The State of the Canadian Program Rights Market 2022

The Demise of the Foundational Business Model of Private Television

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Precis

The existence of a separate television program rights market in Canada is integral to the business model of private broadcasting and, accordingly, has historically been seen as fundamental to a healthy Canadian broadcasting system. Policies favouring Canadian broadcasters, primarily of a structural nature, permit the acquisition by private television stations and discretionary services of rights to popular US television programming, the profits from which in turn cross-subsidize less profitable Canadian programming, from local news to Canadian drama. Studies conducted over the last fifteen years have tracked the health of the Canadian television program rights market and signaled the potential for bypass by Internet based television providers, but as recently as 2017 concluded that the Canadian rights market is relatively sound. This study concludes that the significant presence and market share of US Internet based over the top television (OTT) providers in Canada, and in particular the arrival in the last two to three years of US studio-network-cable-OTT conglomerates, is now significantly eroding the ability of private broadcasters to acquire rights to US programming. Specifically, Canadian video on demand (pay TV & OTT) services are at high risk of losing the ability to acquire premium movie & series TV rights, and discretionary services, particularly in the drama genre, are at material risk of losing the ability to acquire US programming rights, while conventional TV stations and networks are only at minimum to moderate risk, given the strength of the US conventional TV business model and enduring structural support measures in Canada (including the retransmission regime and simultaneous substitution). New public policy approaches currently being contemplated, such as requiring foreign OTT services to contribute to Canadian programming, may, in part, make up for the impact of these developments, but they will not combat them. If a Canadian broadcasting system with a strong private Canadian element is deemed to be in the public interest, new structural measures which could incentivise and prioritize Canadian broadcasting without restricting entry of foreign services, should be implemented.

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List of Abbreviations

AVOD	Advertising (based) Video on Demand
BDU	Broadcast Distribution Undertaking
CAB	Canadian Association of Broadcasters
CAGR	Compound Annual Growth Rate
COL	Condition of License
CPM	Cost per Thousand Impressions
CMPA	Canadian Media Producers Association
CRTC	Canadian Radio-television and Telecommunications Commission
DTC	Direct-to-consumer
FTE	Full Time Equivalent
FCB	Friends of Canadian Broadcasting
GDP	Gross Domestic Product
IBG	Independent Broadcasters Group
MVPD	Multichannel Video Programming Distributor (US term for BDU)
OLMC	Official Language Minority Communities
OTA	Over-the-air
OTT	Over-the-top (television)
POV	Point of View
STB	Set-Top-Box
SVOD	Subscription (based) Video on Demand
TVOD	Transaction (based) Video on Demand
vBDU	Virtual or online BDU
VI	Vertical Integration

Introduction

1. The link between a separate Canadian television program rights market and a healthy Canadian broadcasting system is well established.[1]

2. The Author first studied that link and the status of the Canadian program rights market in a study prepared for the Canadian Radio-Television and Telecommunications Commission (CRTC) in 2007. In the intervening fifteen years, at least eight papers (of which the Author is aware) have been written about the Canadian rights market[2] – interestingly, all by former broadcast executives, lawyers and consultants; apparently none by academics.[3] Studies of the rights market have tended to focus on the English-language television market and private broadcaster access to US programming, given both the critical importance of US programming to the business model of English-language private broadcasters, and its heightened vulnerability to bypass.[4]

3. Until now, the basic theme of these papers (including mine) has essentially been "The land is strong. Storm clouds on the horizon".[5]

4. Not anymore.

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[1] In addition to third party studies in supra, note 2, the CRTC itself has itself publicly confirmed the link on a number of occasions, including in the 2015 Let's Talk TV Policy and its Harnessing Change report. The Broadcasting and Telecommunications Legislative Review Panel Report of January 2020 (available here) also made allusions; but did not address it directly, apparently taking a somewhat pessimistic perspective on its sustainability. See Appendix B for select quotes.

[2] This includes studies done by the Author for the CRTC in 2007 (apparently no longer online), *Developments in the Canadian program rights market,* 2011 (available on the Commission's website here) and a related study (co-authored by Randal Rudniski) on OTT in 2012.
(https://crtc.gc.ca/eng/publications/reports/rp120330.htm#section1-2 . The Author's last study was conducted just over seven years ago for CMF/CMPA & FCB: *State of the Canadian Rights Market*, 2014 (available on the CMPA website, here). Other papers on the subject include those by Dina Graser, Goodmans LLP in April 2008 (for the then Biennial Law Society of Upper Canada Communications Law Conference), Paul Gratton in 2012, Jay Kerr-Wilson and Ariel Thomas*, The Canadian Rights Market Under Siege: The 'end of times' or merely another link in the evolutionary chain?* Law Society of Upper Canada conference, April 21, 2016 and BoonDog.*RECENT DEVELOPMENTS IN TELEVISION PROGRAM RIGHTS IN THE CANADIAN MARKET:*
A SNAPSHOT OF LEGAL OPTIONS AVAILABLE TO CANADIANS TO ACCESS TELEVISION CONTENT (updating the Paul Gratton Report for Telus in 2017 available here)

[3] This is not to say that academic research has not touched on program rights (see, for example, *DOMESTIC SUPPLY TO GLOBAL DEMAND: REFRAMING THE CHALLENGE OF CANADIAN ENGLISH-LANGUAGE TELEVISION DRAMA*, Irene S. Berkowitz, 2016 available here), but there appear to be no major academic research papers on the state of the television program rights market *per se.*

[4] Like others before it, this paper is written from a broadcasting system perspective, and, given the subject, mostly from a private broadcaster perspective.

[5] This not to say there has not been a progression of the level of concern from 2007 to 2017 to now. See Appendix A for examples.

5. The issue of whether a separate Canadian television program rights market can continue to exist, and a Canadian broadcasting system as we have come to know it exist along with it, is now very much in question. This question also extends beyond the English-language television market to the French-Language market as well as to indigenous and ethnic broadcasting, to greater or lesser effect.

6. Moreover, this Author will argue that, fundamentally, the challenges to sustaining a separate Canadian program rights market are not technological, they are – as has always been the case about the Canadian broadcasting system – primarily about political will.[6]

7. Unfortunately, there are indications that public policy makers have started to assume the game is over – that a separate Canadian program rights market and a Canadian owned and controlled predominantly private for-profit broadcasting system will, or at least may, not continue to exist for much longer. That evidence is apparent in many ways, but perhaps none other than the 2021 Bill C-10, *An Act to amend the Broadcasting Act*, and its successor, Bill C-11, *the Online Streaming Act* tabled February 2, 2022.[7]

8. As this paper endeavours to demonstrate, that attitude should be viewed as premature, if not a self-fulfilling prophesy.

9. While under strain, there is a lot of potential life left in the Canadian program rights market, and with it a truly Canadian broadcasting system, yet. The end of the great world-leading experiment of Canadian broadcasting is not foretold.[8] In fact, while, arguably, a failure to regulate major direct-to-consumer foreign services sooner has brought the Canadian broadcasting system close to a tipping point, public policy decisions made by both the CRTC and government in the last two decades to support key players in the system have helped create the foundation for potential ongoing success. Aspects include:

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[6] That the *Canadian broadcasting system is an act of political will* should not be a controversial statement. Rather, it should be seen as merely a statement of reality. The primarily Canadian owned and controlled broadcasting system simply would not exist in Canada without the laws and regulations put in place over the last century to support it. As set out in Appendix A, the 2007 Paper identified five public policy measures that supported a separate Canadian rights market, and their "economic, cultural and social dimensions". The paper spoke to the weakening of these public policy support measures, speculated that "without *further* public policy support, the Canadian program rights market would be at risk" and closed by asking *what can/should be done about it?*

[7] This includes, as of writing, the federal government's apparent abandonment of the policy objective of Canadian ownership and control, the lack of new structural measures to support Canadian broadcasters and the emphasis on "contributions" from online broadcasters.

[8] Only Canada shares a common language and almost nine thousand kilometre common border with the greatest global powerhouse in entertainment and tech. Moreover, English Canada is alone in the world in preferring foreign (US) television entertainment content to its own. The importance and challenge of maintaining a separate rights market – of using Canadians' love of US content to help create and exhibit Canadian content – is accordingly a uniquely Canadian one.

- An aggregately highly profitable Canadian **vertically integrated** large broadcaster-distributor-ISP-telecom sector that, under the right legal/regulatory framework, has the capacity to maintain a separate Canadian rights market for a sustainable majority of popular television programming;[9]
- A vital, **entrepreneurial Canadian independent broadcasting sector** in service of a diverse range of niche Canadian communities;[10]
- A strong and growing Canadian **independent production sector**, adeptly taking advantage of opportunities for Canadian storytelling, streamer originals, and service production and which can best grow and thrive if it remains in a position to monetize international rights for programming primarily funded in the Canadian marketplace;
- **Writers, directors, artists, and stars** who, as Canadians, represent our country's diversity and enormous talent, as well as the diversity of the world's people;
- **Crews, crafts, technical and trades people** using both established and leading technology and expertise;
- Other Canadians, resident and not, but **directly and indirectly** part of Canada's film, television creative ecosystem, from Canada's YouTube Creators, small business people who do it all and create the world's favourite user generated content (UGC), to the Canadian writers and directors behind the biggest US blockbuster movies;
- A diverse, **free and democratic society**, far from immune from forces of hate and intolerance, but nevertheless increasingly aware and embracing of our place in world, including recognizing Indigenous origins and seeking to reconcile our failures, conscious of how we differ, and the need to continue to differ from our neighbours to the south;
- An **international community** that, with the Internet, now faces the same challenges in advancing, promoting and, yes, protecting domestic culture that Canada has faced across the 49th parallel with over-the-air (OTA) broadcasting for a century – and that wants to see Canada succeed; and
- A myriad of **Canadian stories and perspectives** waiting – needing – to be told; stories that resonate at local, provincial, national and international levels.

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[9] Opinions vary on whether or not vertical integration – owning both distribution and content – has been a 'successful' strategy, but there is little doubt that, for example, Bell Media has greater *capacity* to maintain an HBO deal, than Astral would have had. That said, as the traditional BDU distribution system declines, the content side declines with it, and that capacity to compete for rights becomes compromised given the decline in ability to monetize those rights (unless OTT plays can make up the difference).

[10] There is, of course, evidence of entrepreneurship in larger broadcasters, production companies and many sectors of the broader broadcasting ecosystem. However, with limited resources, support, access rights and other privileges, the multi-varied strategies used by independent broadcasters to succeed are impressive.

10. The research for this paper, combining a review of public sources with consultations with Canadian broadcasters and numerous other stakeholders in the system,[11] has confirmed that, against all odds, but with mixed success and an uncertain future, Canada's private broadcasting sector remains viable, even strong; dealing with the cards it is being dealt. New, non-consumer restrictive but Canadian industry supportive public policies are, however, long overdue. Indeed, it is not a stretch to say that decisions made by public policy makers in the next three years will determine whether the Canadian broadcasting system survives, and whether our creative sector gets stuck in an increasing branch plant economy, or whether Canada's democracy, its perspectives, and these many private sector players in it, thrive.[12]

Key Trends in the TV Market

11. While challenges to the Canadian rights market were fairly accurately identified ten to fifteen and more years ago, it is only really in the last three years, that their impacts have started to be felt.[13]

12. There are at least three reasons for this.

13. First, OTT services, starting with Netflix in 2010, were initially largely additive or complementary to the broadcasting system. They grew the television market more than they drew away from traditional TV.

14. The CRTC's Harnessing Change and ongoing Monitoring Reports provide clear evidence of this. Until 2014,[14] revenues in and audiences to the Canadian broadcasting system had continued to grow. While certain segments, such as private conventional television were in decline earlier, other segments such as discretionary television continued to grow or at least hold their own for a few more years.[15] However, while the Commission's 2018 Harnessing Change Report forecast that traditional television would

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[11] This paper would not have been possible without the willingness of senior players in the system to take the time to be interviewed, provide frank and open assessments of their experiences negotiating and acquiring program rights, and in many cases, supplying concrete examples and/or validating assertions made herein. While I will not identify the individuals concerned, you know who you are, and I wish to sincerely thank you for your time and insight. I trust this report constitutes a fair and reasonable aggregate summary of your views and situations.

[12] These words are entirely consistent with, but not as politically correct, as the findings of the Broadcasting and Telecommunications Legislative Review Panel Report, cited at Appendix A herein.

[13] Note that I am speaking here only of challenges to the Canadian *rights market*, challenges to the *broadcasting system* more generally, particularly the loss of advertising revenues to the Internet, have been felt for over 15 years, first in depriving the system of growth, and more recently in causing material declines.

[14] BDU revenues peaked at $8.9 billion and revenue of traditional television services peaked at $7.4 billion for total Canadian broadcasting system revenues of $16.3 billion.

[15] For example, while private conventional television revenues peaked in 2013 at $1.94 billion and declined at a -5.6% CAGR to 2020, discretionary television revenues peaked at $4.1 billion in 2016, and at -2.6% CAGR had the lowest rate of decline to 2020.

hold 86% of total TV revenues (compared to 14% for online television) in 2020 through 2022 [16] the actual market share decline has been much faster – standing at 21% for online television in 2020,[17] a number that could easily hit 25%-30% in 2022 given current trends. And even that fails to tell the real story, which is that of a less than $16 billion Canadian broadcasting industry competing directly with global OTT platforms whose revenues are over five times as high.[18]

15. Second, the challenges facing traditional television did not initially relate to program rights. For over fifteen years, Canadian media have witnessed erosion in advertising, starting even before they saw losses in audience, as advertisers increasingly took advantage of the almost limitless number of cost-effective, data driven, targeted options online. In 2008 online advertising overtook radio, in 2010, it overtook print, and in 2013 it overtook television. As at 2020, Internet advertising represents over 67% of all advertising in Canada,[19] with Google and Facebook alone reportedly taking in 80%.[20]

16. Finally, third, the shift from OTT as complementary to competitive took off when the traditional vertically integrated US studio-network-cable conglomerates realized they too could go direct to consumer, and bypass the traditional "wholesale-retail" relationship between TV production, exhibition and distribution.

17. This latest, only two to three year old, development – epitomized by the launch of Disney+ and Paramount+ in Canada (and HBOMax and Peacock in the US), and influencing or finding parallels in the non-mainstream English language rights market – shows signs of fundamentally altering the nature and health of the Canadian program rights market. Indeed, left unchecked, this new trend is significant enough that it could effectively lead to the disabling of the Canadian broadcasting system as we know it, in a matter of single digit years.[21]

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[16] Figure 32. To be fair, the 2020 forecast was an Ovum prediction, published by the Commission.

[17] CRTC Open Data figures published with 2021 Monitoring Report (data-television-sector, Figures 1 and 17). Ovum data places traditional television services and BDUs in the traditional service category; AVOD, SVOD and TVOD in the online category.

[18] And that is just including those operating in Canada today. Public figures place Netflix at $30 billion US, Amazon Prime Video at $12 billion, Disney+ at $10 billion**,** Paramount+ at $4 billion. Estimating YouTube TV advertising revenues (assume 1/3 of $30 billion total) and everyone else at $4 billion leads to a total of approx. $70 billion at end 2021 and climbing (excluding TVOD). (All USD) The discrepancy is even greater when Canadian programming budgets of Canadian broadcasters are compared with the programming budgets of foreign streamers.

[19] Thinktv figures. https://thinktv.ca/wp-content/uploads/2018/05/2020-Net-Ad-Volume-new-IAB-format-Newspaper-Revenue_Jan27_2022-StatsCan-Update.pdf

[20] https://nmc-mic.ca/2021/03/30/google-and-facebook-control-the-internet-advertising-market-in-canada/

[21] In this, English Canada is unique in the world. In no other country, is content from a separate country so popular; in no other country, could the loss of US programming from domestic private broadcasters have such an extreme impact.

18. Simply put, unlike Netflix and Amazon Prime, the emerging OTT titans are not merely competitors to broadcasters for program rights. Rather, they are the US broadcasters, and their affiliated production and distribution arms – and they are aggressively moving into, and arguably poised to dominate, the global online television market.

19. While the risk of such bypass of the Canadian broadcasting system has been raised in a theoretical way for over 15 years, it is only now that the technological platforms, consumer acceptance and player content strengths and strategies are manifesting themselves in earlier predicted tipping points.[22] As one interviewee put it, like a watering hole in a desert in Africa, with Netflix, Amazon and other big elephants sucking up all the water, *access to content is drying up*.

