted regulations specifying minimum quantitative levels of domestic content to be broadcast by Canada's privately-owned, conventional, over-the-air broadcasters. It allowed half of the cable subscriber fees paid initially to support capital equipment construction, to be re-allocated to a funding program to support Canadian television programs. In the last two decades in particular, the CRTC permitted private ownership of the broadcast media to become more concentrated in fewer hands, directly tying concentrated ownership to more, high-quality, better-financed Canadian programs.
5. The implicit and often explicit promise in all of the CRTC's decisions has been that a thriving broadcast sector, would lead to a thriving cultural sector. After all, Parliament declared in section 3.(1)(s) of the *Broadcasting Act, 1991*, that private programming undertakings should "to an extent consistent with the financial and other resources available to them" assist in creating and presenting Canadian programming.
6. This basic promise – to serve Canadians' interests by providing them with access to Canadian programming – has not been kept.

A Program creation: script and concept development

7. Canadian governments have offered strong support to companies developing new ideas. The federal government recognized the importance of creativity over a century ago,

¹⁶ *House of Commons Debates* (18 May 1932) at 3035-3036 (Right Hon. R.B. Bennett).

¹⁷ The Minister of Marine and Fisheries in 1918, the CRBC in 1932, the CBC in 1936, the BBG in 1958 and the CRTC in 1968.

when it provided Mr. Marconi's research into wireless communications technology with \$80,000 of taxpayer funds. Canadian communication technology continues to benefit from taxpayer-funded support. In the last five years, the country's federal and provincial governments have invested over \$800 million in broadband deployment.¹⁸ Our governments have allocated this money because, as the existence of Business Development Bank of Canada (BDC) attests, turning ideas into competitive companies "... takes several years, millions of dollars and a sequenced range of separate, sophisticated skills."¹⁹

8. Taking risks is – obviously – risky. In 2005, for instance, the BDC allocated \$502 million – more than half the CBC's Parliamentary appropriation in 2005 – to account for losses attributable to defaulting clients.²⁰

9. In television, the parallel to technological research and development is script and concept development.

10. The CRTC explicitly linked script and concept development to the success of Canadian television broadcasting in the late 1980s. In renewing the licences of Canada's privately-owned, over-the-air television broadcasters at that time, it described the objective of program development funding:

... "... it is necessary to have programs in all stages of production, concept development, script development, preproduction, ongoing production, so that there is a constantly renewing supply.

CFTO-TV (29 June 1988) Licence Renewal Application, Schedule 21, CRTC p. 335.

...to ensure continuous investment in the script and concept development phases of entertainment and documentary projects. Emphasis should be upon providing 'seed' money to less experienced writers, directors, performers and producers in order to encourage the development of innovative projects and Canadian creative talent The Commission considers that licensees' commitments on development expenditures relating to the underrepresented program categories are important to the future success of Canadian television broadcasting.²¹

11. In the early 1990s, the Commission expressed its "unwavering support for the development and promotion of Canadian talent."²²

12. By 1994, Canada's privately-owned, over-the-air television broadcasters were investing just over \$59 million in script and concept development. In 2005, they allocated just under \$200,000 for script and concept development.²³ (In 2000, when the CCA reviewed these data they engendered such disbelief that it telephoned the CRTC and received confirmation from CRTC staff that the data were correct.) To place the 2005 data for script and concept development in context, Canada's privately-owned, over-the-air television broadcasters earned revenues of \$2,197,716,224 in 2005, and profits (PBIT) of \$242,177,631.

¹⁸ CRTC, *Status of Competition in Canadian Telecommunications Markets: Deployment/ Accessibility of Advanced Telecommunications Infrastructure and Services*, CRTC Telecommunications Monitoring Report, at Appendix 5, Tables A.5.1 and A.5.2

¹⁹ Business Development Bank of Canada, *Annual Report April 2005-March 2006*, at 19.

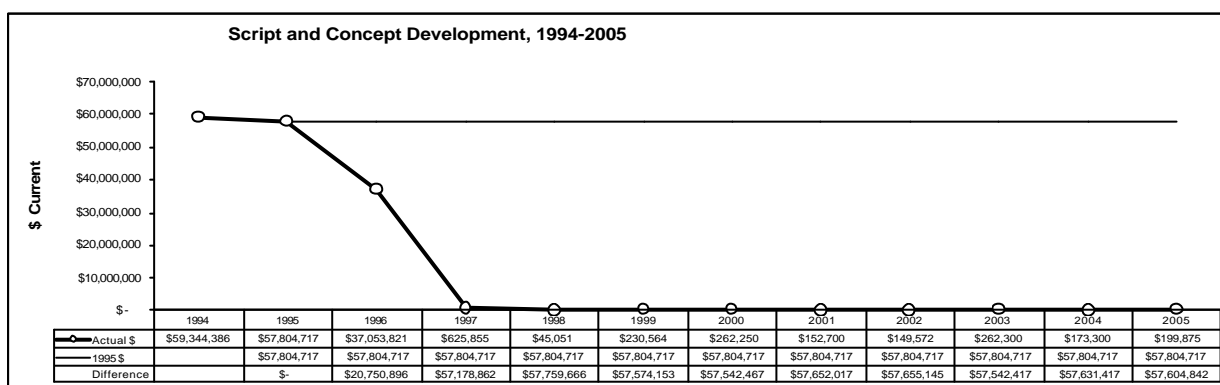
²⁰ *Ibid.* at 34-35 and 57.

²¹ PN CRTC 1989-27, *Overview: Local Television for the 1990s*.

²² David Colville, CRTC Commissioner (27 September 1991) *Canadian TV and Independent Production: notes for an address*, p. 3.

²³ CRTC, *Statistical and Financial Summaries, Private Television 1998-2005*: \$199,875.

13. One way to consider the 2005 data for script and concept development is to note that if we were to assume that a reasonable annual income for a script writer were, say, \$50,000 a year, it seems that Canada's privately-owned, over-the-air television broadcasters may be employing the equivalent of four (4) full-time script writers to meet the program development needs of approximately one hundred television stations, operating in two official languages.
14. Another way to assess the 2005 data for script and concept development is to review past trends. Let us consider just the last decade.²⁴ From 1995 to 2005, Canada's privately-owned, over-the-air television broadcasters spent a total of \$97 million on script and concept development. Is this a reasonable amount?
15. In 1995, according to the CRTC's *Statistical and Financial Summaries*, Canada's privately-owned, over-the-air television broadcasters allocated just over \$57 million to script and concept development as part of their overall programming expenditures (a slight decrease from 1994). If they had continued to spend this amount and no more, script and program spending from 1995 to 2005 would have amounted to \$539 million -- or \$442 million more than Canada's privately-owned, over-the-air television broadcasters actually spent from 1995 to 2005:



16. One explanation for the sharp drop in script and concept spending may lie with reporting practices. Canada's privately-owned, over-the-air television broadcasters may simply be funding development differently, perhaps through new offices whose expenses are not reported within the financial annual returns submitted by individual stations. In the late 1990s, for instance, CTV said that its national and regional development offices would spend \$900,000 annually:

... We believe CTV's commitment to development is unparalleled.

CTV (4 December 2000) *Licence Renewal Application*, Supplementary Brief.

National office	\$500,000 / year
Western office	\$200,000 / year
Atlantic office	\$200,000 / year
Offices' total	\$900,000 / year

CFRN	\$50,000 / year
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²⁴ Although our choice of time period is obviously arbitrary, based primarily on the idea that a decade represents a nice round number, we would have been pleased to review other historical data, but lacked detailed expenditure information for earlier years.

CFCN	\$50,000 / year
CTV's "Saskatchewan stations"	
CIPA-TV	\$50,000 / year
CKBI-TV	\$50,000 / year
CKCK-TV	\$50,000 / year
CFQC-TV	\$50,000 / year
CICC-TV	\$50,000 / year
CKOS-TV	\$50,000 / year
CJOH	\$50,000 / year
CKCO	\$50,000 / year
CTV's northern stations	\$50,000 / year
Stations	\$550,000 / year
 Total CTV offices and stations	 \$1,450,000 / year

17. The question we are unable to address, due to lack of data, is whether CTV's spending commitments for development offices of \$1.4 million represent an improvement on the \$8.24 million spent on script and concept development by all broadcasters in 1999, bearing in mind that CTV's stations at that time comprised almost half of all private television over-the-air stations. Have these spending commitments been respected? Have they changed over time?
18. What we are left with, in terms of easy-to-find reported spending information published by the regulator, appears in the CRTC's annual *Statistical and Financial Summaries*. Bearing in mind the importance attributed to script and concept development by the CRTC and broadcasters alike in the past, these data suggest that the CRTC's previous commitment to script and concept development in Canadian television programming has been breached. They lead us to conclude that the CRTC has decided that it is in the public interest and the interests of a limited number of Canada's privately-owned, over-the-air television broadcasters that over \$400 million be removed from Canadian program spending.
19. Whose interests are served when the fundamental requirement to develop and write strong Canadian dramatic programming over the short-, medium- and longer terms – money – simply seems to disappear from view and analysis?

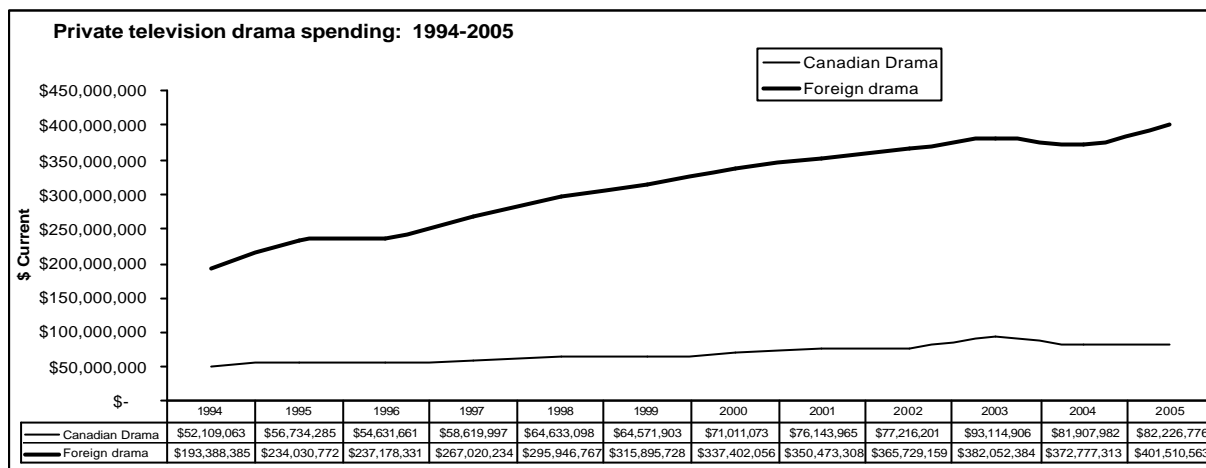
B Program production: drama

20. While news and information are the foundation of our democratic system of government, while sports provide excitement and tension, the programs that best express our imagination are 'dramatic' in origin. Works of fiction drawn from comedic, tragic-comedic and dramatic writing express our values and our ideas.
21. It would be trite to repeat what has been noted for decades: it is cheaper to import foreign dramatic programming, than to develop, write, direct and produce Canadian dramatic programming.
22. Nor, in the thirty-seven years that the CRTC has existed, does this situation appear to have changed, despite a variety of publicly- and privately-funded mechanisms to facilitate the creation of domestic dramatic programs, as well as a series of incentives.

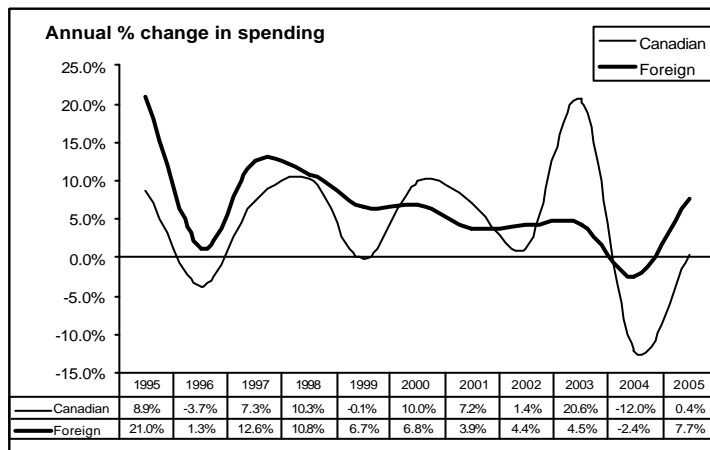
... quality broadcasting, the kind of television that will bring more and more Canadians to a deliberate choice of Canadian programming, cannot be achieved by percentage requirements, but only in an atmosphere of deliberate encouragement.

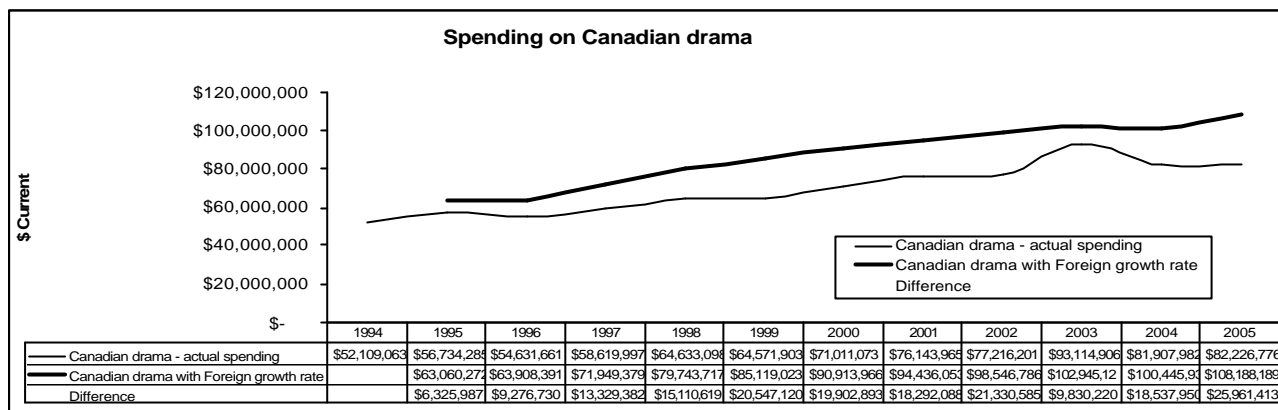
CAB presentation to the Board of Broadcast Governors, Public Hearing (Ottawa: 2-3 November 1959) at 10.

23. It is now a matter of historic fact that Canada's privately-owned, over-the-air television broadcasters have spent more money to acquire foreign dramatic productions, than to obtain Canadian dramatic productions, despite the existence of funds, benefits policies, incentive programs, and deregulation.



24. What concerns the CCA, in particular, is that Canada's privately-owned, over-the-air television broadcasters not only allocate more money to foreign dramatic programs, but that they are doing so at a faster rate. Since 1995, foreign dramatic program spending has increased by an average of 7% per year – or a total of 110% from 1995 to 2006 (for a total of \$3,560 million). Over the same period, Canadian dramatic spending increased by an average of 4.6% per year – or a total of 24% (and a total over this period of \$781 million).
25. If Canada's privately-owned, over-the-air television broadcasters had merely increased their spending on Canadian dramatic production by the same percentage increase as their spending on foreign dramatic production, an additional \$178 million would have been allocated to Canadian dramatic production (see graph, next page).





26. Should we assume that Canada's privately-owned, over-the-air television broadcasters' decisions to re-allocate spending for Canadian dramatic productions to other programming or other expenditure categories meets Parliament's objects for our broadcasting system?
27. Whose interests have been served when funds that might have been used to strengthen Canadian programming, to entertain Canadian audiences, and to employ Canadian writers, producers and actors – have been allocated elsewhere?