Traditional Television

20. As stated in the Author's 2011 report:

> *The greatest underlying risk to the Canadian rights market is not unique to any Canadian player or sector or specific foreign OTT provider, nor is it stoppable. It is the shift to on demand viewing, and with it, the shift to online and mobile TV platforms that are no longer part of the "walled garden" and historic "closed system" of Canadian broadcasting.*

21. At that time, four key factors were identified as "driving the shift to on-demand and hence to OTT" – that while "unlikely to replace broadcasting in the foreseeable future" showed "considerable momentum":[23]

- Increases in Internet network capacity of 40-50% driven largely by consumer demands for online video;
- The explosion of Internet enabled TVs and other boxes allowing seamless access to traditional and online TV sources;
- The apparent determination of both studios and the FCC to foster a competitive OTT market; and
- Consumer interest in cord-cutting or -shaving to reduce TV costs, eliminate services they don't watch, and obtain easier on demand access.

[22] See, for example 2011 Report conclusion noted at Appendix A to this report.
[23] Quotes and identified factors from 2011 Report, p. 18.

22. In the last decade, the "considerable momentum" has been pronounced – to the point that today enabled devices are all but ubiquitous[24] and Internet capacity constraints are no longer even considered an issue.[25]

23. As we shall see, however, Canadian traditional players have not stood still. Despite failed experiments such as Shomi,[26] Canadian broadcasters have each in their own way re-focussed themselves on ensuring they provide competitive Canadian original and Canadian and foreign acquired programming, and found ways to at least be part of the Internet television marketplace at home, and in some cases abroad.

24. Moreover, whether or not the late entrants can successfully convince subscribers to add a third, fourth or fifth OTT service or replace a current one – whether their specific mixes of brand and content are compelling enough to ultimately succeed – remains an open question.

General Interest OTT

25. The arrival of general interest, Internet, or "over the top" television (OTT) in Canada can be marked by Netflix's Canadian launch in 2010. A mere twelve years later, the abundance of general interest and niche OTT, or direct-to-consumer (DTC) TV options in Canada and around the world is striking.

26. General Interest OTT/DTC players operating in the Canadian market five to seven years ago (Netflix, Amazon Prime, Tou.tv, Crave, Club Illico) have now been joined by many more, with more poised to come. These include:

- Canadian services, such as CBC's Gem, Quebecor's Vrai, and Corus' StackTV[27];

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[24] I do not feel it necessary to comment in this paper about the power and ubiquity of apps and smart phones (and their 2-3 year replacement cycles), or the significant presence of Smart TVs (the TV replacement cycle of 7-10 years shortening and cheap dongles and STB being widely available) as this is now widely understood. In hindsight, the comment about the studios and the FCC fostering a competitive OTT market was a little off.

[25] Internet traffic continues to grow upwards of 30% a year driven by video; ISP networks and Internet backbone infrastructure, including CDN networks, have demonstrated their ability to keep pace; and 5G promises the same in the wireless space. The FCC or government generally in the US has not really been a factor; what was a factor in Canada was the Harper government's push for consumer choice (manifesting itself in the CRTC's Let's Talk TV Decision), and hugely significant, its opposition to a "Netflix Tax" and the twelve years Canada lost when public policy makers could have been introducing non-consumer restrictive but achievable measures to stem the foreign OTT tide. Nor did I anticipate that studios would not only "foster a competitive OTT market" but be on their way to becoming the dominant OTT providers themselves.

[26] https://www.cbc.ca/news/entertainment/shomi-shut-down-1.3779675

[27] StackTV is a different beast than the OTT/DTC players identified here as it is an online distribution platform for traditional TV services. It is notable as a key Corus competitive response to OTT, and the fact that it is available through Amazon Prime. I intentionally don't, however, include other online distribution platforms here, like RiverTV or Rogers Ignite SmartStream, or other such virtual or v-BDUs.

- Disney+, Paramount+, Discovery+; and
- not yet in Canada, Peacock[28] and HBOMax[29]

27. Moreover, the nature of these services is changing. All OTT players are now pushing exclusive, ideally, original content – seeking to differentiate themselves in an increasingly cluttered market and be "must have" among consumers.[30] At launch, for example, Netflix was primarily based on library content – older movies and series. In 2012, anticipating the future, as it has so successfully done since its founding, Netflix released its first original, the Norwegian *Lilyhammer*, rapidly followed by *House of Cards* in 2013.[31] Today, all OTT players are, by necessity and consumer demand, pivoting to originals.

28. Our current "golden age of television"[32] or "peak TV", whose arrival was arguably presaged by the first Netflix Original in 2012, has seen a three-fold increase in world-wide production of dramatic series. While few believe it can last, for the time being, a consumer viewing television every waking moment of every day of the year would still not be able to watch all the new dramatic series available.[33]

29. Netflix, whose leadership has kept it so far ahead of the rest of the OTT pack,[34] and Amazon Prime, whose non-media centric business make it a wild card with enormous

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[28] *NBCUniversal Reveals Peacock Has 9 Million Paid Subscribers*, Variety, Jan 22, 2022 https://variety.com/2022/tv/news/peacock-paid-subscribers-9-million-1235164982/

[29] With 74 million subs in US. https://www.reuters.com/business/media-telecom/att-spin-off-warnermedia-43-billion-discovery-media-merger-2022-02-01/

[30] With the exception of older movies, the vast majority of content on OTT is exclusive to a particular OTT provider for the time period it is exhibited on that provider; and those time periods are increasingly becoming indefinite, often now starting with first exhibition. This is also affecting "co-commissioning" and window sharing with Canadian producers/broadcasters, an approach that is increasingly not working for Canadian broadcasters/producers as Netflix seeks global rights, and demands the smallest possible window (as little as first run linear) on any partner or CMF triggering Canadian broadcaster.

[31] https://deadline.com/2022/02/ted-sarandos-lilyhammer-decade-netflix-original-series-anniversary-premiere-1234927208/

[32] We are arguably in the second "golden age of television" – both arising from digital technology. The first spawned by digital cable in the 90s, arguably led to shows like *Buffy the Vampire Slayer* (1997) and *Friends* (1994). "In the five years between 2011 and 2016, the number of scripted television shows, on broadcast, cable and digital platforms increased by 71%. In 2002, 182 television shows aired, while 2016 had 455 original scripted television shows and 495 in 2018. The number of shows is rising largely due to companies like Netflix, Amazon Video and Hulu investing heavily in original content. The number of shows aired by online service increased from only one in 2009 to over 93 in 2016." https://en.wikipedia.org/wiki/Golden_Age_of_Television_(2000s%E2%80%93present)

[33] Based on the Author's back-of-the envelope calculation. 500 series at an average of 1 hour and 13 episodes amounts to 6500 hours a year. 16 waking hours a day is 5840 days a year.

[34] Whether Netflix can maintain its lead is an interesting question of the OTT space; one that Netflix's diversification into gaming suggests the company itself has doubts. See, for example, https://deadline.com/2021/01/streaming-2021-outlook-disney-hbo-max-peacock-apple-netflix-1234662348/ https://www.cnbc.com/2022/03/14/netflix-shares-hit-lowest-point-since-march-2020-when-covid-pandemic-started.html and https://www.midiaresearch.com/blog/why-netflix-is-now-doubling-down-on-non-video-content

resources, are facing stiff competition[35] from traditional media players. The latter have realized that they (a) have or can re-possess program rights, (b) are the owners of key brands and producers of the world's most popular content, (c) can go direct to consumers, avoiding any middleman, and (d) will be rewarded by the market in possessing subscribers rather licensing their product to third parties[36].

30. Indications of this are rampant:

- The November 2019 global launch of Disney+[37] (Disney having acquired the Marvel and Star Wars franchises 2009 and 2012[38]), followed by the launch/inclusion of Star (and raising of prices) in February 2021,[39] and the commensurate loss of rights to Disney programming suffered by competing broadcasters and OTT players;[40]
- The rebranding of ViacomCBS as Paramount+ in February 2022, the launch of the Paramount+ OTT service in March, 2021,[41] a rebranding of CBS All Access, which launched in the US in 2014 and Canada in 2018;[42]
- NBCU's "late" July 2021 US launch of Peacock;[43]

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[35] https://www.theverge.com/2022/3/5/22962196/paramount-plus-first-year-yellowstone-star-trek-1883-spongebob

[36] The financial market's "love affair" with OTT/DTC players is epitomized by Netflix's valuation, despite the fact that the company is massively in debt. Netflix's stock devaluation when it failed to meet growth targets and Paramount+'s February 2022 market losses on announcing its rebirth as primarily an OTT player suggest, however, that the market may be starting to recognize that DTC plays have limits. https://gulfnews.com/technology/companies/netflix-gives-weak-forecast-after-missing-subscriber-target-1.1642716680993 https://deadline.com/2022/02/paramount-streaming-plans-stock-plunge-wall-street-future-1234935496/

[37] https://www.cbc.ca/news/business/disney-plus-launch-canada-1.5251906

[38] https://observer.com/2020/09/disney-buys-star-wars-marvel-fox-hulu-pixar-cost-box-office/

[39] https://globalnews.ca/news/7656898/disney-plus-star-canada-launch/

[40] Disney reportedly abandoned hundreds of millions in program license fees in the process. See, for example, https://www.vox.com/2019/4/12/18307539/disney-streaming-launch-cost-billions-netflix-strategy-change Disney+ now combines Disney, Pixar, Marvel, Star Wars, and National Geographic programming with series and movies from Hulu, 20th Century Studios and the FX channel.

[41] Paramount+ combines content from the CBS Network with programming from Paramount, Nickelodeon, MTV, BET, and Comedy Central. (Formerly ViacomCBS) Paramount+, also owns the free Pluto TV streaming service and the Showtime network. https://financialpost.com/pmn/business-pmn/viacomcbs-to-launch-streaming-service-paramount-in-march https://www.cnbc.com/2022/02/15/viacomcbs-changes-name-to-paramount-to-underscore-streaming-future-.html

[42] https://www.cbs.com/recommended/news/1008474/cbs-all-access-launches-in-canada/

[43] Featuring a "free-to-watch" tier with a light advertising load of no more than 5 minutes of commercials per hour, designed to help it enter a "crowded" market exhibiting "signs of subscription fatigue". https://variety.com/2020/tv/features/peacock-launch-streaming-comcast-nbcuniversal-1234697590/

- The global launch of Discovery+ announced December 2020,[44] with its Canadian launch in October 2021;[45]
- WB (formerly Warner Brothers) removing the HBO subscription option from Amazon Prime in mid 2021;[46]
- HBOMax's aggressive DTC rollouts in Europe,[47] only not in Canada by virtue of its current multi-year output deal with Bell Media;[48]
- A series like Disney's *Only Murders in the Building* (Martin Short, Selena Gomez), that would have historically been produced for ABC, today appears exclusively on Disney+ and is not available to any Canadian broadcasters; and
- A flurry of mergers and acquisitions, from Rupert Murdoch effectively raising the white flag in selling 20th Century (Fox) Studios to Disney, to the, approved as of March 11, 2022, Discovery-WB Merger.[49]

31. As we shall discuss, the repercussions are being felt in a myriad of ways, for example:

- Rights traditionally acquired by Canadian broadcasters drying up, and available rights becoming narrower and more expensive;
- For the first time, evidence of foreign OTT providers even outbidding conventional TV broadcasters for primetime rights; and
- Foreign OTT players seeking to commission domestic original programming from the markets they operate in that will resonate globally – in the short term, helping

[44] https://corporate.discovery.com/discovery-newsroom/discovery-announces-the-global-launch-of-discovery-the-definitive-streaming-service-for-the-best-real-life-entertainment-in-the-world-debuting-january-4-2021/
[45] https://corporate.discovery.com/discovery-newsroom/discovery-inc-to-launch-discovery-in-canada/
[46] https://www.thewrap.com/hbo-max-amazon-prime-video-channels-warnermedia-discovery/ "At the end of the day, you want full control of your customers. And I'm confident with the strength of the offer that will be in the market, those customers are all going to come back into the offer." https://www.thewrap.com/hbo-max-subscribers-down-45-million-amazon-global-subs-rise/ ["retail" and "wholesale" subs]
[47] https://www.rapidtvnews.com/2022020161997/hbo-max-confirms-8-march-for-second-wave-of-european-launches.html?utm_campaign=hbo-max-confirms-8-march-for-second-wave-of-euro-launches&utm_medium=email&utm_source=newsletter_2888#axzz7Jf2y2FMy
[48] In January, 2018, Bell Media reported that had secured multi-year output deals to secure Canadian rights to programming from "the top three premium U.S. brands (HBO, Starz, and Showtime)", primarily for Crave TV. https://www.bellmedia.ca/the-lede/press/bell-media-brings-starz-to-canada/
The terms of such agreements are by their nature highly confidential, but it is reasonable to assume that these Bell agreements will come up for renegotiation within the next few years.
[49] In May 2021, AT&T announced that it had proposed to spin-off WarnerMedia and merge it with Discovery, Inc. to form a new publicly-traded company, Warner Bros. Discovery, under Discovery Inc.'s CEO David Zaslav. In December 2021, it was announced that the deal was approved by the European Commission. It is expected to be close in mid-2022, given approval by Discovery shareholders on March 11, 2021.
https://www.theverge.com/2022/2/9/22925327/discovery-warnermedia-att-merger-antitrust-clearance-ftc
https://finance.yahoo.com/news/discovery-shareholders-approve-warnermedia-acquisition-160726926.html?guccounter=1

contribute to record high levels of foreign service production in Canada,[50] but also threatening to take away a truly sustainable competitive edge of the Canadian owned and controlled broadcasting system – original Canadian programming.[51]

Niche OTT

32. These same trends are leading to and affecting a burgeoning market of niche OTT players – players that are not appealing to a broad mainstream demographic, but are operating in particular genres, like sports, reality TV or news, or appealing to particular audiences, such as ethnic services.[52]

33. In Canada, this includes services such as:
   - Canadian discretionary broadcaster platforms such as OUTtv, APTN's lumi[53], Wildbrain's Spark, and Ethnic Channel Group's Toobi;
   - Foreign OTT players in particular genres like DAZN, fuboTV[54] and others in sports, NBCU's hayu in reality TV,[55] Amazon's Twitch in gaming;[56] and
   - Other niche foreign services like British TV Britbox and Acorn, AMC+, and live free international news services such as France24 and Al Jazeera.

34. Comparatively speaking, however, Canada's niche/discretionary television market is experiencing a fraction of the disruption occurring in the US. Not only does the US market have far more OTT VOD and streaming services, it also has a far more developed online or "virtual" TV distribution market (vMPVD; equivalent to vBDU in Canada) market, resulting in even greater declines in US MVPD (cable, DTH, Telco IPTV) than in Canada – potentially indicative of trends to come here.[57]

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[50] See, for example, https://thelogic.co/news/the-streaming-boom-has-boosted-foreign-film-and-tv-production-in-canada-raising-costs-for-domestic-producers/ and *The Digital Media Universe: Measuring the Revenues, the Audiences, and the Future Prospects,* Nordicity, January 21, 2022, available here: https://www.digitalmediaatthecrossroads.com/pdfs/nordicitypresentation2022.pdf?v263624521

[51] A number of interviewees commented on this; that the inadvertent effect of requiring foreign streamers to contribute to Canadian programming, if not implemented well, could be a loss of Canadian programming and funding support for Canadian broadcasters, further hastening their demise.

[52] What I deem a niche service vs. a "mainstream" service is somewhat arbitrary at the margins. For example, Corus StackTV could be considered a niche service (as it appeals primarily to a female demographic) and Britbox could be considered a mainstream service (as, like Disney+, it provides entertainment and information programming from one producer in one country, BBC)

[53] https://watchaptnlumi.ca/

[54] *fuboTV buys Canadian rights to English Premier League* https://www.theglobeandmail.com/sports/article-fubotv-buys-canadian-rights-to-english-premier-league/

[55] Launched in Canada in 2019. https://www.iphoneincanada.ca/news/hayu-reality-tv-on-demand-canada/#:~:text=Hayu%20has%20now%20launched%20in,%2C%20Sweden%2C%20Finland%20and%20Denmark

[56] https://www.twitch.tv/

[57] US MPVD homes have declined from a high of 101 million in 2014, to 71.6 million in 2021, with 7.6% declines in the last two years. Meanwhile the vMPVD market, including Hulu Live, fuboTV, Sling TV and YouTube TV, grew to 13.4 million subscribers in 2021. https://nscreenmedia.com/big-tv-channel-bundle-losses-3-7m-2021/

35. Arguably, the most significant "niche" player in the OTT television landscape is YouTube. YouTube is not just about cat videos anymore. Television content, from music videos, to news, older movies and children's programming, plays an increasingly important role in the YouTube ecosystem.

36. Having experimented with, and now largely abandoned, the high end original television drama market, YouTube has doubled down on its unique niche as the globe's largest video platform, featuring a diversity of user generated content (UGC) and third party uploaded media content.[58] Nevertheless, given the rapid expansion of YouTube TV (a vMVPD)[59] and the March 2022 launch of YouTube's AVOD service in the US,[60] similar TV focussed approaches could soon be brought to Canada, competing directly with Canadian BDUs, broadcasters and other OTT providers in both premium and library content.

37. By virtue of its massive market share and revenue share business model,[61] YouTube is now able to claim to be the "largest content licensor in the world", with its "partner program" "covering about 2 million creators, and the company paying out $30 billion to them over the past three years"[62] – "roughly neck-and-neck with Netflix on revenue, actually we are slightly larger and growing faster."[63] Globally, media companies

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[58] "YouTube changed its approach toward Originals in April 2019, instead opting to fund non-scripted programming on music and education, as well as funding more elaborate projects from popular YouTube creators. YouTube Originals' unscripted slate includes shows created with Will Smith, Kevin Hart, Paris Hilton, MrBeast, Lele Pons, Justin Bieber and Demi Lovato. Some of YouTube's original scripted series are still around today, but have moved to other platforms, including Netflix and Showtime."
https://www.forbes.com/sites/johanmoreno/2022/01/19/youtube-winding-down-originals-announces-departure-of-top-programming-executive/?sh=5f95b366732f

[59] https://www.cnet.com/reviews/youtube-tv-review/

[60] https://www.rapidtvnews.com/2022032362234/youtube-launches-avod-service.html#axzz7OT4GdtUA

[61] CRTC 2019 Figures: Industry sources report that YouTube's normal rev share model is 55% to the creator/copyright owner 45% to YouTube. While the vast majority of YouTube revenue to content owners is advertising based, some receive subscription revenue (through YouTube Premium) and can also earn revenues from other sources, including sponsorship, merchandizing, memberships etc. – in many niche cases (for, example, amateur ocean sailors) most of their revenues from these non-YouTube sources.

[62] https://www.tubefilter.com/2021/09/15/youtube-chief-business-officer-revenues-netflix/
2021 advertising revenue at YouTube was reported at $28.8 billion, up 47% percent from 2020.
https://www.tubics.com/blog/youtube-revenue https://www.hollywoodreporter.com/business/digital/youtube-ad-revenue-tops-8-6b-beating-netflix-in-the-quarter-1235085391/

[63] https://www.hollywoodreporter.com/business/business-news/youtube-netflix-revenue-content-licensing-1235013502/, quoting Robert Kyncl, Chief Business Officer at YouTube.

currently represent about 25 percent of YouTube viewing (presumably higher on a revenue basis[64]), another 25 percent is music, and 50 percent is YouTube creators.[65]

38. With its unequaled mix of "professional" and "amateur" third party content,[66] YouTube is, among other things, equal parts broadcaster and non-gatekeeping distribution platform, small part subscription platform and traditional MPVD, and large part free advertising supported platform (i.e. a FAST "channel" and/or platform for "channels"). It is a major competitor for consumer time and media advertising, but, for now in Canada, a relatively minor competitor for television program rights – indeed, it is more an outlet and revenue generator for library television and music programming. Going forward, however, in seeking to "capture an even a bigger slice of the $200+ billion US TV industry", Google's 'triple TV threat' could become an equally strong direct competitor here.[67]

39. Other "social media" platforms, such as Twitter, Facebook and TikTok, are similarly competitors for consumer time and media advertising, but are not current, or necessarily likely, competitors for most TV programming. Their "use" of traditional news and information media content programming, along with their ability to monetize advertising revenue associated with that content, is however a major and growing concern of both broadcasters and print media.[68]

FAST/AVOD Platforms

40. The latest and fastest growing new kid on the block, free advertising supported television (FAST) channels are essentially the Internet's latest twist on good old conventional television.

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[64] The vast majority of UGC generates little viewing and no revenues. By contrast, the vast majority of "professional" music and television programming can reasonably be assumed to generate material viewing and revenues. However, in Canada, YouTube reports that its Creator ecosystem is a major success – a recent YouTube funded study concluding that in 2020 YouTube contributed $923 million to Canadian GDP and 34,100 jobs. https://www.oxfordeconomics.com/recent-releases/From-Opportunity-to-Impact-Assessing-the-Economic-Societal-and-Cultural-Benefits-of-YouTube-in-Canada YouTube has also publicly stated that Canadian YouTubers are the worlds greatest exporters – while generally 55% of YouTube creator revenue comes outside of the home market, in Canada it is 90%, and based on internal tracking, the number of YouTube Canadian creators making six figures is up 30% year over year (presumably 2020 to 2021). Source: Robert Kyncl, CMPA Prime Time Panel Session, 10/2/2022, *DIGITAL INNOVATION IN CANADA'S ENTERTAINMENT INDUSTRY: THE YOUTUBE CASE STUDY.*

[65] Ibid.

[66] I am using this terminology merely as a simple means of explaining the range of content available; I am deliberately not defining terms or implying that UGC is inherently amateur, but nor do I find re-using the term "new media" indicative.

[67] Namely YouTube, YouTube TV, and Google TV on smart or connected TVs. https://nscreenmedia.com/google-triple-ctv-threat/

[68] Something the federal government has committed to address. See, for example, https://pressgazette.co.uk/canada-online-news-act-google-meta-facebook/ TikTok's role in sports could also potentially become competitive.

41. Freed from the costs, geographic limitations and bandwidth constraints of over-the-air local TV, free ad supported online TV channels are filling a consumer love of "free" and feeding internet advertisers' increasing appetite for the consumer exposure that comes from imbedded video-based ad placement. Ironically, the same basic forces of supply and demand, that have allowed traditional TV station operators to raise advertising rates as audiences fall,[69] are now feeding what are becoming their biggest direct competitors, and possibly their future and/or replacements.

42. OTT video advertising is currently the fastest growing online advertising segment. Globally, OTT ad video revenues increased from just over $12 billion in 2013 to $130 billion in 2019 and are expected to hit at least $200 billion in 2023.[70] IAB Canada estimates Canadian "Advanced TV" Internet advertising at only $25 million in 2020, but up 83.4% from the year before.[71] Aggressively assuming a doubling every year since would put it at $100 million in 2022 – just over 3% of the total traditional TV ad market and therefore still not large enough to be coming at the direct expense of traditional TV, but potentially getting there.

43. The acknowledged global leader in the FAST channel market is FilmRise, founded in 2012, and now offering more than 40,000 licensed and original films and television episodes spanning all genres, on multiple platforms.[72] The US FAST market is well developed, supported by more than two dozen FAST platforms, including Pluto TV, Roku and Tubi TV – platforms that play a similar role for streaming services (albeit currently unregulated in Canada) that cable plays for TV broadcasters.[73] Growth in the US has

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[69] TV broadcasters confirm that in the last few years they have accomplished the incredible feat of raising advertising CPMs (costs per thousand), as audience declines, to stay revenue neutral, if not regain earlier lost ground. COVID, while negatively impacting retail advertising, has not had a sustained negative impact on the brand advertising that is the mainstay of mass audience traditional TV. 2022 is expected to continue this trend. However as more and more advertising-based near mass video platforms emerge (FAST channels and, say, if Peacock launches in Canada or incumbent OTT operators launch non-subscription-based streams) and if traditional broadcaster reach declines to non-mass reach status, this 'gift' will hit a wall.

[70] ABI Research, "OTT and Multiscreen Video and Digital Content", as cited in Next TV, Jan 28, 2020. https://marketing.sfgate.com/blog/video-advertising-types-marketers-need-to-know

[71] https://www.iabcanada.com/content/uploads/2021/10/IABCanadaRevenueSurvey_Oct7.pdf

[72] https://filmrise.com/

[73] Of course, these platforms/aggregators carry more than just FAST channels, they also carry SVOD services, including many of the main OTT players. Smart TV manufacturers, such as Samsung & LG are increasingly major players, and Rogers Ignite, Bell Fibe, Videotron Helix etc. can be expected to start carrying more and more streaming services including FAST channels. Amazon Prime is a bit of a hybrid, offering both Amazon and third-party OTT services, and Roku could evolve in that direction too, although it may be that platforms will consolidate around a limited number of operating systems, with Roku as an "independent" potentially being at a competitive advantage. See https://www.mediapost.com/publications/article/359287/roku-is-looking-to-license-content-can-producing.html?utm_source=newsletter&utm_medium=email&utm_content=headline&utm_campaign=120987&hashid=G6ziAU_-RGDQ1D7Y6Fi_BFqzBZg and https://www.nexttv.com/news/roku-ceo-wood-samsung-lg-and-vizio-will-eventually-give-up-on-their-own-os#:~:text=NextGen%20TV-,Roku%20CEO%20Wood%3A%20Samsung%2C%20LG%20and%20Vizio%20Will%20Eventually%20Give,Up%20on%2

been aided by a reported 16-fold increase in ad impressions from January 2020 to January 2022. Pluto TV, available in the US, Europe, Latin America, and Brazil (not yet in Canada), surpassed $1 billion in global revenue in 2021 after just seven years in business.[74]

44. Canada's Blue Ant has made a significant play into FAST channels, having announced in in February 2022 its fourth service, Homeful, joining earlier launched Crimetime/TotalCrime, Love Nature, and HauntTV on Samsung TV Plus and Roku in Canada and Comcast-owned streaming service Xumo in the United States.[75] Blue Ant's FAST Channels are in niches both similar to and different from its discretionary TV channels, and while programming is currently mostly acquisition based, presumably more and more original programming will be added over time, with windowing strategies that complement Blue Ant's and other international broadcast channels.

45. Pure play FAST services compete with hybrid subscription/advertising supported versions of SVOD services, including lower cost versions of HBO Max, Paramount+, Peacock and Hulu in the US. While Netflix, has to date indicated that it has no plans to become advertising based,[76] and CBC's Gem and Radio Canada's Ici Tou.TV remain the only significant mainstream hybrid OTT services available in Canada to date,[77] the integration of AVOD and SVOD streaming options into the same OTT platform appears poised to become increasingly common. In March, 2022, Disney+ announced the pending launch of its ad supported version in the U.S in late 2022, and plans to expand internationally in 2023[78] – an approach presumably seen by later entrants as a good means of rapidly acquiring market share.[79]

0Their%20Own%20OS&text=The%20major%20smart%20TV%20makers,Roku%20CEO%20Anthony%20Wood%20said.

[74] https://cartt.ca/prime-time-2022-fast-channels-provide-the-best-of-two-worlds/

[75] HauntTV was the first, launched on Roku in the US in December, 2020. https://blueantmedia.com/2021/03/blue-ant-media-continues-fast-channel-expansion-in-canada-with-the-launch-of-crimetime-now-available-on-the-roku-channel-as-a-free-live-streaming-offering/ https://cartt.ca/blue-ant-launches-new-lifestyle-fast-channel-on-xumo-in-u-s/?mc_cid=0f79c6504c&mc_eid=13c87adf6a.

[76] See, for example, https://netflixlife.com/2021/09/13/does-netflix-have-ads/

[77] To be clear, most Canadian conventional TV stations and networks have websites where they broadcast live and on demand; Stack TV keeps ads in its live stream. For many independent stations, newscasts (content owned by the broadcaster) are all that is broadcast live/on demand; and some networks require a BDU subscription to access live and/or online content. As a rule, discretionary services do not offer free live or on demand content online. The biggest exception to this is arguably Wildbrain's Spark, which offers popular premium kids' and family programming on AVOD basis globally, through YouTube. https://www.wildbrain.com/content/wildbrain-spark/

[78] https://variety.com/2022/digital/news/disney-plus-ad-supported-plan-launch-1235196231/

[79] Peacock and Paramount+ in the US are also supported. UK broadcaster ITV is set to launch its new OTT platform, ITVX, combining AVOD and SVOD, in the latter half of 2022. ITV reportedly plans to adopt a "digital first" strategy with ITVX, airing shows as much as six to nine months earlier than broadcast channels. https://www.digitaltveurope.com/2022/03/03/itv-introduces-itvx-streaming-service/

46. Linear and advertising supported TV is not dead. It is finding its "always on tap, appointment television" core and niche global audiences online. But whether *mainstream* traditional linear TV can survive along with it, or successfully transition to some competitive combination of AVOD/FAST, remains an open question.[80]

Program Rights and the Canadian Broadcasting System

47. In the past, Canada's separate program rights market was readily sustained by:

- Legacy effects of the original broadcast distribution technology: OTA transmission being an inherently local/geographically constrained medium;
- Supporting public and private elements in the system, recognizing that only the public broadcaster bore the onus of being "predominantly and distinctively Canadian";
- Implementing structural measures and restrictions in support of Canadian owned and controlled private broadcasters (advertising deductibility, licensing, eligible services list, priority carriage, simulcast etc.);[81]
- Support for consolidation and tolerance for VI (the idea being Canada needed large Canadian players that could efficiently compete in an increasingly global market)[82]; and
- The business interest of traditional broadcasters, producers and distributors to maintain separate domestic rights (more windows meaning more revenue opportunity for producers/program distributors; a separate domestic window making more content available at lower costs to broadcasters).[83]

48. Signs of erosion became evident over fifteen years ago with the borderless, unregulated nature of Internet video content, soon exacerbated by the launch of Netflix and Amazon Prime.[84] What has rapidly accelerated this erosion in the last two to three years is the

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[80] Today, online TV viewers basically have two main alternatives to traditional TV – FAST services that are free with ad support and premium SVOD with the best content. The traditional TV system primarily has free local OTA TV and streaming on the one side and (relatively high cost) BDU services on the other. Unfortunately, the traditional BDU system is not well positioned to adapt and appeal to both Canadians who are OK with ads and those who are prepared to pay to avoid them. A bleak outlook for linear/traditional television is now a common theme of US commentators. See, for example, https://www.rapidtvnews.com/2022032562246/moffettnathanson-bleak-prospects-for-us-linear-tv-linear-v.html#axzz7OZHIx3tY

[81] These were outlined in some depth in the 2007 Study.

[82] This, of course, being a significant shift from earlier policies favouring the separation of production, distribution and exhibition (carriage/content separation). Rather than prohibiting vertical integration, today policies seek to limit negative consequences through measures such as safeguards and support for independent production and independent broadcasters.

[83] All these factors, with the possible exception of the last one, are canvassed in some detail in previous program rights papers, hence I do not feel it necessary to go into them in detail here.

[84] Netflix launched in the US in 1999 with a few hundred thousand subscribers. By 2006 it had over 6 million subscribers. In 2010 it launched in Canada. https://www.makeuseof.com/how-when-netflix-start-brief-company-history/ Amazon Prime Video launched in the US in 2011 and in Canada in 2016, after Shomi was shuttered. https://www.cbc.ca/news/business/amazon-prime-canada-1.3895663

emergence of global content producer/exhibitors with direct-to-consumer capability and ambition.

49. As noted above, today, the DTC OTT model, spearheaded by Netflix more than 15 years ago, is evolving from being primarily library driven to primarily exclusive original content based and global.

50. The leaders in this space (Netflix, Amazon, Disney) and those playing catch-up (Paramount+, Discovery+, Peacock) are by design or necessity shifting resources to original proprietary content on their DTC platforms, while harvesting pre-existing "wholesale" businesses (the traditional studio to broadcaster model). And the market is rewarding this shift – increasing the valuation of these companies on the basis of the number of DTC subscribers and, in so doing, devaluing the program licensing model.

51. Simplistically put, general interest OTT is becoming a premium series and movie content destination for the core younger demographic, broadcast is becoming "baby boomer TV" – mainstream network drama, sports, news, reality. The shift is reminiscent of how cable TV took viewers and revenue away from conventional television in the 80s and 90s – initially favouring new entrants, but ultimately causing incumbent conventional TV players to acquire or merge their way into the then new TV paradigm. The trouble is that, unlike the public policy environment of the end of the 20th century, today they are no barriers to foreign entry or incentives that make it easy for Canadian private broadcasters to make a successful transition to OTT.

52. At least somewhat combatting this trend, however, is an emerging international policy consensus in favour of maintaining vibrant domestic media and content sectors, in the face of competition from, and revenue losses to, online global giants. This is manifesting itself in different ways around the world, with an increasing focus on news media.[85]

Current state of the Canadian program rights market

53. While the earliest program rights studies cited issues associated with the availability of multi-platform rights, and, 7-10 years ago, the emergence, with additional costs, of extensions of linear broadcast rights (such as "catch-up rights" and "in season stacking"[86]), in the last five years, these evolved into routine fare. Non-linear viewing

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[85] See example moves by Australia and France to protect and support local news media, and EC and French content quotas on OTT providers such as Netflix. Even in the US, concerns over the plight of local news have led to the introduction of a Senate Bill designed to "level the playing field", by allowing news publishers to negotiate collectively with tech platforms. This despite America's national interest in retaining its global dominance in entertainment content and Internet platforms. See, for example, *Australia pressured Google and Facebook to pay for journalism. Is America next?*, Bill Grueskin, March 9, 2022, Columbia Journalism Review.