C Programs for communities: local television service

28. Ensuring that Canadians may learn about themselves and their communities through the broadcast media has been a fundamental goal of Parliament since broadcasting began in this country (see next page, for an example of the local programs already being offered in 1959).
29. Since it was established, the CRTC has shared this concern. In 1989, for instance, it expressed satisfaction with Canada's privately-owned, over-the-air television broadcasters local programming performance:

Overall, we are happy with the performance of these television stations. The Commission believes that Canadians are the best-served television consumers in the world, largely as a result of the high quality service that our broadcasters are providing to their local communities and the significant contribution they make to the broadcasting system as a whole. Local television programming has improved markedly in quality, quantity and diversity over the last five years due to a combination of sustained economic growth and the creativity generated by a highly competitive environment

... many licensees have developed expertise in drama, variety or children's programming. Considering this experience and the relatively strong financial performance of the industry, the Commission expects licensees to make efforts in specific areas which will further improve television service to the Canadian public. While local stations are not

Local television programming in 1959: 25 hours a week

...
 Here is the way we foster Canadian identity, and I will, sir make this very brief. Of course we consider complete local and regional news coverage as a very important part of our daily programme. Educational programmes are specifically tailored for our community, such as when kindergartens were cancelled by the Public School Board, our station initiated its own kindergarten to fill a community need. This is heard each day from 11:30 to 12:00 A.M., Monday through Friday. We also have conducted experimental and university lectures in English. We are also interested in public awareness programmes, such things as the local election coverage for all candidates. Extensive national election coverage is not only important to us when it is supplied by the CBC, but what we ourselves can supply to bring complete and up-to-date information on our local constituencies. We conducted a civil defence series, 26 quarter-hour programmes. We produced a series of 13 programmes done in cooperation with the University of Saskatchewan dealing with international space programmes. Specifically the contribution of the local programme dealing with the "aurora", and experimental research radar programme. We also prepared a documentary on the John Dulles School for Retarded Children. This film was made two years ago and it is still being bicycled across the U.S. by the Council for the mentally retarded children of the United States. We are interested in educational programmes dealing with the work of the John Howard Society. We are interested in the public being made aware of the work being done by over 100 public service organizations. This telecasting work goes on the year around.

We conducted a series with Dr. Lightbody at home and abroad which dealt with the international situation. We are interested in religious services, particularly in religious seasons, and we have in our studios produced, and continue to do, programmes on religious customs, and even religious services. By producing on our own initiative programmes as stated, and many more, we believe we are possibly developing or fostering the development of a Canadian identity in our own areas, for an identity cannot be developed without public understanding.

We are also interested in the development of jobs. For example, and I will name these quickly, the "Gordie Grant Trio" has been running weekly for two years. Grant features each week guest performers either musical or a vocal soloist. "The Polka Singers", a Western orchestra with a weekly show: "The Rolling Rangers", thirteen weeks of half-hour shows during the Summer months; we are planning a live top talent show which will run for thirteen weeks starting November 7th; we have been interested in promoting and putting on the Murray Daskin concert. Musical festival promotion – each year hundreds of dollars worth of promotion is given to ensure the success of these festivals. The Saskatoon Symphony and Junior Symphony promotion ensures the continued success of concern musical performances, and I would just point out that in the Murray Daskin concert we are using part of the Symphony Orchestras in those concerts.

"The Town and country Show", which is one hour and a half weekly, live, is done each year for 39 weeks and provides an outlet for all kinds of talent and the best of this talent is recruited for the above-mentioned show – a top talent show.

Now, we are also interested in fostering good reading habits. For the fourth year we are producing a weekly quarter-hour show done by the staff of the Saskatoon Public Library, and in its annual report reference is continually being made to this TV show and the main area of development involves children.

Live theatre – the majority of live theatre work involves the university to which we regularly contribute talent and promotion in an effort to develop live theatrical development, and we also put up an annual trophy.

Ethnic development – a continual effort is being made to blend imported cultures into the Canadian identity – examples, ethnic dances, musical groups and handicrafts. In further development of talent we have conducted the best technique courses for the past two years and we plan to expand this season. It is of vital importance that along with artistic development of talent, that production development of talent must not be neglected and courses are being conducted on both a theoretical and practical basis.

An important development in our programming has been the beginning of a teen-age show. This hour long weekly production is done with the complete cooperation of the city's high schools and includes, basically, teen-age development in extra-curricular activities. In an attempt to promote a higher standard of employment for interested persons, there is a series of 31 half-hour shows entitled "Careers", and panels have been produced pointing out the advantages of further education, the value of night schools, and so on, as well as pointing out specific opportunities in a wide variety of careers.

Horticultural and agricultural development, being in a part of the world's greatest agricultural country, weekly and daily shows aimed at the farming community are a continual production. The sources of programmes include the regular news sources as well as agricultural experts from the local university. Much more so than we ever thought possible our station has become an integral part of our rapidly growing community in each and every phase of development. We are continually conscious of the impact which television bears on our viewers and make every attempt at selective judicious programming which will result in making itself felt on a Canadian identity. We take pride in the fact, too, that the total Canadian content on our station is 56.3% at this time. I believe, sir, other stations have a similar percentage figure and it is noteworthy in our case that out of 51 hours and 45 minutes of weekly of Canadian talent programming – Canadian content, I should say – 26 and three-quarter hours are CBC to us as an affiliated station and 25 hours are produced locally. We are proud too, that this has been done through our own initiative and not because we were required by regulation to do so.

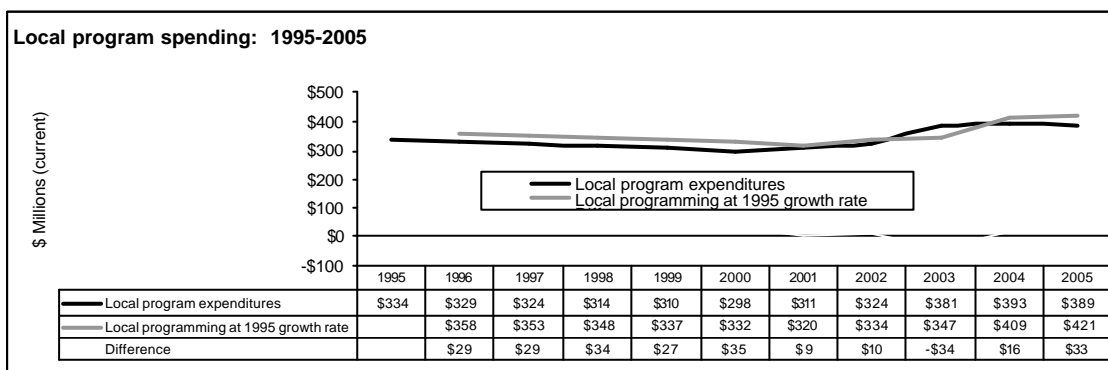
....
 G.B. Nelson, Managing Director of CFQC-TV, on behalf of the Western Association of Broadcasters, appearing before the Board of Broadcast Governors, *Public Hearing*, (Ottawa: 2-3 November 1959) 343-348.

expected to produce programs in every category, each one has a role to play appropriate to its market circumstances and experience²⁵

²⁵

CRTC, *Overview: Local Television for the 1990s*, Public Notice CRTC 1989-27 (Ottawa: 1989).

30. In 1995, the CRTC's position was that "... local television stations still have the special responsibility to offer programming that reflects the particular interests and concerns of the communities they are licensed to serve"²⁶
31. Local programming is not merely necessary because Parliament specifically established its importance in the *Broadcasting Act, 1991*.²⁷ It is also important to enable writers, producers and performers in local communities, to communicate with those closest to them, using the broadcast spectrum they own as a public good. Further, local programming offered through the stations operated by Canada's privately-owned, over-the-air television broadcasters is also necessary as a port of entry into professional broadcasting at the regional and national levels. In 1995, Canada's privately-owned, over-the-air television broadcasters allocated 17.5% of their local program expenditures on programs other than news and information.
32. Between 1995 and 2005, while the total revenues of Canada's privately-owned, over-the-air television broadcasters grew by 41%, these broadcasters' total spending on local programming increased by 16% (or a total of , with an average annual growth rate of 2%.²⁸ The average annual growth conceals the fact that after increasing by 7.3% between 1994 and 1995, local programming expenditures began to decline. In 2005, non-news local programming expenditures constituted 8.2% of total local expenditures.
33. Hypothetically, if Canada's privately-owned, over-the-air television broadcasters' spending on local programming continued to grow by 7.3% each year – the amount by which local programming increased one decade ago – local programming expenditures would have been \$188 million higher.²⁹



34. Whose interests have been served by allocating funds that might have been used to strengthen local community programming, community involvement, broadcast training and local cultural participants? Whose interests would be served by reducing or eliminating this programming still further?

²⁶ CRTC, *CRTC Encourages Private, Local Television Broadcasters to Increase Canadian Entertainment Programming*, News Release (Ottawa: 24 March 1995) at 2.

²⁷ S. 3(1)(ii) of the *Act* states that the programming provided by the Canadian broadcasting system should "be drawn from local, regional, national and international sources".

²⁸ Source: CRTC, *Private Television: Statistical and Financial Summaries* (various years) "Programming and Production Expenses".

²⁹ Actual total local programming expenditures from 1995-2005 = \$3,371 million; with a 7.3% growth rate, this figure would have amounted to \$3,559 million, or \$188 million more than was actually spent.

D Conclusion: promises made, promises broken.

35. Since the early 1990s, the tempting promise of increased volumes of original, high-quality Canadian television programming has not been met in the over-the-air sector.
36. Allowing ownership to become more concentrated has allowed revenues and profits to be controlled by fewer and fewer groups, but has resulted in less money being spent on Canadian programs, Canadian writers, Canadian producers and Canadian actors, than on foreign programs, writers, producers and actors.
37. The CCA estimates that in the three areas of specific concern to the CCA – script and concept development, Canadian drama and local programming – decisions to move away from the status quo in 1994 have resulted in the re-allocation of \$808 million, presumably to serve interests other than those of Canadians and Canada’s cultural sector:

1995-2005	Actual expenditures	Estimated re-allocated Expenditures	Difference
Script and concept development	\$97 million	\$539 million If spent the 1995 amount (no inflation)	\$442 million
Canadian drama	\$781 million	\$959 million If grew at same rate as non-Canadian drama	\$178 million
Local programming	\$3,705 million	\$3,893 million If grew at the same rate as 1994 to 1995	\$188 million
Total	\$4,583 million	\$5,391 million	\$808 million

E How has this happened?

38. As the CRTC’s notice of public hearing has explained, the most important benefit anticipated from its 1999 regulatory policy for Canadian television – more, higher-quality, Canadian programming – has not transpired. Canada’s privately-owned, over-the-air television broadcasters now spend more on foreign programming, than on Canadian programming.
39. The CRTC’s Notice of Public Hearing offers several explanations to account for these facts, including unexpected changes in broadcasters’

It is not surprising to see the trivial programming and the improvisation of many programs, when they are produced with meagre budgets. How can it be otherwise when always the same few artists are asked to fill programs with nothing, or with stretched and dried tricks? Nevertheless it was by promising to produce programs using much Canadian talent that most private stations obtained their licences.

The experience of the past five years must awaken us to reality. It is true that it costs a lot of money to open a new television station, and in the first years of operation most private stations show a deficit. We know now that we must be watchful for whimsical or fabulous promises. We also know that private stations can easily cut the item ‘artists’ when spending has to be reduced.

Committee on Broadcasting, *Report* (Queen’s Printer: Ottawa, 1965) at 43.

operating environment, their competitive environment and the international environment.

40. In reality, however, the data available from the CRTC and elsewhere suggest that the CRTC's regulatory approach to Canada's privately-owned, over-the-air television broadcasters has failed. The approach has failed because the Commission appears to have relied heavily on four, fundamentally-flawed assumptions. Relying on these assumptions for guidance, rather than the clearly-detailed objectives of Parliament in the *Broadcasting Act, 1991*, has meant that Canada's privately-owned, over-the-air television broadcasters thrive, while Canada's cultural sector merely survives.

1 FLAWED ASSUMPTION: CHANGE REQUIRES AUTOMATIC REGULATORY REACTION

41. The CRTC appears to suggest that it failed to anticipate "the nature of changes that would occur" in Canada's television broadcasting environment since 1999. It comments that "[i]n the seven years since the issuance of the 1999 Policy, the pace of change in the television broadcasting environment has increased." The concept of change has been used to justify regulatory shifts for at least a century. Both the CRTC and privately-owned, over-the-air broadcasters frequently point to 'change' to rationalize the introduction of new policies, or the abandonment of old ones.
42. In reality, however, 'change' has simply become a mantra to justify regulatory 'streamlining' decisions by the CRTC which have tended to benefit Canada's privately-owned, conventional, over-the-air broadcasters, rather than Canadian audiences or Canadians in the cultural sector. Appendix 1 offers some examples.
43. Yet the *Broadcasting Act, 1991* in particular was designed to stand the test of time, and in particular the challenges posed by new, as-yet unimagined technologies. The constant invocation of the need to deregulate because of 'change' ensures that the broadcasting system remains in a constant state of flux, and deflects attention from the system's true problem: its failure after decades to establish a stable, business-like environment in which Canadian creators, writers, producers, directors and actors may earn their living.

2 FLAWED ASSUMPTION: MARKETPLACE ECONOMIC THEORY APPLIES TO BROADCASTING

44. For at least two decades the CRTC has expressed its view that competitive marketplace economics would maximize benefits for Canadian audiences of Canadian broadcasters. In 1983, for instance, the Commission suggested that in the face of the increased availability of American programming it might be in private Canadian television broadcasters' economic interest "to enlarge the proportion of Canadian programming in their schedules, to differentiate their programming and to compete successfully in the international marketplace."³⁰

... no radio or television station can come into existence without the grant of a scarce public asset for its use. ... Having decided to permit the creation of these new media, the Canadian choice has been to regulate their use in the national interest.

Committee on Broadcasting, *Report*, (Queen's Printer: Ottawa, 1965) at 7.

45. Unfortunately, Canadian broadcasting does not meet the criteria for a

³⁰ CRTC, *Policy Statement on Canadian Content in Television*, Notice CRTC 83-18 (Ottawa: 31 January 1983) at 11.

competitive marketplace. These criteria relate to buyers, sellers and rationality.

46. In conventional economic theory, a “competitive marketplace” describes an economy or sector in which a large number of purchasers may buy the product of an equally large group of suppliers. Marginal production costs are an important factor in determining pricing; rational purchasers are presumed to seek the lowest price, for the same good or service; rational suppliers are presumed to maximize their profits while selling the same good or service.

[t]he Canadian broadcasting system is worth safeguarding only if it provides the Canadian population with essential services which could not be provided otherwise. It would not make sense to protect a Canadian system based essentially on the retailing of programs “using predominantly non-Canadian creatives and other resources.”

CRTC, *The Improvement and Development of Canadian Broadcasting and the Extension of U.S. Television Coverage in Canada* by CATV, Public Announcement (Ottawa, 3 December 1969) at 2

47. In over-the-air broadcasting, however, the majority of Canadian audiences are not ‘purchasers’ in relation to Canada’s privately-owned, over-the-air television broadcasters – since they either obtain television signals free of charge over the air, or pay a broadcasting distribution undertaking to receive a clearer signal. Rather, advertisers purchase time on television stations so that their advertisements are distributed to Canadian audiences.

48. As well, there are only a limited number of suppliers in conventional over-the-air broadcasting: 16 companies now hold the licences for or control over-the-air television stations, and all but the smallest of these companies hold interests in other broadcast media, such as satellite-based programming services.

49. To the extent that economic theory applies at all to Canadian broadcasting, this sector is best characterized as an oligopoly, not a competitive marketplace. With this in mind, and however pleasant it may be to do so, it is simply incorrect to assume that Adam Smith’s “invisible hand of the marketplace” will somehow encourage Canada’s privately-owned, over-the-air television broadcasters to reduce their current levels of profitability by spending money on expensive, rather than inexpensive, programming.

50. Does it not fly in the face of rationality and logic to assume that despite strong, quantitative evidence to the contrary, Canada’s privately-owned, over-the-air television broadcasters will choose to minimize their profits by spending money on Canadian programming that they have themselves said would not generate adequate profits? Does it not fly in the face of the basic principle that the role of companies in the private sector is, quite properly, to maximize returns to their investors and shareholders, rather than to lower profits by spending money on expensive content when cheaper content is readily available. Would it not be rational to expect that competitive business

Canada has always recognized the value and interest of foreign programs, for television should be for every home a window on the world, and international affairs should not be seen only through Canadian glasses Nevertheless, the Canadian broadcasting system must never become a mere agency for transmitting foreign programs, however excellent they may be. A population of 20 million people surely has something of its own to say, and broadcasting is an instrument by which it must have an opportunity to express itself. The economic facts of television are such that it would be to the financial advantage of stations to fill all their broadcast time with foreign programs, particularly American productions. So that broadcasting will not simply respond to market forces, the Broadcasting Act stipulates that the service should be basically Canadian in content and character

...

... Left to operate freely economic factors would quickly tend to make Canadian private television stations mere extensions of the American networks.

Committee on Broadcasting, *Report*, (Queen’s Printer: Ottawa, 1965) at 31 and 45.

undertakings such as Canada's privately-owned, over-the-air television broadcasters will sell as much of their real product – advertising time, embedded ads and product placements – to their real buyers, advertisers?

51. The fundamental point is that regulation in a sector such as this cannot be replaced with regulatory action or inaction based on the idea that a non-existent competitive marketplace will take on responsibility for making decisions in the public's interest. In reality, responsibility for ensuring private companies' financial health properly rests with management and shareholders. Responsibility for protecting the public interest lies solely with elected members of Parliament, and the federal government. Responsibility for ensuring that Canadians have access to Canadian programming of high quality – lies with the CRTC.
52. Whose interests are served when the CRTC does not fully accept this responsibility or when its main focus appears to be the financial well-being of 16 profitable, privately-owned companies?