[86] In industry colloquial parlance, "catch-up" rights are typically extent seven to 30 days post linear TV broadcast, while "in season stacking" gives viewers the opportunity to watch an entire catalog of back episodes of a particular series, as long as that series is still running. "Life of series exclusivity" does not necessarily grant a broadcaster

features, including “rewind TV” – utilizing a network DVR rather than a consumer PVR,[87] have consequently become fairly standard traditional TV capabilities, typically available on BDU IPTV platforms, broadcaster websites and broadcaster OTT services.

54. The business focus of Canadian broadcaster multi-platform rights acquisitions has, however, shifted in the last three years from providing capabilities designed to keep subscribers inside the regulated BDU system, to using new rights-based features to help maintain historic ubiquitous traditional broadcaster reach by seeking to reclaim those outside that system: so called cord cutters and cord nevers.[88] Broadcasters were initially careful to avoid launching new OTT services that would encourage cord-cutting;[89] now with so many Canadians outside the regulated system, they seek ways to build back traditional ”mass” reach, and with it, maintain their relevance and revenues – even if this may erode the BDU universe.[90]

55. Examples of this include:[91]

VOD rights: it does preclude another broadcaster from running episodes from earlier seasons, or at least provide the incumbent rights holder with a right of first refusal (ROFR) on future seasons and non -linear rights.

[87] There being no effective distinction between the two from a use perspective, but a big distinction from a copyright perspective: an in home personal video recorder (PVR) availing itself of recognized personal use exemptions; a network digital video recorder (DVR) in a grey area and triggering new potential “reproduction” claims from rights holders.

[88] The 2015 CRTC Let’s Talk TV decision (Broadcasting Regulatory Policy CRTC 2015-96) can be seen as an attempt at ensuring this would not be necessary. Anticipating that greater consumer choice was inevitable, the CRTC sought to unbundle historic ’big tier’ packaging and mandate à la carte/small $25 basic TV. I will not opine here on whether that policy should be seen as a success or failure; too early for its time or prescient. In any event, in the result, it demonstrated a basic economic principle that major incumbents, while not immune from market forces, can certainly shape them. And those incumbents recognized that they continue to hold significant market power over TV services (their key suppliers) and customers, and for the last five years have been able to largely maintain margins, by keeping aggregate consumer subscription fees high, and, where they can, driving down service wholesale fees, and in the process, trimming the number of Canadian services offered. This was arguably a voluntary strategy on the part of Canada’s largest multi-station groups - allowing them to put more resources into their stronger brands; but not so voluntary on the part of small independent services that have lost carriage, subscribers and/or revenues.

[89] Indeed, as of a few years ago, major BDUs were seeking to restrict discretionary service online activities through clauses in affiliation agreements.

[90] For obvious reasons, different broadcasters will have greater or lesser concerns about inadvertently or directly contributing to that BDU erosion. VIs with relatively stable BDU platforms and strong OTT plays, particularly Bell and Quebecor, are in a better position to ensure their online television activities complement their BDU businesses. For other broadcasters, including Corus and the independents, the cost benefit analysis favours shoring up media assets through online/OTT strategies. Rogers and Shaw, suffering more erosion of BDU subscription than Telus, Bell and Quebecor, and having shuttered their broad OTT play, Shomi, are upgrading their BDU platform to IPTV and seeking greater scope and synergies in a declining broadcasting environment through merger.

91 In addition, Radio Canada’s Tou.TV launched in 2010 and CBC Gem launched in 2018.

- Quebecor's Club Illico.[92] Since its launch in 2013, Club Illico has provided a broad, largely complimentary, OTT home for French-language series, dubbed foreign series and feature films – with an ever increasing number of titles and original Quebec production slate. Originally available only to Videotron subscribers, Club Illico later became available to non-BDU subscribers, and in February 2021, then in 650,000 homes, officially went Canada-wide.[93] Quebecor also launched Vrai in 2021, its streaming platform for unscripted content, including original and acquired French-language lifestyle shows, documentaries and comedy.[94]
- Cravetv's evolution. Launched as a premium add-on to BDU service in 2014,[95] Crave became a standalone hybrid VOD service, merging with affiliated pay tv service, TMN, in 2018.[96] In 2020, Crave expanded into the French-language Canadian market with French language and dubbed series and movies.[97] While broadcast windows for drama content are shared between Crave and CTV, the same content does not appear on Crave and CTV branded channels at the same time.[98]
- Rogers' March 2016 Sportsnet Now launch and Bell's TSN Direct launch in June, 2018; given the relatively high consumer price points, both clearly targeted at the mega sports fan who has little to no interest in other traditional television;[99] and
- OUTtvGo's launch in Canada in September 2017,[100] and in the US (as of then, branded simply as OUTtv) in March 2021,[101] moves that made eminent sense given the challenges OUTtv faced in maintaining broad distribution post *Let's Talk TV.*

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[92] https://videotron.com/divertissement/club-illico
[93] https://corpo.videotron.com/en/pressroom/videotron-releases-club-illico-app-android-ios-and-apple-tv
[94] https://corpo.videotron.com/en/pressroom/videotron-unveils-new-streaming-service
https://corpo.videotron.com/en/salle-de-presse/vrai-coeur-des-intrigues-avec-des-productions-originales
https://corpo.videotron.com/en/pressroom/six-original-comedies-coming-new-vrai-streaming-service
[95] https://www.hollywoodreporter.com/news/general-news/canadas-bell-media-announces-launch-753595/
[96] With Showtime, Vice, Comedy Central and HBO programming,
courtesy of the CRTC's 2015 hybrid vod exemption order. https://crtc.gc.ca/eng/archive/2015/2015-355.htm
[97] https://www.ctvnews.ca/entertainment/crave-bulks-up-on-french-programming-with-extensive-selection-of-tv-and-films-1.4777549
[98] In other words, Bell continues to position Crave to not directly compete with, or be a substitute for, its traditional TV offerings or its IPTV BDU business. CTV Go features an open free live stream of the CTV Network programming, and catch-up viewing. Live and catch-up viewing to CTV Drama or CTV Sci-Fi still requires a BDU subscription.
[99] https://awfulannouncing.com/international/tsn-direct-canadian-ott-unlike-us-networks.html. Subscription costs ranging from $14.99 to $34.99 per month per service. The calculus presumably made by Rogers, and ultimately Bell, in launching these channels is that they would not cannibalize their respective BDU offerings. Rather, the moves were made to maintain the two companies' effective duopoly in the professional sports franchises of most interest to Canadians (NHL, CFL, NBA, etc.), aided by the fact that most sports is broadcaster produced, meaning there are no additional rights to acquire from producers, just escalating prices for sports rights generally.
[100] https://outtv.ca/press/outtvgo-app-launches-on-apple-tv/
[101] https://playbackonline.ca/2021/03/30/outtv-launches-svod-channel-in-the-u-s/

56. A more recent key example of this phenomenon is Corus' Stack TV (launched through Amazon Prime Video Channels in June, 2019,[102] by a then BDU affiliated entity, in effectively an *anti*-cable play) – allowing Corus to reach Canadians outside the system on its own OTT platform, and thereby achieve a number of important programmer victories:

- First, Corus found a way to directly monetize its programming services, including its conventional TV network, Global. The latter (like all conventional TV services) is not entitled to receive wholesale fees from BDUs;
- Second, Corus successfully navigated previously problematic challenges of obtaining the necessary streaming rights to linear broadcast, particularly, conventional TV, programming;[103]
- Third, Corus created new leverage vis-à-vis BDUs to ensure their services are appropriately compensated and packaged;[104] and
- Fourth, Corus effectively found a means of "making up" for revenue losses in the traditional broadcasting system. With a reported 725,000 paying subscribers to its streaming services,[105] and a monthly sticker price of $12.99 for Stack TV, Corus may now be bringing in roughly $100 million annually in gross online subscription revenues – excluding distribution costs (which could be a material percentage of gross revenues), marketing, and (presumably modest) incremental rights costs.[106]

57. Corus' move has coincided with, and potentially been a catalyst for, similar recent moves, launched and in planning stages, by Canadian independent broadcasters and

[102] https://globalnews.ca/news/5344114/stacktv-corus-tv-package-amazon-prime-canada/ Stack TV includes Global TV (a conventional television station), and discretionary services. Food Network Canada, HGTV Canada, W Network, History, Adult Swim, Slice, Showcase, National Geographic, Teletoon, Treehouse and YTV.

[103] Historic distinctions between rights clearances (viz residuals) for conventional TV and discretionary are less relevant today, but still remain.

[104] This includes the recent announcement of StackTV being launched on Rogers Ignite and Rogers Ignite Smart Stream, a BDU OTT platform that Rogers positioned as a major "intangible benefit" for its proposed Shaw acquisition. https://www.newswire.ca/news-releases/stacktv-now-available-on-rogers-ignite-tv-and-ignite-smartstream-841013012.html (at the time of writing, a CRTC decision on this transaction was pending).

[105] Including Nick+ https://www.newswire.ca/news-releases/corus-entertainment-announces-fiscal-2022-first-quarter-results-811440550.html#:~:text=As%20of%20January%2010%2C%202022,subscribers%20on%20October%2021%2C%202021

[106] Corus does not break out StackTV vs. Nick+ or its other paid streaming services. Amazon reportedly takes between 15% and 50% of subscription channel fees, with 30% being the average. https://variety.com/2018/digital/news/amazon-prime-video-channels-tv-revenue-estimates-1203083998/ Presumably, Corus would have been in a position to negotiate a revenue share in the 70% to 85% range, meaning they could be netting over $70 million annually. Stack TV would also contribute advertising revenue through its live streams.

some independent BDUs, from APTN's lumi launched in the fall of 2019[107] to VMedia's vBDU OTT service, RiverTV, launched in June, 2020.[108] Bell, Rogers and Quebecor have however remained more cautious about non-BDU distribution of their discretionary television brands and content, seeking to supplement their traditional BDU franchises rather than cannibalize them.[109]

58. Meanwhile, the mere *availability* of broadcast rights for acquired programming has become an issue.

59. Three to five years ago, the supply of admittedly increasingly costly (but still profitable) linear, catch-up and in season rights for popular programs remained secure. For the most part, there were still more suppliers for Canadian rights than bidders. Today, demand exceeds supply, linear rights to an increasing portion of foreign programming (let alone SVOD rights) are not available at all, prices for available product are increasing significantly given multiple broadcaster and OTT bidders, and *de facto* broadcaster exclusivity is disappearing.

60. While the challenges in obtaining rights to acquired programming are not exclusive to series drama, it is certainly in the drama category that they are most pronounced. The "Drama and comedy" program category has always been the most popular in both English- and French-language traditional TV markets, garnering 39% and 38% of viewing hours, respectively, in 2019-2020.[110] Not surprisingly, however, drama series and movies have been the primary driver for OTT; the erosion of such programming on traditional TV is therefore striking a core value proposition.

61. These trends play out differently in different segments of the market – both language and nature of service. We will start by looking at conventional TV, discretionary TV, and Pay TV/VOD (BDU and online).

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[107] https://corporate.aptn.ca/features/innovating-indigenous-storytelling-aptn-lumi-streams-our-stories/#:~:text=May%201%2C%202020&text=APTN%20met%20these%20challenges%20head,for%20and%20about%20Indigenous%20Peoples.

[108] https://mobilesyrup.com/2020/06/04/vmedias-canada-rivertv-streaming-app-now-available-over-30-live-tv-channels/ featuring Corus and other independent Canadian channels, but no sports.

[109] For example, none of Rogers', Bell's or Quebecor's TV channels are available on VMedia's RiverTV vBDU offering. Moreover, as earlier noted, while Bell Media and Quebecor are significant players in the OTT space with Crave TV and Club Illico/Vrai respectively, these are more premium SVOD/paytv plays offering largely different programming than that aired on the companies' broadcast networks and discretionary services. It is also notable, however, that Bell & Quebecor are each taking materially different approaches with their OTT offerings: Crave, bilingual, being offered through other BDUs as well as OTT; Club Illico and Vrai, French-Language, offered only on Videotron's own BDUs and OTT. It is not clear whether these different approaches stem from differing strengths and market positions, or intentionally different strategic objectives (e.g. growing the OTT business vs. shoring up overall business interests).

[110] https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2021/rad.htm#a7.1.1

Conventional TV market

62. For linear conventional TV, rights issues today are more those of quality and cost than strict availability, but windows are also being compressed.[111]

63. Canadian conventional TV stations networks remain in a strong position to purchase at least first window broadcast rights from US networks (the 4+1). These acquired rights continue to typically include at least one linear broadcast "rerun" (or unlimited in season reruns), catch up rights and in season stacking (at least for primetime programming).

64. The key reason why these rights remain available, despite US Network TV corporate ties to OTT services, is because *the US Networks are here on BDUs anyway*, by virtue of our three decade old "compulsory license" retransmission regime. This regime, a foundation of cable television in Canada and institutionalized in copyright through the obligation to pay retransmission royalties, allows regulated BDUs in Canada to carry or retransmit local TV stations, including US signals, without permission or direct compensation to those stations.[112] By contrast, the US never permitted out-of-market local station retransmission; and while that country introduced a direct compensation regime, *retransmission consent*,[113] in the 1990s, Canada took a different path and instead introduced a BDU contribution regime – today an important (albeit declining) source of funding for the CMF, independent production funds and local news, as well as remaining the source of funding for community TV channels.[114]

65. In addition, simultaneous substitution (or "simulcast"), introduced in the 1970s, created a limited (but simple and at the time highly effective) way for Canadian broadcasters to maximize their monetization of acquired US program rights.[115]

66. In large measure due to the lucrative retransmission consent regime,[116] US networks are likely to continue to exist for the foreseeable future, and as long as the Canadian

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[111] We will speak more about the French-language market in Canada below, but despite significant differences (for example, reliance on simulcast) the basic issues and trends are the same for both the English and French-language markets.

[112] The compulsory licence set out in section 31 of the *Copyright Act* gives a retransmitter the right to retransmit any local or distant signal upon payment of royalties (the royalties payable applying only for the transmission of distant signals).

[113] For history, see for example https://www.nera.com/content/dam/nera/publications/2014/PUB_Retransmission_Consent_0714.pdf

[114] The origins being Public Notice CRTC 1993-74- *Structural Public Hearing*, wherein the Commission announced the creation of the new cable funded production fund. For current policies on BDU contributions, see the CRTC's Policy framework for local and community television, Broadcasting Regulatory Policy CRTC 2016-224.

[115] For more background, see, for example, references in the Broadcasting and Telecommunications Legislative Review Panel Report, cited at Appendix A herein.

[116] The average US local network station now reportedly charges cable companies a fee of $3 to $4 per subscriber, generating over $3.3 billion in annual revenues for US local TV stations.

retransmission regime and simulcast also continue to exist and Canadian broadcasters retain critical mass, selling first broadcast OTA rights to Canadian private conventional TV stations *remains the rational economic decision* for rights holders.

67. As is becoming increasingly evident, however, the fact that it may remain the rational economic decision, doesn't mean the sale of linear broadcast rights to Canadian local broadcasters will always continue or will happen in a way that is sustainable. There are at least six factors relevant to this.

68. **Availability**. Consultations conducted by the Author revealed that at least one Canadian private conventional TV network[117] recently found itself unsuccessfully **bidding against Amazon Prime** on a prime time US network show. On a specific title cost-benefit basis, it seems highly unlikely that such a show would be worth more to Amazon (which would not have exclusivity on the first broadcast widely available on the US network in Canada) than a broad coverage Canadian network. Amazon Prime has an estimated household reach of under 20%.[118] As a 'free' advertising supported service (with the acquisition of appropriate streaming rights), a Canadian conventional TV network could have an effective reach of almost 100% - via BDUs, OTA transmission, any affiliated OTT platform and should it so choose, its website, and it would benefit from simulcast. On a broader, awareness, brand and subscriber building basis, however, Amazon's move is not irrational at all. Amazon cannot and would not look at acquisitioning or commissioning decisions on a per show return basis.[119] If the show is a hit, cord cutters and cord nevers will want to subscribe to Amazon Prime to get it (unless they choose to (re)subscribe to cable and get a PVR!).[120]

69. **Promotion.** In what might be called a symbiotic/parasitic relationship between the US and Canadian conventional networks, while US Network distribution divisions value the significant licensing fees they receive from Canadian broadcasters (in 2020 approximately $1.4 billion annually[121]), the new/favourite kids on the corporate division

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https://potsandpansbyccg.com/2019/10/23/the-fight-over-retransmission-consent/
https://realeconomy.rsmus.com/retransmission-fees-give-lift-to-tv-broadcast-revenue-as-advertising-declines/

[117] I use the term "network" here not in its CRTC defined sense but to refer to any system of stations with broad coverage – this would include CTV, CTV2, Global, Citytv, 'IndieNet' (a loose coalition of independent stations), TVA and Noovo.