3 FLAWED ASSUMPTION: CANADIAN PROGRAMS ARE A FORM OF CHARITY

53. Over the last two decades Canadian programming hours and expenditures have been described as 'contributions' made by Canada's privately-owned, over-the-air television broadcasters. This may due to Parliament's requirement in section 3.(1)(e) of the *Broadcasting Act, 1991*, that each element of our broadcasting system "contribute in an appropriate manner to the creation and presentation of Canadian programming ...". Broadcasting Notice of Public Hearing CRTC 2006-5, for instance, refers sixteen times to the 'contributions' made by Canada's privately-owned, conventional, over-the-air broadcasters to Canadian programming. Unfortunately this Notice, like many other CRTC notices and decisions, mischaracterizes Canadian audio-visual programming content.
- A broadcasting system for Canadians should have Canadian programs as a requirement.*

CRTC, *Television Programs*, Press Release (Ottawa: 12 February 1970) at 1.
54. The term, "contribute", suggests that Canadian programming constitutes a form of discretionary, charitable enterprise to which privately-owned broadcasters are giving without necessarily receiving directly anything of commensurate value in return. Unless privately-owned broadcasters are computing their taxable income by deducting their Canadian programming expenditures as provided for by section 110.1 ("Deduction for gifts [by corporation]") of the *Income Tax Act*,³¹ Canadian programming is neither a gift nor a donation. Rather, like non-Canadian programming, Canadian programming is a normal operating expense incurred by broadcasters granted the right by licence to exploit Canada's broadcast spectrum. To our knowledge the CRTC does not refer to private broadcasters' 'contribution' to foreign programs – but to their purchase of these programs.
55. Characterizing privately-owned broadcasters' acquisition of sixty percent of their broadcast schedule as a "contribution" marginalizes this program content by treating it as something that lacks commercial worth, that is discretionary and that may be

³¹ R.S.C. 1985, c. 1(5th Suppl.), as am. to 2004, cc. 26.

jettisoned when profits decline or expenses mount – as the CRTC recently allowed the Discovery Health Channel to do.

56. In reality, Canadian programming content is a business expense. Parliament alludes to this in section 3.(1)(e) of the *Act*, when it requires each broadcasting undertaking to make “maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming ...”³²
57. Are the interests of Canadian writers, Canadian actors, Canadian directors, Canadian producers and Canadian audiences well served when Canadian creative audio-visual content and the values it contains is treated as something other than a critical but normal part of Canada's privately-owned, over-the-air television broadcasters' normal operating expenses?

4 FLAWED ASSUMPTION: OWNERSHIP CONSOLIDATION WILL AUTOMATICALLY LEAD TO HIGH QUALITY CANADIAN PROGRAMMING AND A 'BENEFITS POLICY' SERVES THE PUBLIC INTEREST

58. It has been argued for more than thirty years that the most effective way to enable Canada's privately-owned, over-the-air television broadcasters to purchase Canadian programming is to allow resources in this sector to aggregate.

59. In the CRTC's earlier days, it considered reviewing commitments after granting applications to expand:

The Commission has ... taken into account the applicant's insistence on local involvement, on exchange of information and programs, on the need for increased programming and production capacity in the CTV network and generally on improving and increasing program production. Should the proposed ownership pattern not result in the achievement of such objectives, the Commission will review the situation resulting from this decision.³³

60. The CRTC was assured within a year of its creation that Canadian programs could compete with “the best American programs” by “allowing larger broadcasting holdings [to] facilitate higher standards of production”³⁴.

61. The theme that ‘bigger makes us better’ has been repeated in other ownership applications.³⁵ In 1988, when Baton Broadcasting acquired CJOH-TV, it told the CRTC that it recognized

On the question of concentration of ownership of broadcasting media, we were told by the C.A.B. that this is inevitable (...) because of the operational efficiency of this kind of ownership. One is struck in considering this position that it reflects a belief we have encountered before: the belief that operational efficiency must be served at all costs, that the system must be strengthened and perpetuated regardless of human needs or values, that the machine's needs must be satisfied. The idea that the public might not be best served by having all Canadian broadcasting owned by about a dozen groups simply seems to be considered irrelevant. ...

Special Senate Committee on Mass Media, *Report: The Uncertain Mirror*, Vol. 1 (Queen's Printer for Canada: Ottawa, 1970) at 204.

³² *Broadcasting Act, 1991*, s. 3.(1)(f).

³³ CRTC, *Decision 71-425*, Public Announcement (Ottawa, December 23, 1971) at 3, regarding its decision to approve applications by CFCF Limited to acquire several radio and television broadcasting undertakings.

³⁴ Baton Broadcasting, cited by the Special Standing Committee on Mass Media, at 25-26.

³⁵ Although when transfers of control through share transfers are involved, the CRTC does not use a public hearing process to consider changes in ownership: since 1993 the Commission has used an administrative process to deal with applications involving radio stations or networks worth up to \$7 million, with “no unresolved areas of concern”, and cable undertakings with up to 6000 subscribers or groups of cable undertakings serving up to 15000

... that applications for transfer of ownership must contain clear and unequivocal benefits for the community served and the Canadian broadcasting system ... We believe that the future strength of Canadian television in financial terms lies with Canadian programming. To provide the kind of resources required to implement this strategy, Baton believes that a larger economic unit and a stable base for the building of strong financially viable local television stations is required.³⁶

If private television in Canada, which has continued to grow rapidly over the past 25 years, is going to begin to make a commensurate contribution to financing prime-time Canadian entertainment, the resources of the industry will have to be pulled together at the national level to a much greater degree than at present.

Task Force on Broadcasting Policy, *Report*, (Minister of Supply and Services: Canada, 1986) at 451.

62. Similarly, in 1990, when CanWest applied to acquire control of Global Television, it told the CRTC that if the application were approved, "there will be stronger units capable of investing in Canadian programming"³⁷
63. More recently yet, when BCE applied to acquire control of CTV in 2000, it told the CRTC that "...CTV will benefit from BCE's financial expertise and stability. ... Canadian consumers will enjoy easier access to significantly greater amounts of Canadian cultural content (information/education/entertainment) than they have every been available [*sic*] before."³⁸ It is fair to assume, we suspect, that once a formal application is filed with respect to the acquisition of CHUM Limited's assets by Bell Globemedia, the 'bigger-better' theme will again be raised.
64. The reason bigger may well be better is fairly straightforward: as broadcasters acquire more stations, they obtain not only operating efficiencies by sharing costs such as administration and programming,³⁹ but also gain a larger advertising base. Charged with the authority to approve or deny ownership applications, the Commission found by 1999 that Canada's

... broadcasting industry has been restructuring through ownership consolidation. This has resulted in efficiencies and synergies which should provide increased investment in Canadian programming and a greater likelihood of the export of that programming. The Commission expects that the consolidation of broadcasting, production and communications companies will continue, to the benefit of Canadian audiences, the Canadian broadcasting system and the public interest.⁴⁰

subscribers, with "no unresolved areas of concern". The CRTC then informs "the public of its administrative approval by issuing a public notice." Only applications for new licences must be considered at a public hearing. *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings* Public Notice CRTC 1993-68 at 2 iii. a).

³⁶ President and CEO of Baton Broadcasting Incorporated (26 January 1988) *Presentation to the CRTC* regarding the acquisition of CJOH-TV, at 1-2 of the CJOH public examination file of the CRTC.

³⁷ Global Television Network (13 June 1999) *Presentation to the CRTC re – Global change of control*, at 12.

³⁸ BCE (28 June 2000), Letter to the CRTC about its application to acquire CTV, at 5 and 20, CTV public examination file of the CRTC.

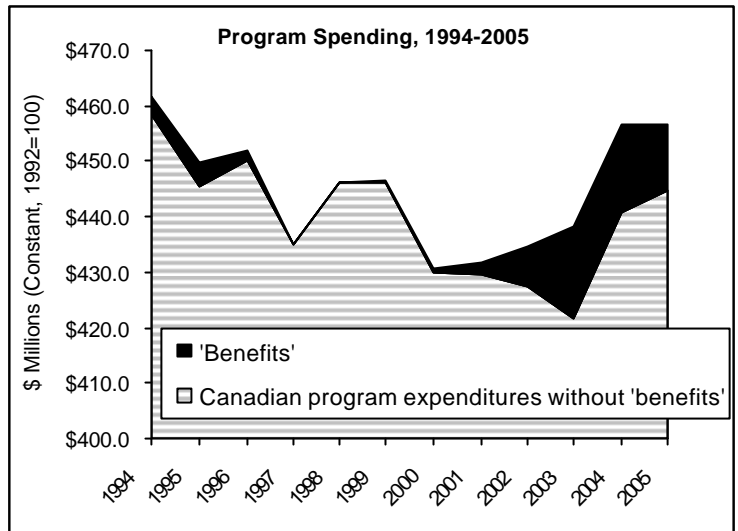
³⁹ Baton identified a number of these efficiencies when it applied to acquire CJOH-TV in 1987: "The provision of a larger economic unit offers economies of scale, where combined resources make possible the quality of Canadian programs necessary to attract audience. ... A larger economic unit also creates economies of scale on the advertising side, where the extension of reach and flexibility of combination offers, particularly on a regional basis, provides the strength to support increased commitments." Nation's Capital Television Incorporated, *Letter to CRTC enclosing an application to transfer ownership and control of CJOH-TV to Baton* (9 September 1987) at 2.

⁴⁰ *Building on Success* at para. 8.

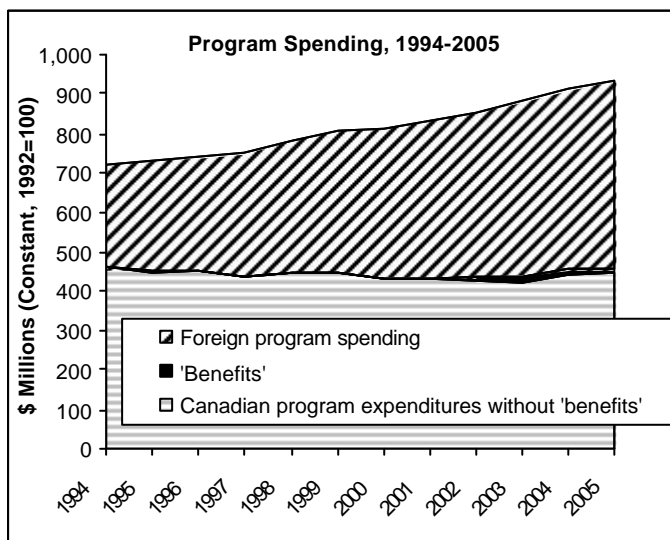
65. After 1999, the CRTC noted, “the Canadian television industry, as anticipated, experienced considerable ownership consolidation.”⁴¹ Yet, as the Commission’s notice goes on to note, more concentrated ownership did not simply occur – the CRTC itself allowed and approved more concentrated ownership, presumably because of the ‘clear, significant and unequivocal benefits’ these transactions would yield for Canadians

66. The impact of the ‘benefits’ policy has immediate, graphic appeal:

67. Indeed, between 1994 and 2005, the benefits policy generated an additional \$65 million for Canadian programs.

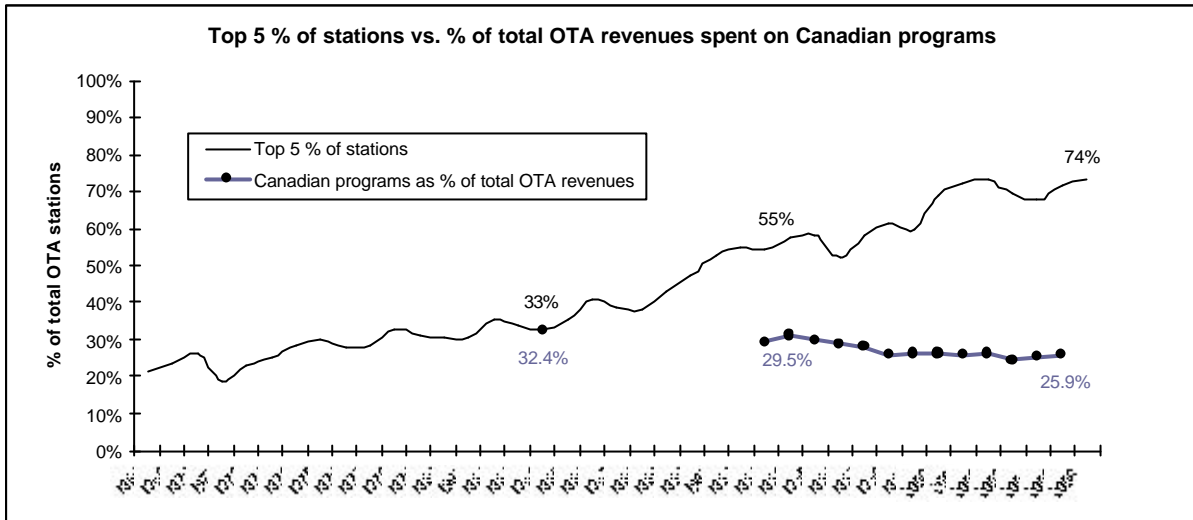


68. When compared against Canada’s privately-owned, over-the-air television broadcasters’ spending on non-Canadian programs, however, one’s impression changes: foreign program spending clearly predominates, and the additional ‘benefits’ offered by the CRTC’s ownership policy, though helpful, are minimal by comparison.



69. Moreover, as the charts on the following page demonstrate, increases in the aggregation of resources among Canada’s privately-owned, over-the-air television broadcasters does not appear to have translated into positive effects on Canadian programming or local programming.

⁴¹ At ¶ 8.



70. The CCA's review of the CRTC's data on program spending for this proceeding has led it conclude that overall, the CRTC's reliance on financial 'benefits' presented during ownership transactions to increase Canadian program production has had serious negative effects.
71. The first of these negative effects is that these transactions are unpredictable, thereby failing to provide Canadian programming with the predictable and business-like financing necessary to all companies' success .
72. The second negative effect is that it creates unconscionable conflicts of interest for the production sector and the Commission alike. Producers or others who fail to support a given ownership transaction, face not only the unsettling prospect of reduced business opportunities if the CRTC denies the transaction, but at a minimum the implicit threat of reduced future opportunities if the Commission approves the transaction. (At present, for instance, 16 ownership groups offer the prospect of business to the cultural sector.) If the CRTC denies a transaction, it faces not only the prospect of being blamed for denying the cultural sector potential new income and challenges over its decision-making competence. If the CRTC grants approval for a transaction, it faces the prospect of being blamed for allowing fewer groups to control access to the airwaves and audiences, and the appearance of being seduced, so to speak, by money rather than the public interest.
73. Finally, a 'benefits' policy lends credence to the idea that Canadian programming requires some form of quasi-charitable beneficence on the part of Canada's privately-owned, over-the-air television broadcasters and the CRTC, much like alms given to the poor as an attestation of the donors' spiritual worth.
74. A 'benefits policy' conveys the laudable idea that the public will somehow benefit when economic ownership transactions that reward buyers and sellers are approved.
75. Yet how are the public's interests served by unpredictable funding, conflicted interests, and mischaracterization of the value of programming that expresses the values and interests of Canadians?

5 *FLAWED ASSUMPTION: THE BEST REGULATION IS NO REGULATION AT ALL*

76. For almost half a century concerns have been expressed about the degree of regulation necessary to achieve Parliament's objectives for Canada's broadcasting system. Given their requirement to maximize the value of their companies to their shareholders, it is not difficult to sympathize with private broadcasters burdened with excessive regulation, not just of the CRTC, but of all federal and provincial regulatory agencies and departments.
77. It is also easy to agree with public policy makers that regulatory overload that fails to generate useful outcomes is ineffective and wasteful. Rational decision-makers in government must therefore ensure that regulatory oversight achieves its objectives. The CRTC has clearly accepted this responsibility, and for more than half of its 'life', has engaged in streamlining and deregulatory exercises with, if nothing else, commendable frequency.