[118] https://www.androidauthority.com/amazon-prime-canada-1174749/ 2 million Amazon subscribers over 14 million Canadian households would be approximately 14%

[119] Amazon's quick decision to green light a second season of its hit *Reacher* ("In the first three days hours after its launch, *Reacher* reportedly ranked among the streamer's Top 5 most-watched series ever in the U.S. and globally") is but one example of this. https://tvline.com/2022/02/12/why-reacher-was-renewed-season-2-changes-from-book/

[120] Ironically, there could be consumers who choose to do this, but at a cost of only $79.99 annually (including free shipping) for Amazon Prime vs. $300 annually for the cheapest BDU package (plus PVR), it would take more than this one show. Rabbit ears would be the more likely alternative.

[121] CRTC Aggregate Annual Returns. (Assumes total programming and production less Canadian programming for all conventional, discretionary and on-demand services would be predominantly US programming.)

block are the US network's DTC/OTT plays, resulting in **US Nets demanding airtime** to promote their Canadian DTC offerings as a condition of selling broadcast rights to Canadian networks. This practice was reported by a number of Canadian broadcasters, notably on the part of those US networks that have recently launched their DTC offerings in Canada, and have little brand awareness (e.g. Paramount+ affiliated with CBS). In an ironic twist, the bullhorn of conventional television is being recognized by the new DTC players that seek to bring it down, but Canadian broadcasters are so in need of popular content that they are doing deals that have the long term effect of undermining them.[122]

70. **Cost.** Interviewees report **ongoing and significant increases in rights costs**, particularly to the most popular fare. Part of this, as always, is due to competition within the Canadian broadcasting space (which now includes Bell's well-funded Noovo, competing with TVA for French-language rights to US programming, but with the additional potential of combined multi-platform Canada English-French market buys[123]). But part is also because Canadian broadcasters are not just competing with each other; even if competition with foreign OTT for linear broadcast windows is rare, competition for broader rights is not.

71. **Scope of rights and exclusivity**. As noted, "linear TV" broadcast rights have already generally expanded to comprise over the air, BDU transmission and now streaming, as well as limited VOD rights. The difficulty for Canadian broadcasters is in going beyond that and what it means for windowing and exclusivity. Broadcasters report that traditional windows are being narrowed, and that the historic life of series exclusivity is under threat. Moreover, for US Nets with affiliated OTT platforms available in Canada, or potentially to come**, post broadcast exhibition windows (however that is defined) SVOD rights are simply not available** – these are virtually always going to, or being reserved for, a US network's affiliated OTT service.

72. **Quality/Viewership**. Interviewees had different perspectives on the quality of US network fare. While most commented on the poor quality of daytime programming, a number felt that prime time programming remains relatively strong – at least relative to historic norms (for example, recognizing that network fare is intentionally designed to be more family friendly for the broadest mainstream audience, and deliberately not edgy or with excessive or graphic images, nudity, profanity. Violence being OK.) That

[122] The equivalent on the BDU side being BDUs promoting and packaging with OTT services like Netflix and Disney+. On the one hand, a BDU reaffirms its position as content aggregator; on the other, does such a BDU merely grow competing services that at some point have no further need of it? The major ISP/Wireless players in replacing BDUs and playing the role of OTT content aggregator being itself an interesting possible future development. See https://www.nexttv.com/news/is-verizon-plus-play-the-true-next-generation-mvpd

[123] TVA is the premiere TV network in Quebec, and both Bell and Quebecor are multi-platform with BDU and OTT entities, Bell's ability to, as appropriate, combine French and English market resources is one Quebecor can only someway replicate by combining forces with a Corus or Rogers.

contrasts with television commentators who increasingly bemoan the lack of originality in network fare, the constant reworking of successful themes or franchises (e.g. hospital procedurals, NCIS 347). Regardless, greater programming choice and convenience on DTC offerings is accelerating viewing shifts away from conventional TV. The net result is, at minimum, a **decline in relative quality or attractiveness of acquired conventional TV rights** commensurate with declines in reach and audience.

73. **Revenues/Profitability**. All of the above is of course happening commensurate with a six year decline in Canadian conventional TV revenues and profitability.[124] A vital, already hard hit, segment of Canadian broadcasting is now getting hit with a whole new set of challenges.

74. There is arguably at least one **silver lining**. Courtesy of Netflix and the popularity of shows like *Money Heist* and *Lupin* there are some indications that Canadian audiences are opening up more to non-US, even foreign language, series. Moreover, as conventional TV broadcasters around the world seek to combat foreign OTT offerings, their mutual interest in producing content that can succeed around the world will only increase. Interviewees cautioned, however, that even in Quebec, such non-US shows are "on the margins" – more critical acclaim than audience. Nothing to date has ever matched the consistent high audience delivery of top US (in English Canada) simulcast drama series.

75. These six factors play differently with discretionary television, and as we shall see, are actually leaving it far worse off in certain genres.

Discretionary TV market

76. The golden child of Canadian television for more than thirty years – the segment that provided a panoply of consumer choice and drove success and profitability for broadcasters and television distributers – is now itself, by most indications, under greater threat from program rights challenges than the conventional TV business it has squeezed down to less than a third of traditional TV viewing.[125]

77. Almost all interviewees commented on the reality that US Cable Nets/studios are diverting resources to premium DTC offerings – particularly as concerns series drama.[126]

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[124] Through to 2020. The good news is that industry reporting puts 2021 revenues slightly higher.

[125] CRTC Open Data. As at 2020, private conventional TV had 24.8% of the traditional TV market, CBC/SRC had 3.4% and US conventional TV stations had 3.9%.

[126] This does not appear to be the case with conventional TV, although it may also be happening there to a lesser extent. In an environment where US cable distributers are cutting costs and dropping channels, US networks need to maintain their "must watch/must carry" status if they are to continue to receive the considerable revenues they receive through retransmission. Thus while they would presumably be cutting costs including peripheral programming, relative to reductions in revenues, it would be a dangerous strategy to cut the prime time programming that secures favourable carriage terms.

One knowledgeable interviewee called it a "strip mining of assets to put stuff online" and said US Cable networks are in a "heap of trouble". And to the extent these Studio-Cable TV conglomerates are in a position to feed their own DTC arms in Canada, rather than licensing to Canadian discretionary TV broadcasters, that choice is almost a no brainer. Why accept wholesale licence fees when you can sell retail?

78. Canadian discretionary services, whose historic partnerships with US players guaranteed programming supply, branding and profitability, are finding that the taps are being turned down or off completely.[127]

79. Availability of discretionary TV rights has become a major issue. And even if rights are available at a justifiable cost, quality is often down, and all the issues noted above with respect to conventional TV, from scope of rights to viewership, revenues, and sustainability, are more pronounced.

80. Studio-CableTV-DTC conglomerates are increasingly feeding their DTC arms rather than licensing to Canadian discretionary TV broadcasters. To the extent that cable TV rights are made available, they are increasingly limited, typically with a small catch up window but no SVOD rights. Interviewees also report North-American rights acquisitions/tie ups of certain cable TV programming taking formerly available Canadian rights off the table.

81. For some years now, originals/exclusive content has become more crucial to drive the success of discretionary services. Even if consumers subscribe to big packages, and are happy to occasionally watch a particular discretionary service for an old movie or TV series available elsewhere, in today's largely non must carry world, BDUs, looking for places to cut costs, have little tolerance for channels that do not add material value.[128]

82. In response, larger broadcasters have harvested a number of their smaller acquisition-based specialties, putting their Canadian program production dollars into their best brands – and particularly favouring lifestyle/reality/sports/news/information based

[127] Indeed, partnerships with US players are increasingly fluid, opportunistic, and short-lived. For example, Disney supplies CTV with one of its top shows, Grey's Anatomy, but is also a major partner with Corus on its children's channels (including, for now, Disney XD), whose rights were taken from Wildbrain's Family Channel in 2015. https://www.theglobeandmail.com/report-on-business/corus-gains-canadian-rights-to-disney-channel-content/article23983642/. The WarnerMedia-Discovery Merger may also well prompt shifts in current alliances with Canadian broadcasters; WB currently sells perhaps 70% of its prime time network programming to CTV and 30% to Global; the HBO/WB partnership with Bell is strong and has lasted 20 years, CTV also owns the Discovery Channel. None of this is guaranteed to continue.

[128] Effectively defined as whether significant number of subscribers will go elsewhere as a result. This is not to say that smaller broadcasters with older fare (movies/series), such as Silver Screen Classics and Hollywood Suite, are not succeeding – they certainly have the advantage of being more able to obtain rights – but the onus is very much on them to demonstrate that their costing, branding, and presence of some exclusive content do not allow them to be easily substitutable

channels.[129] To avoid being dropped, smaller independently owned discretionary services have sought niche exclusive content, including original production, diversified into international plays and their own digital platforms, but most are still losing penetration at a higher rate than services owned by larger vertically integrated broadcasters.[130] The larger drama oriented discretionary services (e.g. CTV Drama, CTV SciFi, W and Showcase) are now at particular risk – It is hard to imagine they will all survive, at least in their current form. Given the primary OTT battlefield of premium drama series/movies, many current multi-year output deals for such channels are unlikely to be renewed.[131]

83. That said, the larger non-drama based discretionary services – those primarily focused on Canadian and original, including live programming, and those partnered with the handful of US Cablenets that are so far largely staying out of DTC game[132] – seem relatively secure for the foreseeable future.

Pay TV, (traditional) VOD and OTT markets

84. By virtue of the significant market presence of foreign OTT and the CRTC's hybrid VOD (HVOD) exemption order, the historically regulated VOD and PPV sectors have declined at a rate three times greater than discretionary services,[133] and, in large part, are effectively being merged with Canadian OTT and replaced by foreign OTT.

85. Thus, Bell's TMN and Super Écran is now part of CraveTV, Videotron has its Club Illico and Vrai, and Rogers, with no OTT platform of its own, currently promotes and includes Disney+ in its Ignite TV package.[134]

86. For the reasons discussed above, competition with foreign OTT is having major impacts on the availability, quality and cost of the premium series and movie rights on which Canadian on demand/OTT services rely.

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[129] For example, Corus' closure of IFC Canada, CosmoTV and BBC Canada, and Bell's closures of Fashion Television and Book Television.

[130] *Analysis of Financial Performance of Independent Discretionary Television Services Compared to Vertically Integrated Discretionary Television Services*, Boon Dog Professional Services Inc., February 2021 Filed as Appendix to an intervention of the Independent Broadcaster Group (IBG) in Broadcasting Notice of Consultation 2021-281.

[131] For example, CTV Sci Fi losing programming from SyFy, owned by NBCUniversal.

[132] Including, for example, Canada's History Channel (with A&E's History Channel in the US) W's Hallmark programming (from the US Hallmark Channel) and HGTV (as long as HTV Go does not launch in Canada).

[133] From 2016 to 2020 on-demand (PPV & VOD) services lost over a quarter of their revenues: a -7.4% CAGR, compared to -2.6% for discretionary services. CRTC Statistical summaries.

[134] https://www.rogers.com/promotions/tv-internet?ecid=PS_R048_R_IGN_Dec_20_IIT_M5OMUL&ecid=PS_R0050_R_CAB_Apr_19_ALW_YNIUMZ&s_kwcid=AL!5244!3!548533973425!p!!g!!tv%20rogers&gcm_uid=AMsySZaMDT1S6WDnuMHcEUiTKwq6&gclid=CjwKCAiAsYyRBhACEiwAkJFKorZMNBZZCSfH0zCOGM-4y1pCuy7MfNvjnARoLGsS4j1uMKEqakehSBoCVvEQAvD_BwE&gclsrc=aw.ds

87. This is rapidly becoming a major issue for first run (post theatrical) movie rights that are the mainstay of Canadian pay TV services TMN, Super Écran and SuperChannel.

88. Of the five major US studios from whom Canadian Pay TV services would have ordinarily acquired movie rights, two (Disney[135] and Paramount) now have their own OTT plays in Canada, and are tying up first run rights for their own platforms.

89. This leaves Canadian pay TV services competing with Netflix and Amazon Prime for first run exhibition windows that are themselves becoming increasingly shorter (12 to 15 months) and subdivided.[136] As it stands, SuperChannel has essentially been shut out of major studio pay rights, and Bell competes with OTT players for annual agreements with Warner Bros, Sony (Columbia/TriStar), and Universal – the latter expected to end should (or when) affiliated Peacock decides to launch in Canada. Sony, the only independent major, and the remaining independent mini majors (Lionsgate, STX, and DreamWorks/Amblin[137]) are in the enviable position of having numerous bidders,[138] negotiating leverage having now shifted from the historic limited number of Canadian pay services to the limited number of unaligned studios, with costs a "runaway train".[139]

90. And while Bell Media/Crave currently owns the Canadian rights to Warner Bros movies and top ranked premium HBO, Starz, and Showtime series content, there is serious risk that Bell will not continue to succeed in convincing HBO to renew and not bring HBOMax into Canada directly.[140]

91. Unfortunately, the likelihood is that the situation can only get worse – causing harm to both the BDU sector and the nascent Canadian OTT sector, and quite possibly locking Canadian broadcasters into the old largely linear non-premium drama television world.

Genres, language markets and other sub-sectors

92. Within the broad platform-based distinctions. noted above, the system is witnessing varying degrees of impact. Services operating in genres or language markets that are, by definition, smaller, more niche and more dependent on foreign/acquired content, such as third language ethnic services, and also suffering from piracy, are highly

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[135] Disney acquired 20th Century Fox in 2017.

[136] While pay TV and SVOD rights remain officially different, they are increasingly treated as one, and pay TV rights (historically up to three years) now divided into a Pay 1 window, say 12 months on TMN, then a Pay 2 window, say 12-18 months on Amazon, then a further Pay 3 window, say 12-18 months on Netflix etc. To the extent TMN/Crave/Super Écran can obtain pay TV rights, their ability to continue to obtain Pay 1 windows is not assured.

[137] MGM was acquired by Amazon in 2021, an acquisition that closed in March, 2022. https://www.nexttv.com/news/amazon-turns-the-screws-on-the-ftc-looks-to-finally-close-its-dollar845-billion-purchase-of-mgm https://www.iclarified.com/85240/mgm-is-now-owned-by-amazon

[138] Particularly Netflix and Amazon Prime, who are not affiliated with a major studio, but also including Disney+.

[139] Interviewee comment.

[140] Further complicated by the WarnerMedia-Discovery Merger, and plans to combine HBO Max and Discovery + in international markets. https://variety.com/2022/tv/global/hbo-max-discovery-plus-international-1235205397/

vulnerable. By contrast, services that have more original content – either by virtue of licence requirements and must carry status (such as APTN), are more reality or information based (the Weather Network, Bloomberg News, HGTV), have grown their distribution platforms domestically and internationally (Blue Ant channels, OUTtv) and/or feature highly desirable exclusive content (sports channels), especially if they have lesser dependence on US dramatic series (French-language services), are holding their own, or at least, are not currently as vulnerable.[141]

French-Language Market

93. The relatively smaller size of the French-language television market in Canada has always presented unique challenges. Amortizing the costs of original television programming over a market that is less than a third the size of English Canada is simply that much harder.

94. That said, the distinctiveness of Quebec and the natural barrier presented by the French language also provide certain advantages in that market. Production costs are, by necessity and with consumer acceptance, materially lower for French-language Canadian programming than for English-language Canadian programming (which are themselves, materially lower than US programming).[142]

95. While bilingual in presentation, with programming that is typically subtitled, and sometimes dubbed, foreign OTT services with their primarily US content base are generally not as attractive to French-speaking Canadians as domestic television sources with primarily original domestically-produced French-language programming. Moreover, US brands that may have resonance in English Canada, such as Paramount+, Discovery+ and Peacock, have little name recognition in French Canada, and therefore have far more work to do, and far less potential upside, in seeking to establish themselves as material DTC players.

96. Notable differences between the English and French television markets also include:

- strong original content offerings in French Canada that can still achieve significant audiences;
- the star system in Quebec;[143]

[141] Other important television "sub-sectors/genres" include public broadcasting, and in particular the CBC, children's programming, documentary, and reality/lifestyle programming. Regrettably, the broad scope, timing and budget of this study did not permit the Author to delve into such areas in any detail.
[142] For series drama. French-language Canadian programming tops out at roughly $600-800K per hour, English-language Canadian programming at $2-3 million per hour, and US programming at $6-8 million per hour on network television (but can go as high as $20 million per hour on premium TV).
[143] That said, interviewees commented on how Quebec's star system was "closed" and primarily traditional media based; the risk being that as younger (virtually all bilingual) Quebecers disconnect from traditional media, they disconnect from the star system as well.

- an increase in competition (to the benefit of consumers) as between Quebecor and now Bell (with Noovo and Crave), but also notable cooperation (TV5Unis content on Ici Tou.TV);
- lesser relative viewing and economic reliance on US programming;
- viewer comfort with dubbing (generally preferred over French-language sub-titles); and
- a history of older movies (beyond 5-7 years) being sold on an exclusive basis, as opposed to generally non-exclusively in English Canada.