78. The CCA has followed with some interest the CRTC's decisions to regulate more flexibly Canada's privately-owned, over-the-air television broadcasters:

Regulatory flexibility	
1970	"With the exception of station and network identifications, programme interruptions shall not exceed 12 minutes in each hour. To ensure the desired flexibility emphasized by both broadcasters and advertisers in recent discussions, the Commission revises its proposed regulations to permit five interruptions for advertising material in a one-hour programme. ... where a broadcaster has sold all 12 commercial minutes in an hour, he may also broadcast a 30-second unpaid public service announcement at his discretion." ⁴²
1983	"As part of its continuing efforts to simplify its licensing procedures, to expedite the processing of applications and to reduce the paper burden and expense now incurred by licensees, the Commission is implementing a simplified licensing procedure for the renewal of AM, FM, TV and cable licensees in certain circumstances" ⁴³
1985	"With a view to providing more flexibility in the concept of what may qualify as a local program, the Commission announces that, effective immediately, it will consider as 'local' any program that is produced on a co-operative basis, provided the program responds to the needs and interests of the audiences the communities or regions served by the co-operating licensees." ⁴⁴
1987	"The Commission's primary objective in revising the television regulations was to provide a more streamlined regulatory framework to meet the objectives of the Broadcasting Act (the act)." ⁴⁵
1988	"... the Commission's new [television,] regulations also reflected its commitments to a more streamlined and supervisory regulatory framework." ⁴⁶
1990	"The Commission recognizes that in order for the broadcasting system as a whole to produce a critical mass of attractive Canadian programming, whether designed for local, regional or national audiences, broadcasters require flexibility to pool resources through co-operative ventures, co-productions and other imaginative partnership arrangements."
1990	"With a renewed commitment to local reflection, but without artificial quantitative measures in non-news programming, the Commission is satisfied that the industry will have more flexibility to provide Canadians with a wide range of Canadian programming of the highest possible quality." ⁴⁷
1991	"The CRTC's new policy for local TV programming ... is designed to encourage high-quality Canadian TV shows by eliminating unnecessary quantitative requirements and giving stations greater flexibility to pool their resources through co-operative ventures, co-productions, and other partnership arrangements...." ⁴⁸
1991	"We've stripped down the regulatory requirements to the essentials in order to give stations the room they need to be creative." ⁴⁹ "What we've tried to do is simply regulation and to allow as much flexibility as possible, while at the same time maintaining our unwavering support for the development and promotion of Canadian talent." ⁵⁰ "... a major objective for the CRTC is streamlining its regulatory process. The CRTC has consciously followed a program of reviewing its regulations and encouraging greater industry self-regulation since the mid-1980s. Streamlining is essential to deal with our dramatically increasing workload, and to permit the industries we regulate to respond more flexibly to changes in the market. Some critics suggested we were abdicating our responsibility and that the industries would use streamlining as a means of reducing their commitment to broadcasting objectives (...) neither concern has been borne out by experience; if anything, today's realities underline the need to continue this process." ⁵¹

⁴² CRTC, *Public Announcement*, Decision CRTC 70-99 (Ottawa: 20 May 1970) at 3-4.

⁴³ CRTC (13 September 1983) *CRTC Public Notice 1983-205, New Licensing Procedure – Applications for Renewal*, p. 1.

⁴⁴ CRTC (20 March 1985) *Public Notice CRTC 1985-58: Introducing Flexibility into the Content of Local Television Programming*, emphasis added.

⁴⁵ CRTC (1 June 1988) *Public Notice CRTC 1988-90: Review of Television Network Policy*, p. 2.

⁴⁶ CRTC (22 September 1988) *Public Notice CRTC 1988-159: The Canadian Broadcast Standards Council*.

⁴⁷ CRTC (18 October 1990) *Public Notice CRTC 1990-95: Proposed Policy for Local Television Programming*.

⁴⁸ CRTC (15 February 1991) *News Release: Putting More High-quality Canadian Shows On The Air Is Key To New CRTC Policy On Local TV Programming*, p. 1.

⁴⁹ CRTC (15 February 1991) *News Release: Putting More High-Quality Canadian Shows On The Air Is Key To New CRTC Policy On Local TV Programming*, p. 1.

Regulatory flexibility	
1992	CRTC allows television broadcasters to publicize Canadian programs without such messages being counted as part of the twelve minutes per hour of advertising currently allowed. "The Commission encourages broadcasters to take advantage of the additional flexibility to promote all types of Canadian programming, particularly Canadian drama and documentaries," said [the]CRTC Chairman ⁵²
1992	"... consistent with its desire to afford licensees as much flexibility as possible , the Commission has developed revisions to the condition of licence regarding expenditures on Canadian programming ⁵³
1993	The Commission identifies its objectives for the Canadian broadcasting system's regulatory framework, the fifth of which is to "be streamlined and limited to those regulatory elements necessary to achieve the objectives the Act, and be flexible and responsive to technological developments and other changes in the broadcasting environment." ⁵⁴
1995	"In coming years, local broadcasters will be challenged by an increasing number of viewing options available to consumers. To help them adapt to changing circumstances while promoting Canadian programming, the Commission has adopted a more flexible policy approach to guide the operations of private, English-language television stations over the next five to seven years." ⁵⁵
1998	"Programming that reflects the views and values of Canadians, strengthens cultural sovereignty and national identity, that is designed for a competitive Canadian marketplace and is positioned for success in foreign markets, will depend upon a flexible regulatory framework." ⁵⁶
1999	<p>"For broadcasters and producers to continue to adapt with success to an increasingly complex and competitive environment, the framework within which they operate must be one that facilitates and enhances flexibility, diversity and choice."⁵⁷</p> <p>"Over the coming decade the [digital transition's] importance, and its consequences for the Canadian broadcasting system will be significant. The regulatory framework must therefore permit the industry to react quickly and appropriately to the pressures, demands and opportunities that will be placed on it. [The 1999 television] policy provides the flexibility that will assist the industry in preparing for and managing this watershed change."⁵⁸</p> <p>"The Commission intends to ... provide broadcasters with more flexibility by extending the peak viewing period for Canadian programming and by encouraging more diversity in programming Canadian broadcasters can expect more flexibility in the type of Canadian programming they are required to air. Broadcasters will no longer be required to spend specific amounts on Canadian programs. This will give them flexibility to adopt programming that is competitive in their markets."⁵⁹</p> <p>"To allow for greater flexibility in the broadcasting of these 8 [priority programming] hours, the evening 'prime time' broadcasting period has been extended. As of September 2000, it will run from 7 p.m. to 11 p.m., seven days a week, instead of being limited to the periods from 8 p.m. to 11 p.m. on week days and from 7 p.m. to 11 p.m. on weekends."⁶⁰</p> <p>Applying the same programming categories "for all licensed services will, in the long run, provide greater ease and efficiency for both the CRTC and licensees with respect to logging and monitoring programming."⁶¹</p>

⁵⁰ David Colville, CRTC Commissioner (27 September 1991) *Canadian TV and Independent Production: notes for an address*, p. 3.

⁵¹ *Ibid.*

⁵² CRTC (10 August 1992) *News Release: CRTC excludes promotion of Canadian programs from definition of advertising material*, p. 1.

⁵³ CRTC (8 April 1992) *Public Notice CRTC 1992-28: New Flexibility with Regard to Canadian Program Expenditures by Canadian Television Stations*.

⁵⁴ CRTC (3 June 1993) *Public Notice CRTC 1993-74, Structural Public Hearing*, p. 3.

⁵⁵ CRTC (24 March 1995) *News release: CRTC encourage private, local television broadcasters to increase Canadian entertainment programming*, p.2.

⁵⁶ CRTC (5 October 1998) *Fact Sheet: 1998 Canadian Television Policy Review*, p. 2.

⁵⁷ CRTC (11 June 1999) *Public Notice CRTC 1999-97: Building on Success – a policy framework for Canadian television*, preface.

⁵⁸ *Ibid.*, at ¶ 113.

⁵⁹ CRTC (11 June 1999) *Information: Did you know?*

⁶⁰ CRTC (11 June 1999) *The new policy on Canadian television: more flexibility, diversity and programming choice*.

79. The CCA agrees that the costs imposed by excessively detailed and inefficiently regulation warrant concern. Should we not be as concerned with the costs to Canadians of inadequate or unenforced regulations?
80. In this sector, a variety of questions is raised by a continuing emphasis on deregulation. How, specifically, have Parliament's objectives for Canadian broadcasting been met by deregulation? Has any new revenue garnered from relaxed advertising restrictions, for instance, flowed into Canadian programming? Are Canada's privately-owned, over-the-air television broadcasters spending more on Canadian programming than ever before? Are more original hours of Canadian drama being produced than ever before – thanks to removal of onerous and burdensome regulation? Has the financial strength and capacity of Canadian television programming been strengthened over the last decade? If the answer to any of these questions is no, is one not compelled to ask in whose interests has the CRTC undertaken its constant deregulatory exercises?
81. However commendable regulatory streamlining may be, streamlined regulation that fails to achieve its legislatively-mandated objectives is as wasteful as bloated regulation that fails to achieve its objectives. It is with this specific point in mind, that the CCA has undertaken its approach to the CRTC's questions.

II CRTC Objective A: OTA Privately-owned television broadcasters and Canadian programming

82. The questions raised by the CRTC in this proceeding are familiar. This is not surprising, perhaps, given that the CRTC has also reviewed its regulatory framework for conventional television policy in 1970, 1979, 1989 and 1999.⁶²
83. In 1979, when the CRTC announced that it would review its television policy, it said that although "there had been some successes" under its policies and regulations, "there had also been obvious shortcomings, most evident with regard to Canadian-produced English-language entertainment programs."⁶³ It found that although children's programs and variety were underrepresented in Canadian television schedules, drama in particular was seriously under-represented – to the point were "Canadian dramatic productions [were] virtually non-existent on private English-language television ... particularly ... during the mid-evening hours [when] only 5 per cent of drama scheduled is

⁶¹ CRTC, *Definitions for New types of Priority Programs; Revisions to the Definitions of Television Content Categories; Definitions of Canadian Dramatic Programs that will Qualify for time Credits towards Priority Programming Requirements*, Public Notice CRTC 1999-205 (Ottawa: 23 December 1999) at ¶14.

⁶² CRTC, *Public Announcement*, Decision CRTC 70-99 (Ottawa: 20 May 1970); CRTC, *Canadian Content Review*, Public Announcement (Ottawa: 31 December 1979); CRTC, *Overview: Local Television for the 1990s*, Public Notice CRTC 1989-27 (Ottawa: 6 April 1989); CRTC, *Building on Success – a policy framework for Canadian television*. Public Notice CRTC 1999-97 (Ottawa: 11 June 1999).

⁶³ CRTC, *Policy Statement on Canadian Content in Television*, Notice CRTC 83-18 (Ottawa: 31 January 1983) at 2.

Canadian-produced”⁶⁴. It announced a public hearing whose focus would be to review the CRTC’s Canadian content regulation

... to determine whether and how modifications to this regulation should be made to help achieve the original objective: to encourage the production of a wide range of quality Canadian-produced programs which a significant number of Canadians would choose to view in all broadcast time periods.⁶⁵

84. For perhaps the first time, the Commission tackled the subjective concept of quality, noting that it was a vital aspect of any program, but “[o]f all the attributes of programming” was perhaps the most difficult to measure or to define. Quite rationally, however, the Commission concluded that regardless of how it is defined,

... quality is, to a large extent, predicted on adequate quantities of talent, money and facilities.⁶⁶

Talent, money and facilities are vital components of a program’s success, and “greatly enhance the probability of high quality programs being produced.”⁶⁷

85. The CRTC sought to raise the quality of Canadian television programs through policy and conditions of licence. In 1989 the Commission “adopted an innovative approach by linking requirements concerning Canadian program spending to each private-sector licensee’s financial performance. Over the licence term, their spending requirements will change as their advertising revenues change.” The purpose of the approach was to “ensure continued improvement in the quality of Canadian programs”.⁶⁸

86. Briefly put, the CRTC had concluded that the level of spending on Canadian programming is a vital element in ensuring the quality of Canadian programming and announced the establishment of a formula linking programming expenditures to advertising revenues. Licensees of private, English-language television stations whose annual total advertising revenues exceeded \$10 million would be required by condition of licence to meet or exceed levels of Canadian programming expenditures established by the formula.

Canadian television programming must attract, engage and entertain. It must also inform, educate and enrich our cultural experience. For if Canadians do not use what is one of the world’s most extensive and sophisticated communications systems to speak for themselves – if it serves only for the importation of foreign programs – there is a real and legitimate concern that the country will ultimately lose the means of expressing its identity.

CRTC, *Policy Statement on Canadian Content in Television*, Notice CRTC 83-18 (Ottawa, 31 January 1983) at 5.

There is no doubt in the Commission’s mind that the goals of the Broadcasting Act will only be met if the proportion and quality of Canadian programs are substantially enhanced. Particular emphasis will have to be placed on currently neglected categories. The development of new shows is, however, both time consuming and costly. Needed improvements must therefore be sought on a long-term basis and will take several years to implement.

CRTC, *Policy Statement on Canadian Content in Television*, Notice CRTC 83-18 (Ottawa: 31 January 1983) at 12.

⁶⁴ CRTC, *Policy Statement on Canadian Content in Television*, Notice CRTC 83-18 (Ottawa: 31 January 1983) at 7.

⁶⁵ CRTC, *Policy Statement on Canadian Content in Television*, Notice CRTC 83e-18 (Ottawa: 31 January 1983) at 2.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ CRTC News Release, *CRTC Renews the Licences of 26 Originating Television Stations in Ontario* (6 April 1989) at 1.

Adherence to the formula was made an expectation for licensees with annual advertising revenues of less than \$10 million.⁶⁹

87. In 1994 the Commission encouraged 'new' entrants to Canada's broadcast system to support Canadian communities by financing Canadian program production, in some cases tying income to minimum program expenditures. The larger the entrant, the greater the entrant's capacity to support program production. The rationale for this was because, as the CRTC pointed out in early 1994, "[a]t this point, the only sure thing about the 'brave new world' of the multi-channel universe is that few of the choices it offers will reflect Canada, our culture or our values unless we invest a great deal more money in Canadian programming."⁷⁰

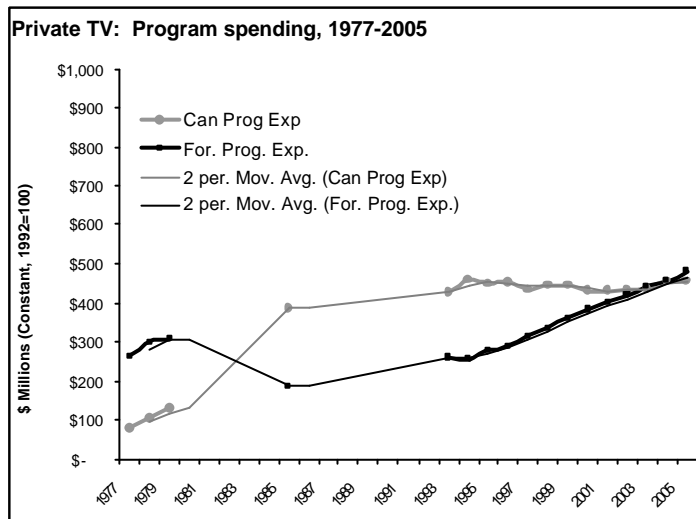
An adequate Canadian content in television programs is unlikely to be achieved by a laissez faire policy of minimum regulations, governing advertising volume, morality, and the like. Economic forces in North America are such that any substantial amount of Canadian programs will not appear on television schedules unless room is reserved for them by regulation. The pleas of private stations that they would produce better Canadian programs if they were allowed to concentrate the available money on fewer productions is not supported by the experience in radio, for which there are no specific Canadian content requirements.

Committee on Broadcasting, *Report*, (Ottawa: Queen's Printer, 1965) at 63

88. In 1999, of course, the CRTC reviewed and again revised its policy for Canada's privately-owned, over-the-air television broadcasters.

89. Like many others will have done for this proceeding, the CCA has spent some time reviewing CRTC policies, decisions and published data.

90. The CRTC's published data suggest that over the last decade, Canada's privately-owned, over-the-air television broadcasters have invested decreasing amounts in Canadian programming. The CRTC's methods to encourage spending on Canadian content have not had hoped-for effects, but rather appear to have reduced the beneficial impact of preceding years' of CRTC policy. Although spending on Canadian television programming generally exceeded spending on foreign content in the 1990s, the reverse is now true. In 2005, as the graph to the right demonstrates, privately-owned conventional television broadcasters spent 5% more on foreign programming content, than on Canadian programming content. Canadian culture has not prospered under the CRTC's supervision of Canada's privately-owned, over-the-air television broadcasters, merely survived.



91. The CCA's review of the CRTC's data concerning Canada's privately-owned, over-the-air television broadcasters has led it to conclude that Canadian programming expenditures is being used to subsidize other business decisions of Canada's privately-

⁶⁹ Public Notice CRTC 1989-27 dated 6 April 1989.
⁷⁰ CRTC, *News Release*, at 1 (issued in relation to in PN CRTC 1994-10).

owned, television broadcasters. Concrete examples exist, although due to time constraints we offer only one here, in relation to a specialty service: “Alliance Atlantis, which owns 80% of Discovery Health, asked the [CRTC] to reduce the amount of Canadian content it carried, from 65% of its schedule, to 35%, “saying the channel was losing money and had not drawn as many subscribers or as much advertising revenue as expected.”⁷¹

92. With respect, the CCA considers that reduced regulatory oversight and increasingly complicated regulatory incentives have had a negative effect on Canadian content, and in turn, on the broadcasting system as a whole.

Objective A: privately-owned, over-the-air broadcasters and Canadian programming	
CRTC questions	CCA response
<i>a) What are the most effective regulatory mechanisms to ensure an appropriate contribution to the production, acquisition and broadcast of Canadian programs?</i>	<p>The most effective regulatory mechanism is one that is not just enforceable but enforced. Neither ‘expectations’ nor ‘guidelines’ constitute enforceable mechanisms under the <i>Broadcasting Act, 1991</i>. This legislation establishes sanctions solely for broadcasters that breach CRTC regulations or conditions imposed on broadcasters’ licences.</p> <p>To be effective, regulations and conditions of licence must be quantitative in nature: a mechanism must specify both the expected weekly and total hours of original program productions, acquisitions and broadcasts, as well as total program expenditures, to be undertaken within specific time periods.</p>
<i>b) Is the Commission’s current approach to independent production appropriate to ensure that the broadcasting system includes “a significant contribution from the Canadian independent production sector,” as required by the Act?</i>	The CRTC publishes insufficient data to assess the effectiveness of its current approach.
<i>c) Should OTA licensees be subject to an expenditure requirement?</i>	<p>Yes. Without specified commitments, Canada’s cultural sector will again not be able to plan in the same businesslike fashion that privately-owned, over-the-air broadcasters presumably employ.</p> <p>Any expenditure requirement would be arbitrary. At a minimum, however, spending on Canadian programming must exceed spending on foreign programming.</p>
<i>d) Should any spending requirement be based on a percentage of revenues, of total program spending, or some other measure? How might any spending requirement account for year-to-year variations in revenues or program spending? Please be as specific as possible in</i>	Spending requirements for each of the stations controlled by Canada’s 16 privately-owned, over-the-air broadcasting ownership groups in a given year [Year] should be based on a percentage of each station’s gross revenues

⁷¹ Barbara Shecter, “Regulator grants cuts in CanCon to Discovery Health”, National Post (22 August 2006).

Objective A: privately-owned, over-the-air broadcasters and Canadian programming	
CRTC questions	CCA response
<i>describing any proposed expenditure formula.</i>	<p>from two years earlier [Year-2].</p> <p>Gross revenues become particularly appropriate in light of the possibility that broadcasters may earn revenue not only from conventional advertising and program sales, but also BDU subscribers.</p> <p>If program spending commitments are based on a percentage of revenues for each station, changes in the revenues will automatically reduce or increase the program spending commitment in subsequent years.</p> <p>Changes in ownership might affect privately-owned, over-the-air broadcasters' ability to meet their programming commitments. The CCA suggests that an ownership group that acquires one or more stations be prepared to undertake the commitments already in place for those stations.</p>
<i>e) What changes, if any, should be made to the Commission's benefits policy?</i>	<p>At present there are 16 privately-owned, over-the-air broadcasting ownership groups. Assuming transactions include all of an ownership group's holdings, this suggests that up to 15 more ownership transactions are possible involving conventional over-the-air television stations.</p> <p>Does the CRTC consider it necessary to change its ownership policy to account for potential variations within 15 more transactions?</p>

III CRTC Objective B: OTA privately-owned television broadcasters' income

93. According to the CRTC's notice for this proceeding, Canada's privately-owned, over-the-air television broadcasters enjoy sound financial health.⁷² The CCA anticipates nevertheless that concerns will be expressed about new threats to these broadcasters' revenues from new competitors, whether operating in the current regulated sectors, or the currently-unregulated new media areas. The threats will likely be identified as coming not only from advertisers' ability to buy advertising time elsewhere, but also from audiences' willingness to fragment their viewing time.
94. The CRTC's questions focus on new sources of advertising revenue, presumably to raise Canada's privately-owned, over-the-air television broadcasters' existing revenues and enabling them to overcome the challenge of competition (often from services they themselves own and from which they earn revenues, due to increasingly concentrated ownership structures). In mid 2005, however, both CTV and CanWest declined to discuss specifics of their approach to changes away from 30-second spots.⁷³
95. Broadcasters in the United States earn substantial income from embedded ads, product placement and advertising integration. Early this year, Nielsen Media Research estimated that use of these ads grew by 30% from 2004 to 2005.⁷⁴ According to the Writer's Guild of America, product placements in filmed entertainment generated revenues of more than \$1 billion in the United States. The WGA claims that during the third season of American TV series, *The Apprentice*, companies such as burger King, Dove Body Wash, Sony PlayStation Verizon Wireless and Visa paid in the order of \$2 million per episode to have their products included into plot lines.⁷⁵ A writer for *Outback Jack*, a series in which urban women survive in Australia's rural area, incorporated a scene filmed beneath a waterfall, in which the women found a new skin cream for shaving their legs.⁷⁶ Rupert Murdoch has said his U.S. News Corp. stations are "experimenting with ways of having a program continue – perhaps silently in the corner of a screen – during ad breaks."⁷⁷
96. The fundamental issue, from the CCA's perspective, is not how the CRTC might amend its regulations to address these new forms of advertising. The simple fact is that business arrangements between advertisers and broadcasters have already established and will continue to establish mechanisms for measuring and conceivably regulating these types of ads. Advertisers may seek by contract, for instance, to have a specific prop shown a specified number of occasions in a specific amount of time, in relation to

"... for the private broadcaster, there is the threat posed to his revenues by a host of new competitors who are contributing to a progressive fragmentation of the Canadian audience."

Federal Cultural Policy Review Committee, Summary of briefs and Hearings (Ottawa: January 1982) at 222-223

⁷² Para 15. of Broadcasting Notice of Public Hearing CRTC 2006-5.

⁷³ Keith McArthur, "Is it the death of the 30-second spot?" online: workopolis.com <<http://www.workopolis.com/servlet/content/fasttrack/2005-709/RCOVERADS09?section=Marketing>>.

⁷⁴ "Product Integration Trend Speeds Decline of 30-Second Spot" (13 February 2006) online: MediaBuyerPlanner.

⁷⁵ Gyula Kangiszer, "The Show Is the Commercial" online: multichannel.com (28 August 2006).

⁷⁶ CBC Arts, "U.S. TV writers protest against product placement" online: CBC.ca <>.

⁷⁷ Keith McArthur, "Is it the death of the 30-second spot?" online: workopolis.com <<http://www.workopolis.com/servlet/content/fasttrack/2005-709/RCOVERADS09?section=Marketing>>.

story lines or specific actors.⁷⁸ The CRTC is well-placed and well-experienced in drafting regulations that could be enforced about the amount, timing and placement of these new types of ads. The CCA suggests this is not the real issue.

97. The real issue for this proceeding is whether it is permissible and appropriate under the *Broadcasting Act, 1991* for the CRTC broaden both the range and the reach of commercial interests' advertising activity in Canadian broadcasting to expand so substantially. Parliament has explicitly defined 'programs'. Under section 2.(1), a program is defined as "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" (emphasis added). Parliament's definition suggests that it intended to distinguish between different types of programs – programs that inform, programs that enlighten, and programs that entertain. In our view, although some advertisements may be entertaining, advertising is primarily a form of commercial information. By definition, then, advertising cannot constitute an entire program, through plot lines, continuous screen presence through pop-ups, character dialogue, or ongoing product placement. For if Parliament had intended that the range of advertising be so expansive that the programs offered to Canadians be 'informative advertisements', 'enlightening advertisements' and 'entertaining advertisements', it surely would have said so.
98. The CCA would suggest that programs that consist almost entirely of advertising – through product placements, through product integration, story lines, characters hovering over specific props or continually-present pop-ups – tip the balance away from that contemplated by Parliament in section 3(1)(i), when it required that the programming offered by our broadcasting system should "be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes".
99. Just as 'change' has become a catchphrase for regulatory flexibility, however, so have financial forecasts often become a mechanism to negate discussions about what is essentially a matter of interpretation, whether of Parliament's will or of the qualitative standards necessary to determine what our legislature meant when it said that programming offered by broadcasting undertakings should be "high standard". On its own, an infomercial clearly identified as an hour-long commercial may be acceptable and within the parameters of 'high standard'. Would a series of infomercials filling an 18-hour long broadcast day also be of high standard?
100. Are there limits, to what is permissible on-air, and what is not? If there are no limits, because Canada's privately-owned, over-the-air television broadcasters require growing revenues to meet (quite properly) their shareholders' expectations, would there be any limits on the content of such advertisements? May we anticipate the resumption of cigarette advertising on-air? When next we see Yo-Yo Ma performing on CTV, may we anticipate the imposition through computer magic of a Telus logo on his violin?
101. Ultimately, what we are able to do, is never necessarily what we must do, or what we should do. The CCA does not believe it is in the interests of Canadians, or Canadians in the cultural sector, to transform a medium that informs, enlightens and entertains, into a

⁷⁸ Gyula Kangiszer, "The Show Is the Commercial" online: multichannel.com (28 August 2006).

streaming billboard that advertises informatively, advertises enlighteningly, and advertises entertainingly – 24 hours daily. If Canada's privately-owned, over-the-air television broadcasters truly believe their prospects for advertising revenue growth are dimming, perhaps it would be appropriate for the CRTC to consider its current licensing policy. Perhaps the problem is not whether Canada's privately-owned, over-the-air television broadcasters must obtain new income, but whether too much advertising inventory already exists. Restricting its supply, under competitive economic theory, would surely raise its value and price?

Objective B: Adding to privately-owned, over-the-air broadcasters' income	
<p><i>a) In light of changes to the form and delivery of advertising messages on television, should the Commission consider amendments to the Regulations respecting advertising? For instance, should the Commission consider restricting its limitation of 12 advertising minutes per hour to traditional commercial messages inserted as breaks in the program schedule (15, 30, 60 seconds etc.)?</i></p>	<p>It would be irrational for privately-owned, over-the-air broadcasters that derive profits from their use of Canada's broadcast spectrum not to seek to maximize this income.</p> <p>At a minimum, the CRTC must require privately-owned, over-the-air broadcasters to report annually on the types of advertising from which they earn revenues in conjunction with their programming. Note that this would include internet advertising offered within or adjacent to streamed programming content.</p> <p>The CRTC must regulate all forms of advertising used to derive benefits from privately-owned, over-the-air broadcasters' use of the broadcast spectrum.</p> <p>It should undertake this regulation in the public interest and in line with the <i>Act</i>.</p> <p>With this in mind, is it in the best interests of Canadian audiences for no limits at all to be placed on non-traditional advertising? We would argue it is not. Given the apparently unpopularity of existing levels of advertising, would new advertising not simply further repel existing audiences for privately-owned, over-the-air broadcasters programming?</p> <p>Is it in the best interests of Canadian writers to be required by privately-owned, over-the-air broadcasters to incorporate commercial elements into scripted Canadian content? We would argue it is not.</p>
<p><i>b) What other amendments to the Regulations respecting advertising would be an appropriate response to current and anticipated changes in the way advertising messages are transmitted to television audiences?</i></p>	<p>At a minimum, the CRTC must ensure that its reporting requirements for privately-owned, over-the-air broadcasters generate accurate data on the revenues non-conventional advertising yields.</p>

Objective B: Adding to privately-owned, over-the-air broadcasters' income	
<p><i>c) Should the Commission consider permitting a subscriber fee for the carriage of certain OTA television signals by broadcasting distribution undertakings (BDUs)?</i></p> <p><i>If so, what stations and under what circumstances?</i></p>	<p>No – if such a fee is merely intended to be used to pay for the shift from analog to digital transmission. Canadians should not have to pay for privately-owned, over-the-air broadcasters' decision not to plan for a technical change that has been known for over ten years.</p> <p>No – if claims are made that such a fee will be used for new, more and higher-quality original Canadian programming – based on past experience, this revenue may simply allow revenues used for Canadian programming to be diverted either into the shift from analog to digital transmission, or the acquisition of more foreign programming, or both.</p> <p>Based on past experience with the CRTC's enthusiasm for deregulation, however, if the CRTC were nevertheless to permit a subscriber fee, it must</p> <ul style="list-style-type: none"> a) establish a lifeline tier consisting of publicly-funded broadcasters that subscribers would automatically receive free of charge. b) regulate the fee either by regulation or condition of licence c) collect financial data about the fee's revenues and the use to which these revenues is put d) determine how Canadians who cannot afford, do not want, or cannot obtain BDU service are to be compensated for their loss of over-the-air transmissions
<p><i>d) If such a fee were to be considered, should it be restricted to services that offer new or significantly improved services to subscribers – for instance, services that provide a program schedule that is predominantly in HD?</i></p>	<p>No, unless the CRTC establishes a financing mechanism to ensure that the CBC's services are all available in HD. (Private broadcasters, of course, are free to make their own financial arrangements to pay for this conversion, including bank loans and/or bonds.)</p>
<p><i>e) Are there other criteria that the Commission should use in determining whether a subscription fee for OTA television services is warranted?</i></p>	<p>Past compliance with CRTC regulations and conditions of licence?</p>
<p><i>f) If such a fee were to be considered, on what basis should it be calculated?</i></p>	<p>The CCA opposes such a fee.</p> <p>Regardless, the CRTC should ensure that such a fee covers the costs to offer all subscribers a free, lifeline tier of publicly-funded programming services as well as the costs for the CBC to shift from analog to digital.</p>
<p><i>g) If a subscription fee were introduced,</i></p>	<p>The CCA prefers to leave this to the CRTC</p>

Objective B: Adding to privately-owned, over-the-air broadcasters' income	
<i>what changes to the Broadcasting Distribution Regulations (the Distribution Regulations) would be necessary or appropriate?</i>	at this time.
<i>h) Is the apparent failure to monetize out-of-market tuning a serious problem? If so, what regulatory measures could be introduced to address the problem?</i>	The CRTC has not published sufficient data for the CCA to provide a response.

IV CRTC Objective C: Implementing HDTV

A Context: Subsidizing private television broadcasters' decisions not to implement HDTV

102. In 1993, the CRTC, the public, Canadian broadcast distribution undertakings and Canada's privately-owned, over-the-air television broadcasters endured a lengthy public process to consider the advent and impact of delivering digital signals.

103. More recently, just three years ago, the CRTC considered the distribution of over-the-air digital television signals.

When broadcasters speculate and dream about the future of television, they tend to concentrate on the great changes that will result from technological development. ... All this fascination with new technology may obscure the essential attention that must be given to television programming in the future. A program of lack-lustre quality will still be a pallid offering even if all the colours of the rainbow are added to it. A bad program remains a bad program even if the signals have travelled half way to the moon and back.

Committee on Broadcasting, *Report*, (Ottawa: Queen's Printer, 1965) at 243

¶22. "The Commission recognizes the substantial costs that must be incurred by Canadian over-the-air broadcasters to build and operate digital transmission facilities and considers that broadcasters must be afforded the opportunity to maximize their advertising revenues by having their over-the-air digital television signals reach as many viewers as possible."

¶26: "... the greater the opportunity that consumers have to be exposed to the superior technical quality of digital, and particularly of HD services, the greater their incentive will be to purchase digital television receivers, which will in turn increase the demand for digital television services. The faster the consumer take-up, the shorter the time period during which broadcasters and distributors will have to provide services in both analog and digital formats. A shorter transition period will reduce the overall costs of the transition for both broadcasters and distributors." So, the time period has become unexpectedly short – are the overall costs now for some reason higher than anticipated?

¶31: "... the Commission concludes that it is reasonable to require BDUs to distribute the primary digital signal of a licensed over-the-air television service in accordance with the priorities that currently apply to the distribution of the analog version of the services and, accordingly, adopts the following principles:

... advertising has a direct effect on the programme itself The common [U.S.] practice of introducing advertising into the very material of the show successfully ruins any programme worth by completely destroying the illusion of a disinterested performance.

Royal Commission on Arts, Letters and Sciences, *Report* (King's Printer: Ottawa, 1951) at 47.

...

The Commission expects over-the-air digital television broadcasters to provide affected BDUs with reasonable notice of the date they intend to go to air. This information may be provided on a confidential basis.⁷⁹

104. The CCA therefore notes with some surprise, the tone of surprise in Broadcasting Notice of Public Hearing CRTC 2006-5:

... the 1999 Policy recognized the eventual replacement of analog with digital technology and noted that stations in the U.S. were beginning this transition. The Commission also recognized that the costs of transition would be significant, and that the regulatory framework should permit the industry to react quickly and appropriately to the pressures it would face. However, the 1999 Policy did not anticipate the rapid consumer acceptance of high-definition (HD) television receivers or the slow pace of transition to digital on the part of Canadian OTA.⁸⁰

105. Our understanding was that the CRTC's assumptions concerning competitive marketplace economics firmly tossed the ball of implementing and financing HDTV into the court of Canada's privately-owned, over-the-air television broadcasters. What has changed, other than the pace of technological adaptation? Have Canada's privately-owned, over-the-air television broadcasters not had ample opportunity, for over a decade to prepare for the analog-to-digital transition? Whatever the answer, the CCA believes that Canadian programming expenditures and local programming expenditures cannot now be used to subsidize Canada's privately-owned, over-the-air television broadcasters' failure to plan ahead, by re-allocating monies away from those areas, into broadcast distribution costs.