97. These differences have, to date, manifested themselves in an arguably stronger domestic rights market for French-language content, and a more competitive French-language TV sector. For example, the CRTC reports:

- In 2020, 63% of average weekly viewing hours of French-language content on traditional television went to Canadian programs, compared to 42% to English- and third-language Canadian content programs in the English-language market;
- From 2019 to 2020, in the French-language market, average weekly viewing hours of French-language Canadian programs increased by over 15 hours with viewing of non-Canadian programs declining by 4 hours. During the same period, for the English-language market, average weekly viewing hours of Canadian programs held steady, while viewing of non-Canadian programs declined by over 18 hours; and
- Fewer Francophones watched television exclusively online than Anglophones (in 2020, 14% vs. 22%).[144]

98. Notwithstanding COVID-19 effects,[145] it is hard not to see the relatively lower loss of viewing hours to non-Canadian programming in French Canada as indicative of both less consumer interest in foreign programming and lower overall dilution from foreign OTT. Alarmingly, however, from 2016 to 2020, the French-language television market in Canada is reported to have suffered slightly greater revenue losses than English Canada, including:

- a -3.8% CAGR from 2016 to 2020 for French-language discretionary services compared to -2.8% for English-language; and

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[144] CRTC 2021 Monitoring Report and open data sets. https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2021/rad.htm#a7.1.1

[145] For example, we know that, early in the pandemic, TV viewing, particularly to news, shot up while sports viewing declined. These changes were, however, not as pronounced in the French-language market as the English-language market. Ibid.

- a -6.3% CAGR over the same period for Quebec conventional television stations vs. -5.6% CAGR for the rest of Canada.[146]

99. As a general observation, it is fair to say that the French-language television market is dealing with same general trends in respect of program rights as in English Canada,[147] but that these are less pronounced. Whether this means that the impacts on French-language broadcasters are merely lagging those of their English-language counterparts, or that the French-language broadcasting market has an inherent and sustainable advantage over the English market viz program rights is, however, at this juncture at least, impossible to tell.

100. What it does not mean is that there is any less concern over the influx of foreign OTT players into French Canada. In fact, arguably, quite the opposite. Not only are concerns over culture and identity generally more widespread and top of mind in Quebec, the threat to the French-language posed by the increasing availability of English-language programming is a major political issue.[148] English Canada's historic affinity for US culture may allow it to be colonialized by US OTT services without much political or consumer resistance; that is not, however, something French-language Canadians would accept lightly.

Indigenous Programming

101. The challenges facing Indigenous programming have interesting parallels and differences with both the English- and French- language markets more generally.

102. For Indigenous programming, issues of market size have parallel implications to those affecting French-language programming, but they are obviously significantly more pronounced. The market for Indigenous language TV programming or programming targeted to Indigenous audiences in Canada is too small to cover production costs; such programming is highly dependent on subsidy or structural support.[149]

103. However, Indigenous culture itself is not a barrier to production; in fact, the converse is true. An "awakening" in terms of public consciousness and awareness of the history and

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[146] CRTC Statistical Summaries.
[147] Including greater threats to movie and drama series-based channels like Super Écran, Z, Vrak and SériesPlus
[148] Indeed, there are increasing concerns that the linguistic barrier is not a barrier to US subscription services like Netflix anymore, particularly among younger almost universally bilingual Quebeckers. See, for example, https://transformation-numerique.ulaval.ca/enquetes-et-mesures/netendances/2022-01-portrait-numerique-des-foyers-quebecois
[149] For example, APTN relies primarily on the "structural support" of mandatory carriage on basic by BDUs pursuant to a mandatory order under s. 9(1)(h) of the *Broadcasting Act*. APTN also benefits from subsidies by way of CMF funding for certain productions it commissions and/or acquires.

plight of Indigenous peoples in Canada, the US and elsewhere around the world has spawned production of mainstream US, Indigenous-themed television series, including *Reservation Dogs* on Hulu in the US and Disney+ in Canada[150] and *Rutherford Falls,* on Peacock in the US and Corus in Canada.[151] These US shows were preceded by Canadian shows like *Mohawk Girls*, five seasons of which aired on APTN between 2014 and 2017, and which was picked up by Peacock in 2021 and is today available on CBC Gem and APTN Lumi in Canada.[152]

104. A notable recent Canadian example is *LITTLE BIRD*, a six-part limited dramatic series about an Indigenous woman on a journey to find her birth family and uncover the hidden truth of her past. *LITTLE BIRD* was the first original drama commissioned by Bell Media for Crave, in partnership with APTN, and is understood to be launching simultaneously on Crave and APTN Lumi in 2023.[153]

105. For Canada's premier Indigenous television outlet, APTN, the consequences of this broader societal openness in terms of availability of program rights are mixed. Increasing awareness and interest in Indigenous culture and history increases both potential audiences and competition, but also opportunities for collaboration. APTN interviewees note, for example, that not only were they unable to acquire Canadian rights to *Reservation Dogs* and *Rutherford Falls*, they weren't ever presented with an opportunity to bid on them. Moreover, given interest from streamers, APTN's ability to even acquire ongoing (library) rights for earlier commissioned shows like *Mohawk Girls* is not assured.

106. Thus, while its mandatory basic carriage, its public interest mandate and relatively high levels of original production combined with a "growing" market somewhat insulate APTN from negative program rights trends and the declining BDU universe, APTN (and other Canadian broadcasters) will have increasing difficulty in obtaining and retaining rights to the most popular Indigenous themed drama series and movies. This will take away growth opportunities that, historically in the Canadian broadcasting system, APTN, in particular, would have had, and makes APTN more reliant on structural support and subsidy to be successful – funding more original Canadian Indigenous themed programming, for which it will want to seek extensive multi-year linear and SVOD rights.[154] An MOU between APTN and CBC/Radio Canada covering entertainment and

[150] A "half-hour comedy that follows the exploits of four Indigenous teenagers in rural Oklahoma who steal, rob and save in order to get to the exotic, mysterious and faraway land of California", first aired in September 2021. See link here.

[151] A "breakthrough" moment in Indigenous representation in comedy TV, airing April 29, 2022 on Showcase through the Global TV app, website or with a cable login and via STACKTV.

[152] http://mohawkgirls.com/

[153] https://www.bellmedia.ca/the-lede/tv/crave/little-bird/

[154] APTN reports, however, that as it stands, competition for CMF funding is resulting in less access to Indigenous production funds, decreasing from 90% to 60% in the last few years.

news programming, announced in March 2022, also points to an increasing role for Canada's public broadcaster in Indigenous themed programming, and, importantly, in a collaborative manner.[155]

Ethnic Broadcasting

107. Ethnic television in Canada is a highly competitive market with a range of players and services, (relatively) large and small, exempt and licensed, foreign and Canadian, third-language and predominantly English. While conclusive commentary on the state of the ethnic television rights market, and the health of Canadian ethnic television, is outside the scope of this study, some general observations can be drawn.

108. First, the good news. CRTC statistics reveal that, in aggregate, revenue for ethnic discretionary services actually grew from 2016 to 2020, unlike the decline for discretionary services generally – a 0.7% CAGR vs. -2.9%.[156] This occurred despite the myriad of foreign ethnic services available from BDUs and online, including pirate sites.

109. Rogers' OMNI local ethnic television stations have not been so lucky: their revenues declined more in accordance with declines suffered by conventional television as a whole – a -5.6% CAGR from 2016 to 2020. [157]

110. Within the independent ethnic television universe, the smaller, newer Canadian exempt niche third-language services, including many owned by ATN and ECG, are much more vulnerable than the established licensed former must carry services, such as TLN, ATN Channel, and Fairchild.

111. The former, with their far smaller subscriber base, limited distribution and programming budgets, and low Cancon levels, are highly dependent on foreign programming supply arrangements. With the increasing ability of foreign services to come in directly, via the BDU system and/or via the Internet, the business model of these services becomes highly challenged.

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[155] https://cartt.ca/aptn-cbc-radio-canada-sign-mou-marking-the-beginning-of-a-beautiful-thing/?mc_cid=4c314bbf8d&mc_eid=13c87adf6a. CBC, of course, had audience success with the show Trickster, which sadly was consequently coloured by issues of Indigenous cultural appropriation and authenticity. https://www.cbc.ca/news/entertainment/trickster-cancelled-1.5893752

[156] CRTC Statistical summaries. That said, the number of ethnic services increased over the same period, from 116 to 121 reporting units and average PBIT margins decreased from 12.1% to 7.8%, while the number of discretionary services overall declined from 308 to 302, and average PBIT margins increased from 21% to 24.3%.

[157] CRTC reporting does not break out OMNI revenues, however, CRTC annual aggregate returns do disclose "designated group" conventional TV financials, which for Rogers reveal a revenue decline from $197.6 million in 2015 to $162.6 million in 2020 – or 18% compared to 24% for conventional TV as a whole. Note that Rogers' designated group conventional TV revenues increased to $179.7 million in 2021.

112. The larger licensed ethnic channels have had the time and scope to build services that feature more original Canadian news, information and entertainment programming, and while still prone to losing foreign programming supply arrangements, are both less dependent on foreign programming and less able to be merely bypassed in favour of foreign channels. They are also better placed to negotiate more reasonable BDU distribution arrangements.

113. Ethnic broadcasters also report that piracy remains rampant, and that unlike in the mainstream broadcasting space, there have been far fewer successes in shutting down pirate sites or platforms. ECG's launch of Toober (an online streaming platform for live foreign third-language channels[158]) in 2021 can be seen as both providing a legitimate alternative to piracy, and a recognition of declining opportunities for distribution of smaller third-language services on BDUs.

114. The importance of Canadian ethnic services, and of Canadian control over foreign services, has recently been heightened by concerns over the distribution of Russian state propaganda through the (authorized for BDU distribution) television service RT.[159] Pursuant to the *Broadcasting Act*, all Canadians are entitled to have access to programming of "high standard". Unfortunately, the above indicators suggest that ethnic Canadians may be at even greater risk of losing access to Canadian services that meet this standard and "cater to tastes and interests not adequately provided for by the programming provided for mass audiences".[160]

Sidebar on news

115. The diversity, independence, trustworthiness and reliability of news and information is increasingly being seen as a major public policy concern.

116. News has two media pillars – print and broadcasting. Print has suffered terribly because of the Internet, but the strongest of print voices are now stabilizing and, indeed, with new digital models, coming back.[161] Meanwhile, Canadian broadcast news is in decline. In both, it is *local* news, in smaller communities, that is particularly at risk.

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[158] https://www.toober.com/about-toober

[159] See https://crtc.gc.ca/eng/archive/2022/2022-58.htm

[160] *Broadcasting Act*, S.3(1)(g) & (r)(ii)

[161] In Canada, arguably the strongest, most viable, news brand is the Globe and Mail. The jury is out on the Star, which was recently sold and which is adopting a subscription based digital model. The Post is still primarily ad based online, and while solvent on an operating basis, carries significant debt. La Presse made a remarkable, and apparently successful, shift to digital-only ending with its last print editions in 2016. In the US, the New York Times and Washington Post are the best examples of print outlets that have successfully made the digital pivot, managing declining print readership with increasingly global digital reach..

117. The reality is that true local news has never been and never will be very profitable. Most Canadians assume news is "free". The percentage of Canadians who expressly pay for news hovers around 10%.[162] And in the free advertising supported model with which it primarily exists on broadcasting, it needs to be "packaged" with other popular/profitable content to be viable and sustainable.

118. Broadcast news is almost exclusively broadcaster produced; thus, while it has no associated program rights concerns, news is an important example of broadcast content that depends on the ecosystem around it. The reason it is a broadcasting *system* is that everything is linked if not interdependent. While news garners less than half the viewing of drama and comedy, in 2020 it was the second most popular content category on television in English-Canada and third in French-Canada.[163] Broadcast news survives, and remains the most popular form of news consumed by Canadians, in large measure because it is packaged, in radio with music, and in TV with other domestic, and acquired foreign, programming.

119. A future for diverse, relevant, reliable and compelling Canadian news sources – particularly any significant level of local news in smaller markets – therefore has a strong correlation with a sustainable program rights market.

<u>Sidebar on sports</u>

120. Sports is historically the second most watched category of programming in English Canada, and the third most in French Canada. [164]

121. Sports is seen as one of the key anchors of traditional television. It attracts loyal fans who are prepared to pay not insignificant sums to watch it. Moreover, while sports programming is available from foreign television sources and OTT, Canadian broadcast television outlets have some distinct competitive advantages in retaining the most popular sports franchises and events.

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[162] As so few Canadians purchase TV channels à la carte, the best proxy for this is subscription levels to print news. *The Shattered Mirror*, Public Policy Forum, 2017, tracked the decline in newspapers sold per 100 households from 102 in 1950 to a projected 10 in 2020. https://shatteredmirror.ca/wp-content/uploads/theShatteredMirror.pdf According to the 2020 Digital News Report by the Reuters Institute for the Study of Journalism at the University of Oxford, 13 per cent of Internet users in Canada accessed paid news content online in the previous year.

[163] CRTC 2021 Monitoring Report and Open Data. In 2018 and 2019, English-language services had a 14% level of viewing to news, behind drama, sports and general interest/reality, and French-language services a 15% level behind drama and general interest/reality. News viewing increased in 2020 in both English and French Canada due to COVID-19 to 18% and 17% respectively. (data-television-sector, Figure 9)

[164] CRTC 2021 Monitoring Report and Open Data. In 2018 and 2019, English-language services had a 18% level of viewing to sports and, and French-language services a 15% level. Industry 2021 viewing figures suggest that 2021 is more in line with previous years. https://inspiration.nlogic.ca/en/tv-viewing-trends-in-canada

122. First, Canadian sports broadcasting is dominated by two well-resourced vertically integrated entities, Bell and Rogers; smaller players include TVA Sports and MLSE.[165] In addition to being able to take advantage of multiple distribution platforms (including conventional, discretionary & pay TV, BDU, Wireless, ISP and OTT platforms), Canadian sports services garner significant budgets and revenues and spending:

- At more than $900 million annually, sports is the highest Canadian program expenditure (CPE) category of Canadian traditional television[166];
- Like news, the vast majority of programming expenses on sports are for Canadian programming[167]; and
- Together, mainstream sports and national news discretionary services have experienced lesser rates of revenue decline relative to discretionary services as a whole, and now represent almost 38% of discretionary service revenues.[168]

123. Moreover, mainstream professional sports have certain unique features that help maintain broadcasting as the preferred television exhibition medium.

124. First, the nature of sports leagues, the geographic basis of teams, fans' love for their home teams (be they playing at home or elsewhere), the promotional value of television in encouraging live game attendance, the use (albeit declining) of blackouts for home games – all these factors favour exhibition on mass reach domestic broadcasters.

125. Second, the role of broadcaster as producer and programmer. Not just acquiring thousands of titles from third parties, but curating and commenting on, if not specifically producing, coverage of sporting events.

126. Third, the live nature of sports; the desire to amass as big an audience as possible in a single exhibition.[169]

127. And fourth, the high cost of sports rights, and the need to amortize those costs over as wide a revenue base as possible – favouring the dominant mixed subscription and advertising-based model of traditional television.

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165 Maple Leaf Sports & Entertainment, owned 37,5% by each of Bell and Rogers, and in turn owning digital sports channels LeafsTV, NBA TV (Canada) and GolTV.

166 Sports CPE on conventional television stations and discretionary services exceeded $900 million in three of the five last reported years (2006-2020). Even during COVID-19 (2020) sports CPE was $813 million. CRTC 2021 Open Data.

167 CRTC Reporting combines mainstream sports and national news discretionary services. It reveals that in 2020, of $1.04 billion in aggregate programming, only 10% ($103 million) went to foreign programming.

168 CRTC Financial Summaries. From 2016 to 2020, mainstream sports and national news discretionary services had a -1.4% CAGR, compared to -2.6% for discretionary services as a whole. Part of this would presumably be attributable to the manadatory carriage of CBC News Network and TVA.

169 It is worth noting here that the 'politics' of Canadians potentially losing "free" (or at least relatively affordable) access to major home games is also relevant.

128. Despite these advantages, and, as noted earlier, the fact that the major Canadian discretionary sports brands launched OTT versions over four years ago, traditional TV has experienced some notable direct incursions from foreign services that are becoming more competitive than complementary.