Objective C: Subsidizing Canada's privately-owned, over-the-air television broadcasters' decision not to proceed with HDTV	
<i>a) Describe the public policy implications of a decision not to require OTA transmission of digital/HD signals, including the implications for the Canadian Broadcasting Corporation/Société Radio-Canada, educational and OTA community television services.</i>	For fifty years, from the mid 1930s to the late 1980s, Canadian regulatory authorities sought to ensure that all Canadians obtained broadcasting service, preferably in their own language. Is the CRTC prepared to tell Canadians that they may now lose these services unless they pay for them through a new BDU fee?
<i>b) For those Canadians who continue to rely on OTA transmission, what reasonable and cost-effective alternatives could be proposed?</i>	The CRTC's question is difficult to answer because it is vague. Reasonable for whom? Cost-effective for whom? Surely, from a Canadian over-the-air viewer's perspective, it is most reasonable and most

⁷⁹ CRTC, *The regulatory framework for the distribution of digital television signals*, Public Notice 2003-61 (Ottawa: 12 June 2002).

⁸⁰ At ¶8.

Objective C: Subsidizing Canada's privately-owned, over-the-air television broadcasters' decision not to proceed with HDTV	
	cost-effective to require OTA transmission to continue as is?
c) How would licensees make local and regional programming available to the appropriate communities if there were no OTA digital transmission?	Is the CRTC considering dropping its local content - local ad revenues quid pro quo?
d) What changes to CRTC regulations and/or policies would be required to accommodate a change resulting in no OTA digital transmission?	The CCA has no comment to offer at this point.
e) If such an approach were taken, at what point should analog over-the-air services be shut down, or should the Commission specify such a point?	The CCA has no comment to offer at this point.

V CRTC Objective D: Local programming

106. Section 3 of Canada's *Broadcasting Act, 1991* highlights the importance of local programming content. Requiring that programming be drawn from local sources not only informs and enlightens Canadians about the events that directly affect them, but also gives local writers, producers, actors and technicians the opportunity to entertain their neighbours through a ubiquitous medium. Local talent does not spring, full-grown, from the metaphorical forehead of Canada's privately-owned, over-the-air television broadcasters. People grow and develop, often from the local scene, into regional and national talent venues. Broadcasting and journalism of high standard develop through training and experience in professional broadcasting milieux.
107. Canada's broadcast regulators traditionally supported the existence of local service:
- It is the policy of the Board [of Broadcast Governors] to ensure the continuation of local television service under conditions which would deprive viewers of the level of local service to which they have become accustomed.⁸¹
108. Within a decade of the CRTC's formation, it set out its view of the importance of local programming. When CFTO-TV acquired CFQC and CFQC-TV Saskatoon in 1972, the Commission required that "[t]he production of local live programming and news services in radio and TV must be maintained or improved where possible."⁸²
109. In Decision CRTC 75-373 the CRTC renewed the licence of CHLT-TÉLÉ 7 Ltée for CHLT-TV Sherbrooke, and explained that
- ...the function which television stations can and must carry out in the social and cultural context of the communities they serve, in addition to their participation in network programming. ...[O]ne of the Commission's most important objectives ... is the

⁸¹ Board of Broadcast Governors, *Public Announcement Extension of Television Services* (Ottawa: 5 October 1966) at 2.

⁸² CRTC, *Public Announcement*, Decision CRTC 72-163 (Ottawa, 9 June 1972) at 1.

establishment and development of local and regional television stations. The policies and decisions of the Commission have always been directed at strengthening the resources of local stations, including a sufficient number of qualified staff, to enable them to produce an adequate number of quality programs to meet the needs and aspirations of the population.

110. In Decision CRTC 75-522 (25 October 1975) the CRTC specifically linked Canada's privately-owned, over-the-air television broadcasters' access to local advertising revenues to local programming. The Commission said it

... believes that the establishment of broadcasting services in a community should, wherever possible, be a reciprocal matter. Where an applicant proposes to seek local commercial revenue from a community, he should also be prepared to provide some service to the community in the way of locally-produced, locally-oriented programming."

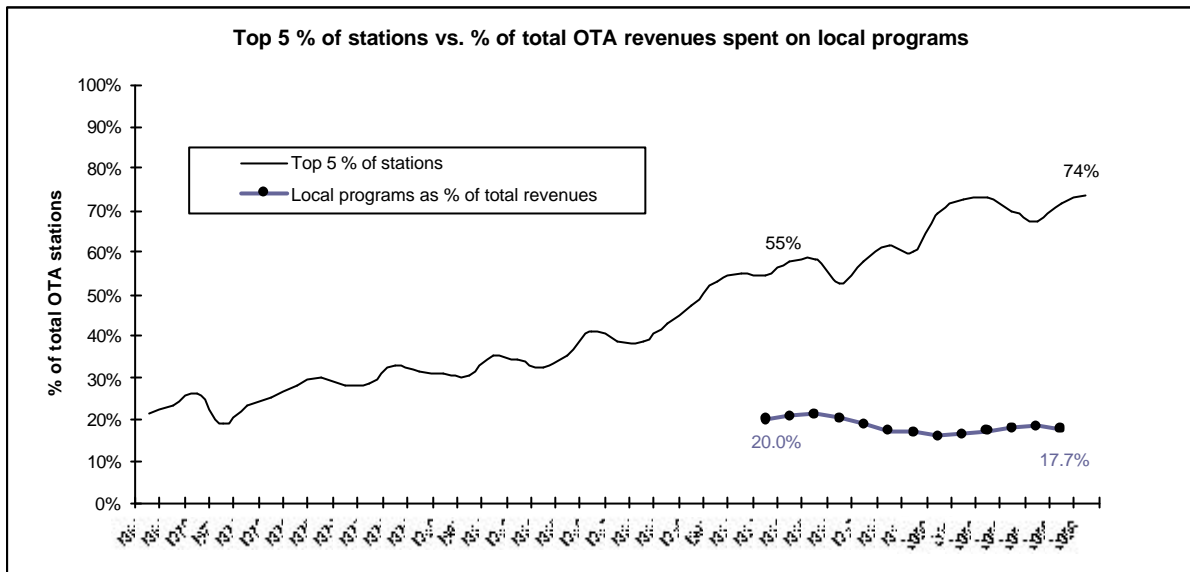
The Commission therefore granted a licence to rebroadcast CHLT Sherbrooke to Trois-Rivières, under a condition that "no local TV sales activity take place in the Trois-Rivières market area until the licensee provides to the community a programming service approved by the Commission."

111. In 1985, the CRTC reiterated

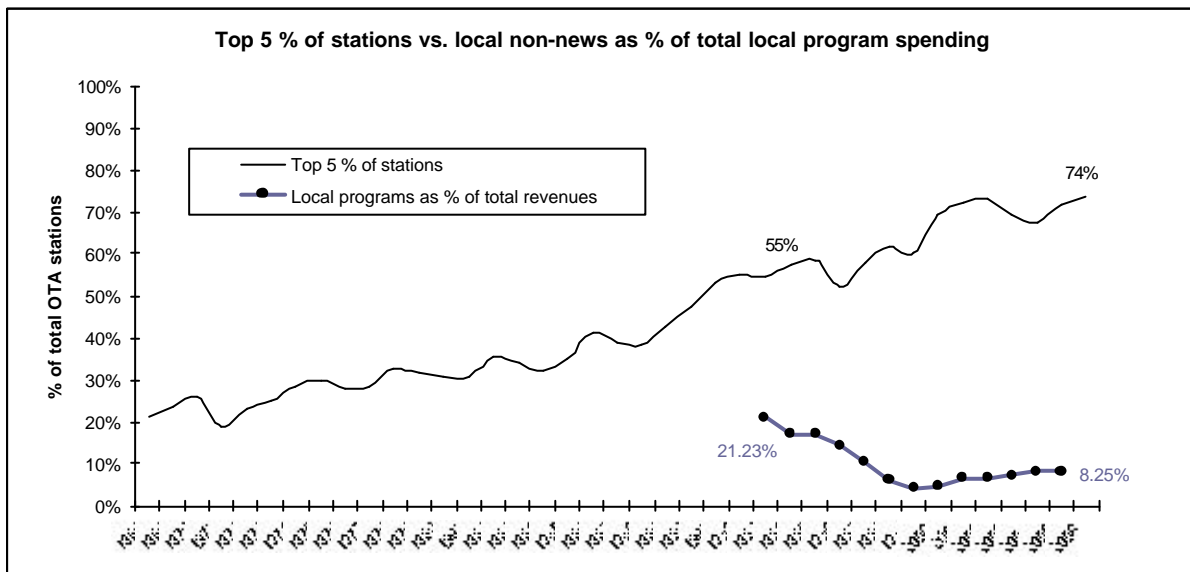
... the importance it attaches to the broadcasters' responsibilities to local program production, and this is reflected in the fact that television licensees are required to set out in detail their commitments to local programming in their Promises of Performance.⁸³

112. Since 1993, however, the value of local programming expenditures relative to Canada's privately-owned, over-the-air television broadcasters' revenues has declined, from 20% in 1993, to 17.7% in 2005. This has occurred despite the promise offered implicitly or explicitly that by aggregating the resources of Canada's privately-owned, over-the-air television broadcasters, local programming would improve.

⁸³ CRTC, *Introducing Flexibility into the Content of Local Television Programming*. Public Notice CRTC 1985-58 (Ottawa: 20 March 1985) .



113. Importantly, from the CCA’s perspective, local programming other than news, information and sports has also declined as a percentage of total local programming from 17.2% in 1995, to 8.2% in 2005.



114. These limited data lead the CRTC to ask just how many hours of original local programming are being aired by Canada’s privately-owned, over-the-air television broadcasters. It raises this question in particular how much non-news local programming now exists. This is because for some time rumours have suggested that Canada’s privately-owned, over-the-air television broadcasters have dismantled their non-news production studios, selling off equipment and leaving the stations with empty

shells. In mid-2006 *Playback* published a list of Canada's "major studio facilities".⁸⁴ This list included one broadcaster – the CBC. What evidence does the CRTC have about the number of over-the-air, non-news television studios that are currently active and functioning?

115. The CCA has taken note of arguments that there are other venues for local programming. Apart from cable community channels, after all, there are blogs online. Accepting this argument – what remains for Canada's privately-owned, over-the-air television broadcasters to do in local communities but sell advertising time and make money? Must we now accept there are no public service obligations? Shall the past half century become a quaint era sometimes described as the 'golden age' of local broadcasting?

Objective D: Local programming	
<i>a) What has been the impact of out-of-market tuning on stations in small markets?</i>	[The CCA has no comment.]
<i>b) Are the measures set out in Public Notice 2003-37 to assist independently owned small market broadcasters in maintaining and improving local programming having their desired effect? Should they be continued or altered? If the latter, how?</i>	As the CRTC has not published financial data separately for independently-owned small market broadcasters, the CCA is unable to answer this question. Given the very limited number of independently owned small market broadcasters – are there perhaps 7, in total? – the CCA believes it would be useful to spell out what these broadcasters are now and have been doing in local programming in the Canadian communities they are now licensed to serve.
<i>c) Should independently owned small market broadcasters be obliged to broadcast a minimum amount of local programming? If so, what amount should that be?</i>	Yes. As the CRTC has not published financial data separately for independently-owned small market broadcasters, however, the CCA is only able to answer in the abstract. In doing so, it relies on the CRTC's long-standing policy concerning the financial benefits that local broadcasters obtain from local advertising markets. The Commission explicitly linked these benefits to the provision of local service, presumably in line with Canada's broadcasting legislation. Until Parliament amends the <i>Broadcasting Act, 1991</i> , therefore, this programming must include news as well as entertainment programming.
<i>d) What measures may be appropriate to ensure that small market stations controlled by larger broadcast ownership groups continue to fulfil their local programming obligations?</i>	Quantitative conditions of licence that are enforceable and <i>enforced</i> .

⁸⁴ Playback, "Major studio facilities across Canada" *Playback* (24 July 2006) at 25.

Objective D: Local programming	
e) <i>Should the Commission expect broadcast ownership groups with profitable stations in the largest Canadian markets to subsidize their stations in small markets?</i>	Yes. To paraphrase Thomas Aquinas, to whom much is given, much is expected.

VI CCA's additional recommendations about the CRTC's regulatory framework for over-the-air privately-owned television

116. We have moved well beyond the early years of the twentieth century, when the central goal in developing the medium of "wireless telegraphy" was to attain "a material reduction in the rates for telegraph messages between Canada and other countries".⁸⁵ Since the early 1930s, Parliament has established that broadcasting has non-economic dimensions.
117. The CCA asks the CRTC to consider matters beyond the questions set out in its notice of public hearing. Its recommendations about these matters are set out below.
118. We should not see this as a failure of regulation – the Commission has tried regulation, enforcement, flexibility and incentives – but as a failure of licensees.

A Stable funding

119. After all, stable financial support benefits those who enjoy it. To that end, the Canadian government has provided critical support for many sectors of the Canadian economy for decades. In the last few years, entities such as Export Development Canada and the Business Development Bank of Canada have offered Canadian business financial support worth more than \$60 billion.
120. Export Development Canada was established in 1969. Its mandate is to "support and develop, directly or indirectly, Canada's export trade and Canadian capacity to engage in that trade as well as respond to international business opportunities."⁸⁶ As Canada's official export credit agency,⁸⁷ in 2004 it offered \$54.9 billion⁸⁸ worth of insurance, financing and bonding⁸⁹ to small, medium and large exporters.
121. The Canadian government also established a business development bank in 1974, "to promote and assist in the establishment of and development of business enterprises in

⁸⁵ Canada, *Memorandum of agreement between Marconi companies and the Canadian government*, *Sessional Papers* No. 51a (2d session, 9th Parliament) 17 March 1902 at 1-3. Under this agreement, the federal government agreed to pay Marconi's Wireless Telegraph Company, Limited up to \$80,000 to erect a wireless telegraph station in Nova Scotia. Although the agreement's focus in its purposive introductory clause is the reduction of telegraph rates, it is interesting to note that s. 7 of the agreement also included a domestic content provision, stipulating that the "companies will, as far as possible, use Canadian machinery, material and labour in the construction of said station in Nova Scotia."

⁸⁶ Export Development Corporation, *2004-2008 Corporate Plan Summary* (Ottawa: 2004) at 2.

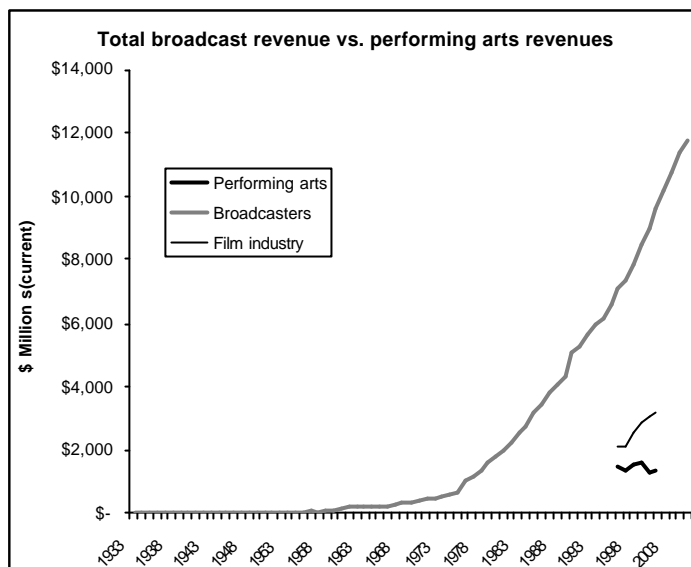
⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, at 4.

⁸⁹ *Ibid.*, at 42-44.

Canada".⁹⁰ The Business Development Bank of Canada now offers businesses "a wide range of lending, investment and consulting services complementary to those of commercial financial institutions".⁹¹ A "financially self-sustaining, commercial Crown corporation",⁹² the Bank's support "leverages investments from the private sector, over \$4 for every dollar BDC invests."⁹³ In 2006 it offered 25,802 clients financing of \$9.7 billion.⁹⁴

122. Canada's telecommunications sector has also benefited from the Canadian government's support for these companies' development and financial strength. The CRTC, for instance, has forbore from regulating over two-thirds (70%) of revenues earned by Canadian telecommunications companies. Taxpayers' have helped extend the availability of broadband to new, potential subscribers for companies in this sector. In 2005, broadband access became available to 74% of Canada's rural households, a six percentage point increase from the previous year.⁹⁵



This growth was made possible in part through \$301 million worth of taxpayer-supported activities undertaken by the federal government, such as the commissioning of a National Broadband Task Force in 2001, the establishment of a \$105 million Broadband for Rural and Northern Development Pilot Program that began in late 2002, the \$155 million National Satellite Initiative of late 2003, the \$28.4 million Canadian Strategic Infrastructure Fund, the \$2.8 million Municipal Rural Infrastructure Fund, and the \$10 million FedNor program.