129. DAZN (the self-described "the Netflix of sports") and, more recently, fuboTV ("The New Home of Football") have launched global sports platforms, available in Canada, and in so doing, have taken soccer English Premier League (EPL) rights away from TSN and Sportsnet. Both services feature what are generally considered "niche" sports in Canada – with, for example, fuboTV featuring the French beIN Sports (more soccer and other miscellaneous European sports)[170], and Britain based DAZN featuring similar, and in some cases identical European sports franchises, but also notably, NFL and MLB coverage.[171]

130. The latter is indicative of the troubling development, paralleling the moves of major television studios, of many leagues launching their own direct to consumer plays. While non-aligned third-party foreign OTT services robbing Canadian broadcasters of rights to niche international sports programming is a concern,[172] the retaining of sports rights by key domestic sports leagues, such as the NHL, MBL, CFL and NBA, or franchises like the Olympics, would be a disaster.[173]

131. To date, moves by leagues and key sports franchises into OTT have been moderate, and have posed no existential threat to Rogers and Bell. However, as is the case for conventional and discretionary TV generally, developments (particularly in the US) maybe indicative of what is to come.

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[170] https://www.theglobeandmail.com/sports/article-fubotv-buys-canadian-rights-to-english-premier-league/ fuboTV, like Toober, and SlingTV, is effectively a v-BDU – an online-based aggregator of sports channels, with live and on-demand programming. The Company announced in November, 2021 that it had surpassed one million total subscribers in the United States, Canada and Spain; a relatively low number but one they can expect to grow materially through the acquisition of EPL rights.

[171] https://www.dazn.com/fr-CA/welcome. Dazn launched its DAZN streaming service in Europe and Japan in 2016 and added markets including Canada, the U.S. and Brazil between 2017 and 2019, before rolling out globally in late 2020. As at end 2020, it is estimated that DAZN had 7.6 million paid subscribers, down from 7.8 million in 2019 because of COVID-19.

[172] That said, Canadian sports broadcasters would be watching with alarm US OTT moves into sports, including Apple TV Plus airing weekly *Friday Night Baseball* double headers and Amazon streaming *Thursday Night Football*. https://www.nexttv.com/news/apple-gets-rights-to-stream-friday-night-baseball-games. NHL Hockey rights in the US are owned by Disney (which owns ESPN and ABC), with games aired on ESPN+. https://www.nytimes.com/2021/03/10/sports/hockey/hockey-nhl-espn-disney.html#:~:text=After%20an%20absence%20of%2016,with%20the%202021%2D22%20season.

[173] More niche sports franchises with their own OTT plays, such as UFC Fight Pass, Tennis TV, F1 TV, are also more of an irritant. "Typically" Canadian regional sports, such as Grand Slam of Curling or junior hockey, would not be as prone to foreign OTT incursions, but nor are they as highly valued.

132. In the early 2000s, major North American sports franchises, including MLB, NHL and NBA launched their own cable channels in the US. In various forms, these channels have been made available in Canada, with strict blackouts of broadcast rights for Canadian teams.[174] While US-launched OTT versions of these services currently have limited availability in Canada,[175] OTT coverage may reach a critical mass where such leagues determine that going direct, exclusively, rather than licensing the most popular home team games to the likes of Bell and Rogers, makes economic sense. Alternatively, with three of our major sporting leagues – MLB, NBA and NHL – being primarily US based, is the future one of global streaming platforms on both sides of the border buying North American rights? Any such a transition would not happen overnight, but it is all too possible – especially given that well-heeled global players would be in an economic position to take a few years of losses in Canada to achieve it.

Metrics and Monitoring

133. While the mandate of this study, like those before it, is to provide a *qualitative* analysis of the state of the Canadian audio-visual rights market, it is worth commenting on available *quantitative* measures.

Available/useful quantitative indicators

134. There appear to be no useful direct metrics on program rights. There is no statistical or industry body that tracks the availability of program rights across platforms. Based on industry consultations, it might be reasonable to estimate, on a comparable to historic basis, that over 98% of foreign conventional TV programming rights continue to be available, as do on the order of 70% of foreign discretionary TV programming rights, and that these numbers can be expected to decline. Unfortunately, as discussed above, mere availability of linear broadcast rights only tells part of the story – it does not speak to cost, quality, availability of VOD and streaming rights, or competitive TV programming exclusive to OTT platforms.

135. A person might also reasonably assume that one should be able to easily compare audiences as between traditional TV and OTT. Unfortunately, such a person would be wrong. While in Canada, Numeris does provide some overall diary comparisons, and Neilson, in the US, [176] some genre specific comparisons, the primary measurement bodies and metrics for the internet consumption and TV viewing are different. The typical OTT metric is total minutes viewed; the traditional TV metric is average minute audience.

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[174] For example, the MLB Network, sponsored by Rogers and NBA TV through Maple Leaf Sports & Entertainment.
[175] The MLB Network is not currently available in Canada on an OTT basis; the NFL Network is available (on DAZN) in Canada.
[176] https://www.nielsen.com/us/en/insights/article/2022/streaming-grew-its-audience-in-2021-drama-reality-and-kids-programming-lead-the-content-wars/; https://time.com/6120365/netflix-most-watched-programs/ ; https://top10.netflix.com/

136. As already referenced, the quantitative measures one is left with are therefore more general ones – measures of the health of all or segments of the Canadian television market (like revenues, audiences and subscriber levels), rather than measures of the health of the program rights market more specifically. One challenge with such measures, particularly in a fast changing market, is that they can often be twelve to eighteen months out of date.[177]

137. Currently available aggregate indicators for Canadian television include:

- **Audiences to traditional TV**. From 2016 to 2020, average weekly hours of traditional television viewing decreased, on average, by 2.1% annually.
    - Nevertheless, in 2020, on average, in any given week, 97% of Canadians watched traditional TV and 71% of Canadians watched Internet-based television services.
    - In the 2020/21 season only one of the top ten shows on traditional (network) TV show exceeded 2 million viewers. In the 2017-18, eight shows exceeded 2 million viewers, and the top show had 3.85 million.[178]
- **Advertising revenues to traditional TV**. From 2016 to 2020, advertising revenues of private conventional television stations, discretionary services and on-demand services combined declined from $2.8 billion to $2.3 billion.
    - As noted above, excluding YouTube and social media platforms, OTT advertising is relatively underdeveloped, estimated at only $25 million (by IAB Canada) in 2020.
- **Subscribers to traditional TV**. The number of BDU subscribers peaked in 2012 at 11.53 million (83% of Canadian households) and has declined by a CAGR of -2% since, to 10.21 million (66% of Canadian households) in 2020 (as of Q3 2021 it was down to 9.8 million households[179]).
- **Subscription revenues to traditional TV**. From 2016 to 2020, subscription revenues of private conventional television stations, discretionary services and on-demand services combined declined from $3 billion to $2.8 billion.

[177] That said, some more up to date industry and corporate monthly and quarterly data is available, for example, CRTC Annual Aggregate Returns and select quarterly data; monthly industry TSS data and corporate quarterly statements.

[178] 2+ AMA (average minute audience - the average number of viewers watching a program during any given minute) Numeris, Total Canada, English Channels. "Season" corresponding to a CRTC broadcast year of September to August.

[179] CRTC quarterly monitoring. https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/rad.htm

- **Revenues to OTT.** From 2016 to 2020, OTT revenues grew at a CAGR of 26.3% to an estimated $3.9 billion in Canada in 2019-2020, the majority subscription based, and accordingly rivalling subscription revenues to Canadian traditional television.[180]
    - In 2020, 20% of Canadian reported that they watch TV exclusively online, including 32% of Canadians 18-34 and 2% of Canadians 65+.[181]

Going forward metrics

138. In February 2022, the CRTC launched a new Annual Digital Media Survey, which will require all material OTT services operating in Canada to provide basic information on their activities starting with a filing for the 2020-2021 broadcast year due 30 June 2022.[182]

139. While the Commission has yet to determine the extent to which collected data will be published in aggregate form, it would appear reasonable to assume that collected data would at minimum permit the Commission to validate, if not improve upon, current revenue estimates obtained from third party sources. Moreover, data collected on numbers of subscriptions should allow the Commission to get a better handle on OTT reach.

140. Understandably not governed by the proposed survey, and, for the reasons noted above, still hard to obtain, would be more accurate viewing statistics, including relative viewing to top shows and reach as between foreign OTT and Canadian broadcast and OTT platforms. The importance of this should be obvious. For Canadian broadcasters to demonstrate their ongoing relevance, they need to continue to demonstrate that they reach far more Canadians (with news, sports and entertainment) on their combined broadcast and OTT platforms than foreign providers. Hopefully, Numeris in Canada will help take on that challenge.[183]

Conclusions

141. Top line:
    - *Has the health of the Canadian program rights market suffered serious declines in the last three to five years?* Yes.
    - *Is a viable separate Canadian program rates market at serious and relatively imminent at risk?* Yes.

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[180] These figures are estimates from the research firm Omdia. They include YouTube and TVOD based ITunes so arguably overestimate the then true OTT market.

[181] All figures from the 2021 CRTC Monitoring Report, and for the given broadcast year ending, unless otherwise noted. https://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2021/rad.htm#a4

[182] https://crtc.gc.ca/eng/archive/2022/2022-47.htm

[183] In Fall, 2021, Numeris announced its "first VAM dataset release", "the first critical step towards Cross-Platform Video Measurement". https://inspiration.nlogic.ca/en/numeris-vam-dataset-is-here

- *Is it likely to decline to zero*? Probably not, but it's bad and it's going to get worse.
- *How much time do we have?* Best guess, given current trends: 3 years. Three years for public policy to decide whether to continue to mostly sit on the sidelines or try and combat these trends.

142. Plausible book ended pessimistic and optimistic scenarios:[184]
    - **Worst Case:** Public policy continues to do little to nothing to shore up the Canadian owned and controlled broadcasting system, meaning 3 years before HBO Max, NBC Universal etc. have established their own DTC plays in Canada, broadcast rights to the most popular foreign TV programming become either unavailable or cost prohibitive, and major Canadian broadcasters lose so much must watch entertainment programming, that they're bleeding audiences and advertisers, and the system loses critical mass.
    - **Best Case**: The lumbering ship of Canadian broadcasting policy starts turning around, starts to reintroduce and strengthen material measures that advantage Canadian broadcasters over foreign broadcasters in the Canadian market (access and content funding, in particular), increases the relative cost of the direct-to-consumer Canadian plays over historic wholesale plays for the major US networks and studios, and combined with a cluttered, confused, and diminishing returns Canadian OTT market, causes (a) the remaining US players that have not yet entered the Canadian market with DTC plays, to stand down (b) marginal foreign OTT entrants (perhaps Discovery+ and Paramount+) to retreat, (c) the major Canadian players to reinvest rather than harvest change and (d) Canadian programming and independent broadcasters to thrive.[185]

143. We know linear television is not dead; we know that Canadian broadcaster owned platforms (traditional and OTT, combined) for linear and on-demand content have higher penetration than those of the best foreign OTT players; and we know that while there are limits to how much TV people will watch and pay for, the video advertising market (traditional and online) is growing significantly. We know that Canadian programming, in all genres, is stronger and more reflective of Canada than ever before.

144. We know that the main competition from foreign OTT is in high budget, blockbuster, global appeal current movies and "edgy" series drama; that the core efficiency of traditional television broadcasters is being narrowed to sports, news and information, reality, lifestyle – including programming that is more specific to Canada and its communities, that can be more readily monetized domestically. The immediate risk is

[184] Interviewees had varying degrees of optimism/pessimism. Public policy interviewees were very uncomfortable with the worst case scenario, but many in the industry felt it to be all too realistic.
[185] Credit for the phrase “harvest change” goes to Brad Danks, Outtv, per the appearance of the Independent Broadcaster Group (IBG) in *Broadcasting Notice of Consultation CRTC* 2021-281.

that, in drama, Canadian broadcasters will be restricted to short first run linear exhibition windows for the limited amount of US product they can obtain.

145. We know that the Canadian owned and controlled broadcasting system, in its entirety, encompasses a broader swath of programming and delivery options than the foreign OTT market in Canada. There are more and more ways Canadians can opt in, with greater ease, at different price points, for different kinds of content supplied by Canadian broadcasters.

146. We know the Canadian broadcasting industry is in decline, and expect that decline to continue for some time,[186] but see reasons why that decline could level off.

147. *How would one rate the state of the Canadian program rights market today?* **6 out 10 overall**:
- **8 out of 10 in conventional linear television**. Conventional linear rights to foreign programming are largely still available, however their costs are increasingly disproportionate to their value, and the ad-supported business model for conventional TV remains problematic;
- **6 out 10 for linear discretionary television**. Availability and costs of foreign program rights are an increasing issue; and
- **4 out of 10 for broadcaster Pay TV/VOD**. As pre-existing multi-year output deals expire, Canadian broadcasters are increasingly unable to acquire Pay TV/VOD rights to foreign programming, and to the extent these rights become available, there are multiple foreign and domestic bidders. Canadian broadcasters risk being effectively shut out of the majority of high-end foreign dramatic series and current movie rights, which in turn risks a further acceleration in cord cutting.

148. *Why does it matter?* It matters for important economic, social, cultural and democratic reasons.

- **Economic,** because the Canadian broadcast sector contributes $9.1 billion to Canada's GDP;[187]
- **Social,** because key social policy objectives of reflection, diversity and accessibility will not be readily achieved without a strong and vibrant Canadian broadcast sector;
- **Cultural,** because the production, packaging and promotion of Canadian and other programming by Canadian broadcasters, rather than foreign conglomerates, is a meaningful contribution; and

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[186] Although not necessarily evenly, as seen with the 2021 bounce back in conventional TV revenues.
[187] Compared to $4.3 billion for Film and Video and $572 million for music and sound recording. Source: Department of Canadian Heritage, Technical Briefing Deck on Bill C-11, February 2, 2022, p.3.

- **Democratic,** because strong and diverse Canadian news and information media needs Canadian television

149. Put another way, the level of direct annual government subsidy, excluding tax credits, that goes towards Canadian programming and supports the broadcasting system's economic, social, cultural and democratic output is under $2 billion. This figure includes CBC parliamentary appropriation and government support for the CMF, NFB and Telefilm. The indirect subsidy towards Canadian programming derived from regulation can conservatively be estimated at over two times this amount. This includes direct expenditures such as BDU contributions, 'incremental' broadcaster Canadian programming expenditures, and the value of such measures as simulcast, access rules, predominance of Canadian services and foreign service entry rules.[188]

150. *What is the likelihood of this approximately $4 billion in annual regulatory value being fully replaced if the program rights market unravels?* Canadian Heritage has placed the potential value of contributions by online undertakings to Canadian content and creators at $830 million annually by 2023.[189] And while the current government has increased direct subsidy to the CBC, CMF and Telefilm, can it realistically be expected do more and would a future government cut back? Subsidy can in theory replace structural regulation, but in practice, the level of public subsidy that would be required to make up for losses in the monetary value of regulation would be high enough to make the prospect unlikely and/or undependable.

151. Or in more conservative conventional consultant speak, the Canadian owned and controlled television broadcasting system appears to be poised to reach a tipping point in the short term. To the extent that public policy makers plan to take corrective action, therefore, they should not assume they have more than a few years to do so.[190]

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[188] The value of subsidy vs. regulatory measures vs. export was first explored by the author in *Over the Top Television in Canada – Is Past Prologue?*, prepared for the Law Society of Upper Canada Entertainment & Media Law Symposium 2015. Estimates have been updated to reflect current circumstances.

[189] https://www.canada.ca/en/canadian-heritage/corporate/transparency/open-government/standing-committee/guilbeault-bill-c10-amend-broadcasting-act/fact-sheet-respecting-values-ethics.html

[190] Historical note. In a December 2006 Report to Government, *THE FUTURE ENVIRONMENT FACING THE CANADIAN BROADCASTING SYSTEM* pursuant to section 15 of the *Broadcasting Act*, the CRTC stated "In the Commission's view, given the evidence of this proceeding with respect to the speed and acceptance of technological change, it would be prudent for policy makers to assume that a potential for material economic impact on broadcasting undertakings exists over the medium term."

Public policy implications

152. Over the last 15 years, Canada has watched the advancing tide of foreign OTT but remained hands off in terms of public policy. For reasons that apparently made sense at the time, we let ourselves be convinced that the Internet was something completely different; that nothing from pre-existing broadcasting policy and regulation could or should be reasonably adapted to online broadcasting.[191]

153. The January 2020, Broadcasting and Telecommunications Legislative Review Panel Report, with its sub title *Time to Act*, advanced both the urgency of the situation and the twin notions that the current *Broadcasting Act* allows the CRTC to respond and that legislative reform is advisable. At the time of writing, Bill C-11, *the Online Streaming Act* was at second reading stage.

154. In addition to passage of Bill C-11, 2022 may usher in other important broadcasting related legislative developments including an Online News Act, that would ensure digital media platforms pay for their use of print and broadcast news content. [192]

155. It is not the mandate of this paper is to inform or influence any specific pending decisions of the CRTC, the federal government or Parliament.

156. However, it seems fair to say that if time was of the essence in January 2020, it is only more so twenty-six months later.

157. Moreover, it is unclear whether policy actions currently being contemplated – with their emphasis on extracting contributions from online players – are up to the task of ensuring the survival and viability of a Canadian owned and controlled broadcasting system.