123. The *Report* of the tax-payer funded Telecommunications Policy Review Panel in 2006 recommended the federal government continue to fund the expansion of broadband across Canada. Provincial governments have also invested in broadband deployment, for a total of \$546 million between 2002 and 2005.⁹⁶
124. The government has clearly determined that long-standing agencies such as the EDC and BDC, and new projects such as broadband infrastructure, are necessary to provide Canadian businesses and telecommunications service providers with stable financial support and assistance. Indeed, the government has established a variety of other business-related programs and services to support Canadian business. Industry

⁹⁰ Business Development Bank of Canada, *Annual report April 2005-March 2006*, at 57.

⁹¹ *Ibid.*

⁹² *Ibid.* at 28.

⁹³ *Ibid.*, at 19.

⁹⁴ *Ibid.*, at 23.

⁹⁵ CRTC, *Monitoring Report: Status of Competition in Canadian Telecommunications Markets*

Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services (July 2006) at 56 and Appendix 5, Table 8.5.2.

⁹⁶ *Ibid.*, at Table A.5.1, Appendix 5.

Canada's Strategies website lists over 800 programs that may assist Canadian administrative, support, waste management and remediation services alone.⁹⁷

125. While Canada's privately-owned, over-the-air television broadcasters have thrived financially, those in the cultural sector have not.⁹⁸

126. The CCA therefore supports a spending formula for Canada's privately-owned, over-the-air television broadcasters that would set out predictable funding for Canadian programming, based on these broadcasters' previous revenues. The CCA also supports time-based requirements for Canada's privately-owned, over-the-air television broadcasters to specific numbers of hours per week of new and original Canadian programs from every genre, and in particular, drama.

127. As with the traditional business sector, making Canada's cultural sector financially secure has no magic, quick-fix solution:

... there is no silver bullet prescription to make Canada a more successful incubator of innovative, globally successful companies. The long-term solution will require several changes, starting with a culture of "serial" entrepreneurs, people who have previously been successful at creating a profitable company around an innovation and who are ready to do so again. It will also require a greater number of knowledgeable venture capital fund managers to provide the expertise and experience needed to nurture the growth of innovations. Additionally, Canada needs a more efficient process that targets, finances and nurtures innovations destined to be world-class market technologies.⁹⁹

128. Canada's cultural sector requires the same stable and long-term support mechanisms now available to other business sectors of the economy. This support need not be drawn directly from taxpayers. Those who profit from their to Canada's broadcast spectrum must support Canada's cultural sector. The CCA notes that while broadcasters and telecommunications companies alike have thrived, those providing the content these companies transmit and distribute, have not:

129. Canada's telecommunications companies (and broadcast distribution undertakings) now support physical infrastructure: since 2001 all telecommunications service providers are required to 'contribute' to the cost of local service in rural and remote areas, based on revenues. In February 2006 the CRTC announced that deferral accounts established in relation to the application of the price cap formula will be used to expand broadband services to rural and remote communities, and to improve access of telecommunications services to the disabled. (This CRTC decision may soon be challenged in the courts, however.)

Obviously television stations cannot go on indefinitely repeating the same programme or the same series of programmes. If Canadian productions are not of high quality, they will succeed only in driving even more Canadian viewers to United States television stations

CAB presentation to the Board of Broadcast Governors, Public Hearing (Ottawa: 2-3 November 1959) at 10.

⁹⁷ Industry Canada, "Canada Business Services for entrepreneurs" online: http://www.cbcs.org/servlet/ContentServer?bissector=Administrative+and+Support%2C+Waste+Management+and+Remediation+Services&pagename=CBSC_FE%2FCBSC_WebPage%2FCBSC_WebPage_Temp&lang=en&cid=1091019988349&c=CBSC_WebPage. Several links relate to the cultural sector.

⁹⁸ Source of data in graph: CRTC *Statistical and Financial Summaries*; Statistics Canada.

⁹⁹ *Ibid.*

130. Along with Canada's privately-owned, over-the-air television broadcasters, the CCA recommends that the country's telecommunications service providers be required to support the creation, production and distribution of Canadian programming content, for three reasons. First – sound business practice suggests that attractive content in turn attracts subscribers. Second – Canadians, not private companies, own the spectrum used by telecommunications distributors to earn revenues; Canadians deserve a higher return on their investment than the diminutive licence fees now paid by telecommunications providers for the opportunity to exploit and profit from this resource. Third – Canadian taxpayers have subsidized and continue to subsidize the installation and development of telecommunications infrastructure across the land; taxpayers deserve a higher return on this investment than the mere right to generate a monthly income stream for telecommunications companies.
131. A simple and efficient mechanism for supporting Canadian programming content lies with the licence fees now paid by telecommunications service providers. These fees should be increased, and this increase should be used to fund Canadian content production.
132. In addition to supporting programming content financially, Canada's telecommunications service providers must be regulated to ensure that they do not impose new costs on the cultural sector. As growth in Internet access and applications continues to decline – as it must, since at some point most Canadians will have subscribed to these services – it is reasonable that telecommunications service providers will seek new revenues.
133. The highly-controversial issue of net neutrality centres around new revenue streams for telecommunications service providers. Charging either audiovisual providers to access subscribers, and charging users to access audiovisual content are simple mechanisms that Telecommunications service providers are adopting to replace income lost as subscription growth decreases. Canadians' access to Canadian culture, and the availability of Canadian culture to Canadians, must not subsidize telecommunications service providers. The CRTC must continue to ensure that telecommunications service providers carry content on a non-discriminatory basis.
134. Finally, the CCA accepts that the CRTC believes that more concentrated ownership offers benefits. The CCA notes, however, that the CRTC's discussion of ownership is obscured by general references to "broadcasters". In reality, there are tens of thousands of writers, actors, directors, producers and other members of the cultural work force – but fewer than twenty privately-owned, over-the-air television broadcasters. The Commission should periodically report on the status of ownership, viewing, revenues of each of these groups, to ensure regulatory transparency.

B Access by Canadians to Canadian programs

135. Though new technologies for disseminating audio-visual content have come and gone, what remains in their place is content.
136. Content matters, not only because it employs voters and taxpayers in the cultural sector, but because competition in the discourse of civil societies is critical to democracy. A cornerstone of democracy is the right to speech: in ancient Athens, for instance, a

slogan of the early democratic movement was *isegoria* – equality of speech. Athenians' view of democracy included the concept that each citizen had the right to have their opinion heard, and the right to speak in court.¹⁰⁰ As technology advances, and facilitates our ability to speak out, and share our views, neither ownership nor technology must not be allowed to make some voices more equal than others.

137. The CCA is concerned that increased regulatory flexibility, in combination with Canada's privately-owned, over-the-air television broadcasters' rational decisions to maximize profit-making opportunities by acquiring programming that is less expensive rather than more expensive, have reduced Canadians' access to high-quality Canadian programming.
138. The CCA recommends that the CRTC ensure that Canada's 16 privately-owned, over-the-air television broadcasters spend specified amounts on specified new, original hours of Canadian programming.

C Regulation that is rational, enforceable and enforced

139. A regulatory framework whose rules are not enforced has little value. In fact, its effects can be negative: the framework's mere existence purports to demonstrate that regulation exists and is enforced.
140. A complex regulatory framework may have equally limited value. The CCA is concerned that the CRTC's apparent current approach of cajoling Canada's privately-owned, over-the-air television broadcasters to provide programming content to which Canadians are entitled and have been promised – high-quality, properly-financed Canadian programs – serves merely to propagate the false impression that Canadian programming constitutes some form of discretionary, charitable donation on the part of Canada's privately-owned, over-the-air television broadcasters. A review of Canada's privately-owned, over-the-air television broadcasters' requests for regulatory flexibility in the past (shown in Appendix 2) suggests that a series of deregulatory initiatives have yet to achieve their intended object – more and higher-quality original Canadian programming, particularly drama.
141. Applicants for broadcasting licences are aware that Parliament has decided that broadcasting is not like every other commercial commodity or service. They have themselves decided to seek access to or to remain in this sector. Nothing requires Canada's privately-owned, over-the-air television broadcasters to retain their licences. The mere fact that applications to acquire existing licences, and applications to offer new service, are being made underscores the value of these licences.
142. The CCA believes that the objects set out by Parliament in its broadcasting legislation will only be achieved if the Commission establishes a clear, simple regulatory system that applies to each of Canada's 16 Canada's privately-owned, over-the-air television broadcasters. The CCA welcomes the incentives already available through assisted financing through the Canadian Television Fund. It strongly supports the existence of a publicly-funded national broadcaster operating in every part of the country, in both official languages, whose technical expertise, training programs for employees and

¹⁰⁰ Sian Lewis, "Tyrants, spies and the general's dilemma: the ideology of information in the Greek polis" in Hiram Morgan, ed., *Information, Media and Power Through the ages* (Dublin: University College Dublin Press, 2001) 13 at 16.

continued program production have benefited Canada's privately-owned, over-the-air television broadcasters.

143. The CRTC has applied some of its policies and regulations to all programming undertakings. In 1999, for instance, it revised the definitions of its television content categories for over-the-air television to its pay and specialty licensees.¹⁰¹ The technological shift from analog- to digital-based communication technologies does not require the CRTC to abandon the policies it has developed for the last several decades to achieve Parliament's objectives. The CRTC need not and must not establish separate but unequal broadcasting systems that relax some broadcasters' commitments to achieving Parliament's objectives. Broadcasting must be viewed as a form of communications that Parliament is entitled to regulate. The CCA recommends that the CRTC review its exemption decisions with respect to New Media and mobile television.
144. As one group of experts who reviewed the system and its regulation commented, "[t]here is no point in asking where a national broadcasting system is going. It will go only where it is pushed by conscious and articulate public policy, or where it drifts if there is no policy."¹⁰² The CRTC's notice of public hearing seems to suggest that concentration of ownership merely 'happens'. In fact, however, the CRTC is actively involved in this process, since it (along with the parties to these commercial transactions) may deny applications to transfer control of valuable broadcasting licences.
145. The CCA is concerned that the CRTC has effectively relinquished control over licensing by waiting—after the "I"s have been dotted and the "T"s crossed by these parties—to receive the applications to transfer control from parties to commercial ownership transactions. Now that just 16 groups control conventional over-the-air private television, how many large transactions will the CRTC comfortably deny, faced with the prospect of losing equally large 'benefits'?
146. The CCA is concerned that insufficient empirical evidence exists to justify that the public interest has been served by "clear, significant and unequivocal" benefits for our broadcasting system. The CCA is therefore concerned that continuing the present course of concentrating ownership in the hands of a few interests will fail to achieve Parliament's objects for Canadian broadcasting, and more importantly, will not serve Canadians interests.
147. The CCA as a result recommends that the CRTC initiate a public proceeding to consider the advantages and disadvantages of a competitive licence renewal process, in which applicants for an existing broadcasting licence are able to present their proposals to better serve Canadians and their local communities than existing broadcasters.

The Commission insists that where there is any change in the effective control of a licensee [sic] or in the broadcasting undertaking carried on by it, the prior approval of the Commission must be sought. This is not only a condition of the licences issued by the Commission, but it is of fundamental importance in enabling the Commission to carry out its responsibility for the regulation and supervision of all aspects of the Canadian broadcasting system for the purpose of implementing the policy of the Broadcasting Act.

CRTC, *Public Announcement* (Ottawa: 2 June 1972)

¹⁰¹ CRTC, *Definitions for New types of Priority Programs; Revisions to the Definitions of Television Content Categories; Definitions of Canadian Dramatic Programs that will Qualify for time Credits towards Priority Programming Requirements*, Public Notice CRTC 1999-205 (Ottawa: 23 December 1999) at ¶14.

¹⁰² *Fowler Commission* at 5.

D Sovereign jurisdiction

148. Foreign ownership seems very distant. It was over half a century ago that a number of Canadian radio stations had become American network affiliates: CFRB Toronto and CKAC Montreal affiliated with CBS, CKWX Vancouver and CKLW Windsor with Mutual, and CFCF Montreal with ABC.¹⁰³ It was over forty years ago that cable companies in Canada¹⁰⁴ and television stations were controlled by foreign-controlled companies.¹⁰⁵ In 1963 three cable television systems with head-ends in the United States were operating in Canada.¹⁰⁶ In 1967, Quebec's only private television stations – CFCM-TV and CKMI-TV -- were controlled by non-Canadians: 50% of the shares in Television de Quebec (Canada) Limitee were owned by Famous Players Canadian Corporation and American residents controlled 51.8% of that company's capital stock.¹⁰⁷
149. It was thirty-eight years ago when the 1968 *Broadcasting Act*¹⁰⁸ reduced foreign ownership in all broadcasting entities to a minority and non-controlling positions. Between 1969 and 1973 non-Canadians divested themselves of eighty different broadcasting undertakings in Canada (fifty-six cable, eleven radio and thirteen television services).¹⁰⁹ (Not everyone took the new foreign ownership policy seriously: in 1974 a U.S.-based company was convicted of operating a cable company in Sault Ste. Marie without a licence. It had been operating in Canada since 1968, became known to the Commission by 1969 and was finally charged with operating without a licence in 1972.¹¹⁰)

¹⁰³ Foster, *supra* note 12 at 152. During committee hearings in Spring 1953, CFRB Toronto was described as an American station on Canadian soil, a description to which its licensees (the Sedgwicks) objected). *Ibid.* at 153

¹⁰⁴ At this point the Federal Department of Transport, rather than the BBC, dealt with applications for cable systems: Foster *supra* note 12 at 182. In 1964 the radio regulations were amended to include cable television systems. *Radio Act Regulations*, C.R.C., c. 1371. When the BBG proposed to hold a hearing on cable television, the National Community Antenna Television Association of Canada said that the hearing was beyond the BBG's mandate, and threatened legal action against the BBG and each of its members if it made recommendations to the Minister that impaired cable's growth and development. The BBG's members responded at the hearing by stating that they did not intend to recommend anything to the Minister as a result of the hearing. *Ibid.* at 210. Cable was explicitly incorporated into the 1968 *Broadcasting Act*. "... the legislation indicates that community antenna television systems will also be subject to licensing by the Commission." *House of Commons Debates* (1 November 1967) at 3749 (Ms. LaMarsh).

¹⁰⁵ Exemptions granted by order in council (date indicated in parentheses) allowed Canadian Marconi (18 August 1959), Western Ontario Broadcasting Company Limited (16 February 1961), Central Ontario Broadcasting Company Limited (17 October 1963) and Television de Quebec (Canada) Limitée (18 Feb 1965) to operate broadcasting undertakings. (House of Commons Debates, at 3114 [Question No. 397 – Mr. Grégoire; answered by Ms. LaMarsh]). Western Ontario Broadcasting Company Limited held the licences for CKLW-AM, CKLW-FM and CKLW-TV in Windsor. It was owned by RKO Distributing Corporation of Canada Limited, owned in turn by RKO General Inc., which was owned by General Tire and Rubber Co. of Akron, Ohio. The stations' promotional literature described them as "Detroit stations". Foster, *supra* note 12 at 261.

¹⁰⁶ *Ibid.* at 210.

¹⁰⁷ *House of Commons Debates*, at 5740 (Mr. Gregoire).

¹⁰⁸ *Broadcasting Act*, 1967-68, S.C. c.25.s.1.

¹⁰⁹ Stratavision, *Ownership Structure and Behaviour in the Canadian Broadcasting System*, Prepared for the Task Force on Broadcasting Policy (Toronto: 17 January 1986) at 6.