158. To the extent that there is an interest in strengthening support for Canadian broadcasters, it would appear important to recognize the advantages and disadvantages of the various instruments that are, at least theoretically, at a policy makers' disposal. These will be grouped here into three general categories: subsidy, internal cross subsidy and structural measures (regulation potentially playing a role in all three).

159. Subsidy measures include tax credits (such as the Canadian Film or Video Production Tax Credit), access to public funds (such as the CMF and Telefilm) and direct funding (e.g. Parliamentary appropriation for CBC/Radio Canada and COVID-19 Emergency relief funding), private non-market driven requirements (such as BDU funding of the CMF,

[191] From the "Internet must be free and permissionless" to irrelevant side debates like "Are streaming services more like broadcasters, or are they more like video rental stores? "https://variety.com/2021/global/global/netflix-europe-avms-regulation-streamers-1235009148/

[192] See, for example, https://pressgazette.co.uk/canada-online-news-act-google-meta-facebook/.

independent production funds and the ILNF), and proposed measures such as contributions from online undertakings and implementation of the Australian model for news support. All indications are that subsidy measures are the current preferred approach of government.

160. Subsidies can be advantageous for recipients as “cash in hand”, but, particularly for funds, are typically over-subscribed, subject to non-objective criteria, and prone to change and uncertainty over time. Moreover, in respect of support for news, funds raise greater concerns about the potential for state interference.[193]

161. Internal cross subsidy, typically made possible by structural measures, was historically the preferred means of supporting Canadian programming aired by private broadcasters. A study of the program rights market is at its core a study of the health of the primary cross subsidy model of private broadcasting: namely, the use of profits from US programming to subsidize Canadian programming through CPE requirements. In the last two decades, other cross-subsidies have also become important – including the cross subsidy of less profitable television stations by more profitable ones and the effective cross-subsidy of conventional television by discretionary television, evolving now, with declines in the profitability of discretionary services, to broader effective cross subsidies within large media groups (including from radio and BDU operations).[194] There also appears to be a perception, in both public and in political circles, that the largest vertically integrated entities like Bell, Rogers and Quebecor, should use their profitable wireless and ISP telecommunications services to subsidize their broadcasting operations.[195]

162. The difficulty with cross subsidies outside a particular service or platform (such as a conventional TV group or network) is that in a highly competitive market, they are difficult to rely on over the long term. Leadership of a Corus, Quebecor Media, Rogers Media or Bell Media may each be generally judged by their overall performance, and have the latitude to maintain unprofitable segments for a period of time, but ultimately operations that have little or no prospect of profitability are not maintainable –

[193] The more automatic and non-discretionary a support mechanism is (such as tax credits) and the more it is removed from government influence (such as contributions from online players), the less critics can argue that government is in a position to control or influence creative and editorial decisions, and compromise journalistic independence.
[194] New operations – including OTT services, can also be seen as being cross-subsidized for a start-up period by established profitable operations.
[195] To the extent this perception exists, the answer may be to resurrect the idea of an ISP or broadband tax to support Canadian programming and/or Canadian programming undertakings. At least this way all ISPs that benefit from the Canadian content they make available to Canadians would be required contribute, rather than the current vague expectation that only telcos that own media companies need do so. See, for example, *Strengthening Canadian Television Content: Creation, Discovery and Export in a Digital World*, Lawson Hunter, Kenneth G. Engelhart and Peter Miller, December, 2017, p. 24, available at https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Final%20Commentary_498.pdf

especially when overall revenues and margins are in decline. This is in fact a challenge all Canadian private TV broadcasters increasingly face; and while predictions of drastic cutbacks made in the last few years have yet to materialize, significant cuts to operations, including staffing, have.[196]

163. Moreover, cross-subsidy can only work in the context of a meaningful "regulatory bargain" or *quid quo pro*. Private companies simply cannot be expected to do things, just because they have done them in the past, or because "it's the right thing to do".

164. An assumption that current subsidies and cross subsidies can continue to prevent even more major cuts, including ultimately to the number of Canadian discretionary and local TV services currently operating is at best, therefore, an unwise one.

165. The public policy question accordingly becomes one of whether new direct subsidies can be significant enough to sustain Canadian private broadcasting (as is the case, in large measure, for Canadian production) or whether public policy should dig back into the tool kit of structural measures.

166. From a *perception* point of view, the challenge in directly subsidizing major broadcasters from government coffers was made clear through the early stages of COVID-19. The negative reaction to such broadcasters accessing the Canada Emergency Wage Subsidy (CEWS) was plainly evident, despite the clear nexus between that support and keeping news on air.[197] Moreover, although reliance on indirect subsidy (including contributions from foreign broadcasting undertakings, or mandated negotiations for distributing news) may be somewhat acceptable for publicly traded broadcasters, being directly dependent on permanent and explicit government subsidy is unlikely to be.

167. Thus, while new structural measures that are *prima facie* restrictive or permission based (such as lists of services eligible for distribution) may not be deemed appropriate for Internet based TV offerings,[198] structural measures that financially advantage or give priority to Canadian owned and controlled broadcasting services (such as Internet advertising tax deductibility, zero rating of wireless data usage, preferential access to Canadian production financing and expanded rights protection measures) should be under serious consideration.

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[196] I have myself made the mistake of predicting station closures, when operational rationalizations, including dramatic cuts to local staff and centralization, can achieve similar cost cutting targets without the same negative political ramifications. See, for example, https://www.cbc.ca/news/business/crtc-local-tv-1.3418341

[197] See, for example, https://blogs.teksavvy.com/bell-blasted-for-cews-subsidy-dividends https://www.thestar.com/business/2021/02/08/top-telecoms-took-in-almost-a-quarter-billion-dollars-from-canadas-wage-subsidy-program-and-kept-paying-dividends.html

[198] While the two concepts – permissionless entry and no restrictions – are often conflated, it is only the first concept that logically applies to Internet-based activity. Ultimately, access for Internet services that do not comply with Canadian laws (be they matters of crime, hate, piracy or contribution) has to be restricted.

<u>Appendix A – Statements of Increasing concern over the state the program Rights Market: 2007 to 2021</u>

2007 Author Study:

The 2007 Paper identified five public policy measures that supported a separate Canadian rights market, and their "economic, cultural and social dimensions":

1. *Advertising Tax Deductibility as set out in Section 19.1(1) of the Income Tax Act;*
2. *Direct program rights protection measures (which primarily benefit conventional television) such as simultaneous substitution;*
3. *Barriers to direct foreign entry, such as the then Eligible Satellite Services List and genre protection (primarily benefiting what the CRTC then called Canadian pay and specialty services);*
4. *Preferential distribution of Canadian services, including priority carriage for local television stations, mandatory carriage for certain "public interest" specialty services (s. 9(1)(h)), access rules for other specialty services; and tiering and linkage rules to ensure a predominance of Canadian specialty and pay services in all BDU channel packages; and*
5. *Market entry criteria for the licensing of new local broadcasters and, historically, advertising limits.*

The paper spoke to the non-application of such measures to "new media platforms" and their reduced effectiveness vis-à-vis regulated players, and stated:

> *It is not unreasonable to speculate that without further public policy support, the Canadian program rights market would be at risk if and when the online market:*
>
> - *Exhibits comparable quality TV product; and*
> - *Has comparable advertising revenues*
>
> *Going direct ("retail") to Canadians rather than through Canadian broadcasters ("wholesale") would be a very simple economic equation.*

The paper concluded with the following:

> *The question becomes one of "tipping point" theory.*
>
> *Is there a point at which the reduced effectiveness of existing measures benefiting Canadian broadcasters, combined with their non-application to new media platforms, completely undermines the separate Canadian rights market? And if so what can/should be done about it?*

2011 Author Study:

In addition to the factors identified at paragraph 21 above, the 2011 study identified the greatest underlying risk to the Canadian rights market as the shift to on-demand viewing, and with it, the shift to online and mobile TV platforms that are not part of the regulated “walled garden” of Canadian broadcasting. It stated:

> *As more TV viewing shifts to on demand and online, the Canadian rights market will be under increasing strain. Even with a strong competitive response from Canadian broadcasters and BDUs, Canadian players will see a diminution of market share to foreign OTT providers, who even with inferior and/or less content, will draw viewers and revenues from the system for reasons of price and convenience. The more that viewing shifts to on-demand, the bigger the slice that OTT gets, the better able OTT is to get better programming, and the less revenue Canadian broadcasters will have to buy the foreign programming that is their competitive advantage. The cycle continues with a greater incentive for studios to sell to foreign OTT in Canada, particularly their own or affiliated services (eg. Hulu)… Nothing will change the dynamic faster, and drive Canadians away from the broadcasting system more, than an inability to provide popular content.*

2014 Author Study

In 2014, the authors concluded that although pressures continued to mount, the Canadian rights market remained sound, and, barring material disruption, should remain so through the medium term at least. It indicated:

> *The vast majority of multiplatform TV rights should continue to be bought and sold in Canada separately from other jurisdictions – be it from the US, or other countries – for the foreseeable future. Barring material disruption, the degree of program, viewing and revenue losses to foreign OTT players over the medium term should not be of such a magnitude as to undermine the viability of the Canadian rights market.*

Nevertheless, the study also described scenarios that could have a material effect - including regulatory risks in the immediate term and, in the medium to long term technological/competitive risks. With respect to the latter, it noted a number of potential tipping points that could have a disruptive impact on the Canadian rights market.

2017 BoonDog Report

> *The traditional business model of Canadian broadcasters/media companies is contingent on having a separate rights market for Canada. In today’s evolving program rights market, this can no longer be assured*.

2018 CRTC *Harnessing Change* Report

Among the *Market Insights* made by the Commission in this report is #14:

> ***Existing TV program rights markets will be difficult to untangle.***
> *U.S. studios still dominate investment in TV content. These investments rely on the segmentation of content rights across a global network of distributors and services. While it is possible that U.S. rights holders will go directly to consumers online in the same way that their pure-play competitors do, untangling longstanding business relationships and long-term content supply agreements between these U.S. rights holders and their global partners—all of whom need to protect their own interests—will prove challenging in practice and may take years. This challenge will be compounded as online services start to bolster their on-demand content offerings with existing linear TV channels that are geographically restricted. Some examples are the U.S.-only launch of online TV subscription services such as YouTube TV, Hulu, DirecTV Now and SlingTV.*

Four years later, it is fair to say that the Commission overestimated the "challenge" in U.S. rights holders going "directly to consumers online".

Telus 2019 Submission to the Broadcasting and Telecommunications Legislative Review Panel (citing the 2017 BoonDog Report)[199]

> *… the distinct Canadian program rights market which has allowed Canadian media companies to build business models based on reselling foreign content (what other than relying on their own home grown productions) is eroding.*

Broadcasting and Telecommunications Legislative Review Panel Report

> ***Support by foreign media services to Canadian content***
> *The idea of conditioning the introduction of foreign programming services into Canada on support of Canadian content is nothing new. What is new would be the application of this principle to the Internet and how this might best be achieved.*
>
> *Foreign media content services have been a part of the Canadian media landscape for several decades.*
>
> *In the early 1970s, the CRTC allowed BDUs to carry the US network signals — today ABC, CBS, NBC, Fox, and PBS — into all Canadian markets and not just into the cities near the US border where the signals were freely available off-the-air.*
>
> *At that time, several US border stations were selling ads to Canadian advertisers based on their overflow into those markets, thereby eroding the revenues of Canadian broadcasters. The decision by the CRTC to allow BDUs to carry those signals was*

[199] at para 6, Jan 11, 2019. Available here

accompanied by a rule that whenever a Canadian station had acquired the rights to a program carried on the US station, the BDU would be required to substitute the Canadian signal for the US signal if the program was being broadcast at the same time. Over the years, this "simultaneous substitution" policy has repatriated hundreds of millions of dollars of ad revenue to Canada (estimated by the CRTC at $250 million in 2012–13), while allowing foreign signals into Canada.[200]

In the 1980s, the CRTC had to consider how to introduce new media content services through cable television and decided to license Canadian versions of the most popular US media content services. Accordingly, Canadian companies were licensed to make available content from such foreign services as HBO, Discovery, History, Disney, HGTV, and MTV. This was accompanied by meaningful Canadian content commitments.

The CRTC also permitted a number of foreign services to come into Canada through affiliation contracts with Canadian BDUs, subject to four provisos, 1) the service could not be directly competitive with a Canadian programming service, 2) it could not sell ads on its service to Canadian advertisers, 3) in place of the "local avails" (typically, 1-2 minutes each hour used by a BDU to provide customer information or to promote its own services) on those signals, BDUs were required to promote Canadian programs, and 4) a levy of 5 per cent applied to the subscription revenue for the foreign service, paid by the BDU to support Canadian content.

Through these means, therefore, the introduction of foreign services into Canada has been done on a basis that supports Canadian content production and distribution.

[200] Broadcasting Regulatory Policy CRTC 2015-25, Measures to address issues related to simultaneous substitution (29 January 2015), para 14.

Appendix B – About the Author

Peter Miller is a communications lawyer and engineer with over thirty years of broadcasting, telecommunications and creative industry experience, in both private practice and senior executive positions. Since 2006, he has acted as an independent advisor to select clients in the public and private sectors, specializing on the impact of digital technology.

Peter's practice is largely focused on media, but is wide ranging in terms of the types of clients and nature of assignments. Clients have included numerous large and small private broadcasters telecom service providers, trade associations, producers, unions and guilds as well as public entities, including Canadian Heritage, CMF, the Competition Bureau, CRTC, City of Mississauga, OMDC and the Ontario Ministry of Tourism, Culture and Sport. Assignments themselves have included legal and regulatory advocacy, public policy analysis, strategic planning and economic impact exercises.

Over the last decade, Peter has researched and authored a number of public and private reports relating to creative industries, including digital media trends, convergence and the future production and media landscape. The following is a sampling of reports:

- *Local Television News in Canada: Prospects and Proposals for Action,* January 2019 (for Bell Media, filed as part of submission to Broadcasting and Telecommunications Legislative Review Panel)

- *Strengthening Canadian Television Content: Creation, Discovery and Export in a Digital World, December 2017,* (with Ken Engelhart and Lawson Hunter) C.D. Howe Institute *https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Final%20Commentary_498.pdf*

- *The Deductibility of Foreign Internet* Advertising, January 2017 (co-authored with David Keeble), revised as *Close the Loophole!*, April, 2018

- *City of Mississauga Creative Industries Strategy*, September 2016 (with David Keeble, Caroline Parkinson and Michele McIver)

- *Canadian Television 2020: Technological and Regulatory Impacts*, January 2016 (co-authored with Nordicity)

- *Over the Top Television in Canada – Is Past Prologue?,* April 20, 2015 (A paper prepared for the Prepared for the Law Society of Upper Canada Entertainment & Media Law Symposium, April 30, 2015)

- *The State of the Canadian Program Rights Market*, June 27, 2014 (for the CMF)

- Canadian Commercial Radio: 2014-2020, An Environmental Scan, January 2014

- *The CRTC's Genre Protection Policy, A Discussion Paper*, March 15, 2013
  http://www.crtc.gc.ca/eng/publications/reports/rp140315.pdf

- *Market Impact and Indicators of Over the Top Television in Canada: 2012,* March, 2012, conducted with Randal Rudniski, CFA RJR
  http://www.crtc.gc.ca/eng/publications/reports/rp120330.htm

- *The Business of Canadian OTA Television: 2009,* August, 2009
  http://www.crtc.gc.ca/eng/publications/reports/miller09.htm

Additional Background

Peter's professional background includes private practice in communications law, and senior broadcast executive positions.

From 2008 to 2009, Peter was Chief Operating Officer for S-VOX, the Vision TV group of companies. In this capacity he oversaw the organization's operations and broadcast infrastructure as well as its marketing, communications, advertising sales, business development, legal, regulatory and affiliate relations functions.

From 2002 to 2005, Peter held the position of Vice President, Planning and Regulatory Affairs for CHUM Limited, where he was the key strategic advisor on industry developments and growth opportunities for CHUM Limited, as well as being responsible for all facets of CRTC regulatory affairs and government relations. Prior to joining CHUM in 1998, Peter was Senior Vice-President and General Counsel to the Canadian Association of Broadcasters (CAB), responsible for all policy and legal issues for radio, specialty and television.

Peter began his career in telephone network design at Bell Northern Research in Ottawa. His experience also includes serving as a Parliamentary Assistant in the House of Commons.

Peter is a frequent industry commentator who has been actively involved in numerous industry boards and committees. Peter is a former Adjunct Professor in Communications Law at Osgoode Law School, a past chair of Interactive Ontario, past chair of the CAB Specialty & Pay Services Board, past treasurer of Canadian Digital Television, past member of the Toronto Film Board and a current member of the Centre for Addiction and Mental Health Constituency Council.

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