¹¹⁰ In *R. v. Maahs and Teleprompter Cable Communications Corp.* (1974) 21 C.C.C. (2d) 497 (Ont. C.A.), aff'g 19 C.C.C. (2d) 540 (Ont. Prov. Ct. [Crim. Div.]), the court of appeal upheld the conviction of Teleprompter and its manager in Ontario (Ralph Maahs) for operating a cable undertaking in Canada without a licence on October 28-29 1972; through a succession of subsidiary corporations and since 1968, the US-based Teleprompter had run a cable undertaking serving 8000 subscribers in Sault Ste. Marie, despite the enactment of 1968 *Broadcasting Act* and warnings from CRTC that it should obtain a licence; Teleprompter even intervened in a CRTC public hearing against

150. Non-Canadians continue to be involved with Canadian broadcasters. Discovery Communications Inc., for instance, holds 20% of CTV's Discovery Channel specialty service, while Animal Planet North America Inc. holds 20% of CTV's Animal Planet (a category 2 specialty service). In some cases, however, the potential for influence over the undertaking rather than the actual proportion of voting or non-voting shares held has resulted in licence applications being denied.¹¹¹ On other occasions, the Commission has used conditions of licence to address concerns over foreign ownership. In 2000, for instance, it approved CTV's acquisition of TSN, RDS and the Discovery Channel on condition that a clause in a Proposed Amended Shareholders Agreement, "whereby the sole minority foreign shareholder would have, in effect, the right to choose who would be the majority Canadian partner of NetStar, would potentially affect who, among Canadian parties, could bid for control of the company in the future" was removed.¹¹²
151. Notwithstanding our long history of foreign broadcasting and our proximity to the world's largest program exporter in the world, the CCA strongly recommends that the CRTC focus on its mandate under the *Broadcasting Act, 1991* – to implement Parliament's programming objectives in Canadians' interest. Focusing on broadcast activities such as new advertising opportunities in other countries whose goals, objectives and interests differ from those of Canada, may benefit the short-term interests of Canada's privately-owned, over-the-air television broadcasters but will not serve the public interest, the needs or the desires of Canadians.

[...]

If a country doesn't have a lively, vital and active communications system, if all the talk, all the movement of views, ideas and opinions, and all the images come from outside, then I suggest that after a while you have no common purpose

Of course, if we think of broadcasting as a pipe system to transport goods, that is another matter altogether But that is not why my colleagues and myself have accepted the responsibility of this Commission, and I don't think that is why Parliament has taken all the trouble of developing this Act. If you read it carefully there are much broader and fortunately much more intelligent expectations in this Act than just providing canned entertainment.

In the view of the Committee, we can safely entrust the development of the Canadian broadcasting system to a Commission with that kind of vision.

Special Senate Committee on Mass Media, *Report: The Uncertain Mirror*, Vol. 1 (Queen's Printer for Canada: Ottawa, 1970) at 204, quoting the Chairman of the CRTC.

an applicant who had applied for a cable licence to serve subscribers in Sault Ste. Marie: "[t]he defendant corporation throughout exhibited a defiant attitude toward the CRTC and laws of this country, probably because in their ivory tower in New York City they felt immune, untriable and unreachable."

¹¹¹ *PrimeTime Canada, on behalf of a company to be incorporated*, Decision CRTC 98-173, at paras. 11-12.. Prime Time Canada's "sole, initial activity would have been to distribute U.S. 4+1 signals. PT 24 [a non-Canadian company] would have been the exclusive supplier of these signals and PTC would not have been able to distribute other U.S. 4+1 or Canadian signals unless the U.S. company agreed. Any action that would have resulted in a licence amendment would have required PT 24's approval. The presence of PT 24's nominee would have been required as part of the quorum of the licensee's proposed board of directors and PT 24 would have had a veto over the appointment and renewal of PTC's CEO. ... 12. In view of the foregoing, the Commission finds that PT 24 would have been in a position to exercise effective control of PTC. The Commission, therefore, has determined that the applicant would have been effectively controlled by a non-Canadian. By virtue of the Direction, PTC is, therefore, deemed to be a non-Canadian, and, accordingly, is not eligible to hold a Canadian broadcasting licence".

¹¹² *CTV Inc. on behalf of The Sports Network Inc. (TSN), Le Réseau des Sports (RDS) Inc. (RDS), and 2953285 Canada Inc. operating as The Discovery Channel*, Decision CRTC 2000-86.

Appendix 1: The Times, They are a-Changin'

The Role of Change in Canadian Broadcasting Regulation	
1928	Minister of Marine and Fisheries: " Changes are taking place very rapidly in the radio business, and a station which is up-to-date to-day may be obsolete and of no use in two months time." <i>House of Commons Debates</i> (31 May 1928) at 3627 (Mr. Cardin).
1980	CRTC announces a review of its radio policy, "... in the context of the accelerated changes that are taking place in the broadcasting filed ..." and for other reasons ¹¹³ Its aim is "to improve and simplify the current regulatory practices and procedures"
1983	CRTC: The environment for conventional television broadcasting "is changing rapidly and is characterized by uncertainty related to the future evolution of technology, competition, the present economic situation and government policy. "Technological change represents perhaps the most important element of uncertainty in the broadcasting environment of the 1980's as it relates to the programming and financial position of conventional television broadcasters. Satellite-to-cable delivery systems and the future development of direct-to-home broadcast satellites will make possible a very large expansion in programming alternatives The effect on conventional television broadcasting of these and other developments, such as videocassettes, is uncertain." ¹¹⁴
1988	CRTC: "The primary objective in undertaking this review [of its regulations] was to provide a regulatory framework free of outdated regulations and more suited to the rapidly changing and increasingly competitive broadcasting environment (...)" ¹¹⁵
1989	CRTC: "The Commission recognizes that the broadcasting industry in Canada is faced with a degree of uncertainty over the next five years. However, the Commission considers that this uncertainty is no greater than for other service industries or other players in the Canadian economy as a whole." ¹¹⁶
1991	CRTC: " The world you are doing business in today is more complex, more volatile, and frankly more difficult to predict than ever before. This is equally true for broadcasters and for the Commission. We are also grappling with change and the fundamental issue of how best to achieve the goals of the Broadcasting Act." ¹¹⁷
1993	CRTC: "There was a clear consensus among participants at the public hearing that the communications environment now emerging will largely be in place by the year 2000. Movement towards this new environment is being driven by three intersecting environmental forces: changing technology , increasing competition and what has been described as the 'new consumer'." ¹¹⁸

¹¹³ CRTC, *Review of Radio*, Public Announcement. (25 September 1980)

¹¹⁴ CRTC (31 January 1983) *Notice CRTC 83-18, Policy Statement on Canadian Content in Television*, p. 10.

¹¹⁵ CRTC (22 September 1988) *Public Notice CRTC 1988-159: The Canadian Broadcast Standards Council*.

¹¹⁶ CRTC (6 April 1989) *Public Notice 1989-27 Overview: Local Television for the 1990s*, p. 6.

¹¹⁷ David Colville, CRTC Commissioner (27 September 1991) *Canadian TV and Independent Production: notes for an address*, p. 1.

¹¹⁸ CRTC (3 June 1993) *Public Notice CRTC 1993-74: Structural Public Hearing*, p. 3.

The Role of Change in Canadian Broadcasting Regulation	
1994	CRTC: "Given the rapidly evolving communications environment, the Commission will re-evaluate its position [on allowing infomercials during the broadcast day] in three years." ¹¹⁹
1995	CRTC: "'Since [private TV] stations' licences were last renewed in 1989, the Canadian broadcasting environment has undergone tremendous change ,' said [the] CRTC Chairman. 'In coming years, local broadcasters will be challenged by an increasing number of viewing options available to consumers. To help them adapt to changing circumstances while promoting Canadian programming, the Commission has adopted a more flexible policy approach to guide the operations of private, English-language television stations over the next five to seven years." ¹²⁰
1996	CRTC: "The scope, complexity and the rhythm of change of the current communications revolution is without precedent." ¹²¹
1997	CRTC: "Given the speed at which change roars through our business , it is critical that we steer carefully, with both hands on the wheel. New communications technologies, products and services are announced almost daily. Competition is now firmly entrenched in the Global marketplace. Traditional industry distinctions are blurring. It is an exciting, yet intimidating time in our industry, a true roller coaster ride." ¹²²
1998	CRTC: "The Canadian television environment has undergone significant changes since the last major review of the Commission's policies in the mid-'80s. The Commission feels that the time is right to review its regulatory framework to ensure that it continues to effective in this rapidly changing environment." ¹²³
1999	CRTC: The Commission reviewed its television policy because "regulation needed to continue to be relevant and effective in today's changing environment ." ¹²⁴ CRTC: "We are convinced that the policy today opens the door to a promising future for the Canadian television industry. It will allow the industry to continue to innovate, stand out and achieve more success in an increasingly competitive world, for the greater enjoyment of Canadian viewers...." ¹²⁵
	CRTC "... with technology changing, with relationships shifting, and with public expectations evolving, we must move along a continuum from detailed regulation to broader parameters whenever possible. We must be more focused on promoting the opportunity for Canadians to build on their successes in the changing communications landscape." ¹²⁶

¹¹⁹ CRTC (7 November 1994) *Public Notice CRTC 1994-139: Amendment to the Television Broadcasting Regulations, 1987 to permit, by condition of licence, the airing of "infomercials" during the broadcast day*.

¹²⁰ CRTC (24 March 1995) *News release: CRTC encourages private, local television broadcasters to increase Canadian entertainment programming*, p. 1.

¹²¹ Chairperson, CRTC (28 October 1996) *Convergence and Broadcasting: What does the future hold? Notes for an address to the 1996 Annual Convention of the Canadian Association of Broadcasters*.

¹²² Chairperson, CRTC (21 October 1997) *Evolving towards a better Canadian communications system: call for collaboration and dialogue Notes for an address to the Canadian Association of Broadcasters Annual Convention*.

¹²³ CRTC (6 May 1998) *News release: Canadian television programming – a future defined by Canadians for Canadians*, p. 1.

¹²⁴ CRTC (11 June 1999) *Information: Did you know?*

¹²⁵ CRTC (11 June 1999) *The new policy on Canadian television: more flexibility, diversity and programming choice*.

The Role of Change in Canadian Broadcasting Regulation	
2001	CRTC "... the world of communications is undergoing profound changes. No sector has been spared by this swift and all-encompassing evolution. The forces of convergence, technological progress and globalization are tearing down borders and leading to a phenomenon of unprecedented vertical and horizontal integration." ¹²⁷

¹²⁶ Andree Wylie, CRTC Vice-Chairperson, Broadcasting (11 September 1999) *Notes for an address to the Atlantic Association of Broadcasters Annual Conference.*

¹²⁷ Andree Noel, CRTC Regional Commissioner, Quebec (4 October 2000) *Collaboration: the key to better regulation: notes of an address..*

Appendix 2: The CRTC and Private Broadcasters' Requests

Private Broadcasters' Requests for ...	CRTC response to requests
Simplified licensing	
Priority of access and channel position over foreign, exempt and non-programming services ¹²⁸	Granted
Distributor contributions to Canadian programming ¹²⁹	Granted 1993, cable subscriber-funded television fund established
Renewal of CTCPPF's \$100M funding ¹³⁰	Obtained February 2001
Amended ownership rules for foreign ownership ¹³¹	Granted
Right to control use of signal by distributors ¹³²	Granted
More flexible scheduling of Canadian programming	1986, CRTC changes from requiring Canadian content to be scheduled reasonably over 6-month periods [to prevent dumping of Cancon into summer months], to 12-month period ¹³³
More flexible advertising rules	1970, ads allowed in news programs longer than 10 minutes 1984, up to 2 minutes more of ads/hour before 6 pm . if these promote Canadian programs ¹³⁴ 1987, 30 seconds of PSAs per hour as well as up to 2 minutes of Canadian promos per hour excluded from advertising 1992, Canadian promos excluded from advertising 1994, infomercials allowed
Increased public funding for	Obtained 1983 (Telefilm Canada)

¹²⁸ CAB (16 January 1995) *Submission regarding Order in council P.C. 1994-1689 (Information Highway) Canada's Private Broadcasters: 'For Generations to Come'*, p. iii.

¹²⁹ CAB (16 January 1995) *Submission regarding Order in council P.C. 1994-1689 (Information Highway) Canada's Private Broadcasters: 'For Generations to Come'*, p. iii.

¹³⁰ CAB at CRTC public hearing (20 July 1998) *Television policy hearing*, Hull, transcript pp. 61-63.

¹³¹ CAB (16 January 1995) *Submission regarding Order in council P.C. 1994-1689 (Information Highway) Canada's Private Broadcasters: 'For Generations to Come'*, p. iv.

¹³² CAB (16 January 1995) *Submission regarding Order in council P.C. 1994-1689 (Information Highway) Canada's Private Broadcasters: 'For Generations to Come'*, p. iv.

¹³³ CRTC, *Amendment to the Television Broadcasting Regulations – Retention of the Twelve-month reporting period for the measurement of Canadian content* Public Notice CRTC 1986-270 (Ottawa: 29 September 1986).

¹³⁴ CRTC, *Policy Statement on Canadian Content in Television*, Notice CRTC 83-18 (Ottawa: 31 January 1983) at 17.

Private Broadcasters' Requests for ...	CRTC response to requests
Canadian production ¹³⁵	Obtained 1993 (Canadian Television Fund)
Encouragement of investment into Canadian programming	<p>1983, 50% Canadian content credit proposed for programs produced outside Canada in languages other than English, French, Inuktitut or Canadian Indian languages, and which are dubbed or lip-synched in Canadian production facilities.¹³⁶</p> <p>1984, international co-productions to qualify as 100% Canadian content if carried by any CRTC licensee¹³⁷</p> <p>In PN 1987-28 (30 January 1987), the CRTC announces a new policy on TV co-productions based on the 'twinning' of Canadian and foreign production packages, to encourage high quality Canadian productions in drama, variety, documentaries and children's programming</p>
Allowing individual broadcasters to make their own decisions about spending on Canadian content (<i>ie</i> , no conditions of licence) ¹³⁸	See 1999 TV Policy
Relaxation of local programming requirements	1985, Because "individual stations generally have difficulty financing and assembling the necessary components of a drama, variety feature or other program requiring more expensive production", the CRTC will count as 'local' any program produced in cooperation with by several broadcasters, because this might "result in a greater number of programs of higher quality which are attractive enough to compete for viewers' attention and which could be rescheduled in more appropriate viewing hours", and expects broadcasters to spend as much money with its co-producers as it would have spent without them. ¹³⁹
Control of more services ¹⁴⁰	See pay and specialty service licensing decisions
Fee for carriage ¹⁴¹	Partially obtained
Access by private broadcasters' production affiliates to production funds ¹⁴²	Not yet obtained

¹³⁵ "The CRTC and DOC have declared that we and other licensees across the country are in the drama production business. If there's going to be government support or TV production in this country, it shouldn't be so weighted that the only private entity that can utilize the dollars is CTV. We and other broadcasters from coast to coast need our share of public monies to meet our license commitments. We will fight for this right with every means available to us." David Mintz (8 March 1990) Letter to Pierre DesRoches, Executive Director, Telefilm Canada, regarding Telefilm Canada's disbursement and minimum licence fee requirements, p. 4.

¹³⁶ CRTC, *Policy Statement on Canadian Content in Television*, Notice CRTC 83-18 (Ottawa: 31 January 1983) at 17.

¹³⁷ CRTC (2 March 1984) *Public Notice 1984-56: Proposed Criteria, recognition for Canadian programs*.

¹³⁸ CAB (3 October 1994) *CRTC Public Hearing*, Toronto, transcript p. 130).

¹³⁹ CRTC, *Introducing Flexibility into the Content of Local Television Programming*, Public Notice CRTC 1985-58: (20 March 1985).

¹⁴⁰ CAB (3 October 1994) *CRTC Public Hearing*, Toronto, transcript p. 121.

¹⁴¹ "One of the CAB's key recommendations was that television stations should receive compensation from cable operators for the carriage of local signals. The CAB claimed that increased revenues to broadcasters would enable licensees to strengthen their Canadian programming." CRTC (3 June 1993) *Public Notice CRTC 1993-74: Structural Public Hearing*, p. 13. See also CAB (3 October 1994) *CRTC Public Hearing*, Toronto, transcript p. 122.

¹⁴² "We would like to see even more changes in the industry such that a production company affiliated with Global might access Telefilm, the Ontario Film Development Corporation or other publicly funded bodies, in the same manner that

Private Broadcasters' Requests for ...	CRTC response to requests
Simplified renewal procedures	1983, to expedite application processing and reducing licensees' paper burden and expense, CRTC implements simplified licence renewal process if no concern exists requiring more detailed public analysis of licensees' past performance or future plans ¹⁴³
Eliminate significant benefits test for acquisitions ¹⁴⁴	Not yet obtained

Alliance or Atlantis can still access those bodies. We applaud the success of our Canadian producers, but feel that monopoly access to public funds is no longer warranted." Global Communications Limited (19 May 1995) Licence Renewal Application, CRTC p. 64.

¹⁴³ CRTC, *New Licensing Procedure – Applications for Renewal*, Public Notice CRTC 1983-205 (Ottawa: 13 September 1983) at 1.

¹⁴⁴ CAB (4 June 1997) *Public Notice CRTC 1997-48: Call for comments concerning Order in Council P.C. 1997-592, New National Television Networks, Phase I Comments*; CKVU (1 June 1994) Licence Renewal Application, CRTC p. 199.