CFTPA

Representing television, film and interactive production in Canada

ACPFT

Porte-parole de l'industrie de la production cinématographique, télévisuelle et interactive au Canada

Submission by the Canadian Film and Television Production Association

With respect to:

Broadcasting Notice of Public Hearing CRTC 2006-5:

Review of certain aspects of the regulatory framework for over-the-air television

September 27, 2006

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INTRODUCTION

1. The Canadian Film and Television Production Association (CFTPA) provides the following comments in response to *Broadcasting Notice of Public Hearing CRTC 2006-5*, Review of certain aspects of the regulatory framework for over-the-air television ("the Notice of Public Hearing"). The CFTPA considers this proceeding to be an important and timely exercise, in advance of the Commission's consideration of the licence renewals of the private conventional television broadcasters. The CFTPA requests to appear at the public hearing commencing 27 November 2006 to expand upon the views set out in this submission.

2. The Association represents the interests of almost 400 companies, located in every region of Canada, that finance, produce, distribute and market films, television programs, and interactive media products in English. In an ever-consolidating media world, it is independent producers who provide diversity to the Canadian broadcasting system, primarily through the drama, documentary, children's and performance productions that we create and finance. Our members employ writers to prepare screenplays, hire directors, actors and craftspeople to help turn the stories into programs and conduct all the business dealings to make high quality, innovative television programs and new digital platform content for Canadian and international audiences.

3. As such, we have a vital interest in this proceeding. Among the Commission's objectives for this regulatory review are "to ensure that conventional television licensees contribute effectively to the production, acquisition and broadcast of high quality Canadian programming that attracts increasing numbers of viewers" and "to provide conventional broadcasters with greater clarity regarding regulations that affect costs and revenues in order that they are in a position to propose maximum contributions" to effect this. The CRTC has indicated that it intends to review certain aspects of its 1999 television policy, including the possibility of reimposing Canadian expenditure requirements on conventional broadcasters and a review of the Commission's benefits policy as it pertains to television broadcasting transactions.

4. The CFTPA would like to state for the record that the position taken in this intervention was conceived without conflict of interest, in accordance with the CFTPA's Arm's-Length Governance Guidelines. The Association has consulted with various stakeholders, including the Coalition of Canadian Audio-visual Unions (CCAU) prior to preparing our submission.

5. The focus of our comments is English-language television program production and the appropriate regulatory framework for the largest private Canadian English-language conventional TV broadcasters.

6. In preparing this submission, the CFTPA commissioned Nordicity Group Ltd. ("Nordicity") to provide an "Analysis of Canadian Broadcaster Financial Performance and Programming Expenditures" (attached as Appendix A) and to prepare a background paper on "The Creation of Regulated Terms of Trade Between

Producers and Broadcasters in the U.K." (attached as Appendix E). We have also appended data showing "Share of Canadian Broadcaster Licences Fees in English-language CTF and non-CTF Funded Projects By Program Genre" for the 2000/01 to 2004/05 period (Appendix B). The CFTPA has compiled a Demand-Supply Analysis of Canadian Programming (Appendix C) that provides information on the number and type of programming services licensed by the Commission since 1999 and on the various production fund support programs in Canada, as well as "Hypothetical Industry Outcomes from the Impact of a Prospective New CRTC Conventional TV Policy" (Appendix D).

7. The Notice of Public Hearing provides a quick environmental scan since the issuance of the June 1999 television policy framework (*Public Notice CRTC 1999-97*). It references the number of new services, Canadian and foreign, that the Commission has licensed and authorized; the impact on viewing; and notes the significant ownership transactions that have taken place, with their related benefits and licensing commitments. The Commission concludes that the television holdings of the large ownership groups enjoy a healthy financial situation, with stations in large English-language markets showing a profit margin (PBIT) of 14% in 2005.

8. Nevertheless, the Commission notes that the "environment for television licensees, in particular over-the-air licensees, is undergoing significant change" and that "regulatory clarity is necessary" in order that licensees can prepare renewal applications proposing the maximum realistic contributions "to the production, acquisition and broadcast of high quality Canadian programming that attracts increasing numbers of viewers".

9. The Commission has invited comment in response to a number of specific questions related to four major objectives. We have limited our comments to the first two – how broadcasters can best contribute to the creation and exhibition of a greater quantity of appealing, quality Canadian programming, and the most effective regulatory measures to support this goal.

10. Our submission provides information about the independent production industry in Canada and the role we play in achieving the goals that have been set by government of achieving quality Canadian programming and cultural diversity within the Canadian broadcasting system, at a reasonable cost. We discuss the business realities of program creators and of broadcasters in regard to the creation of high quality productions. We propose that it is time to realign the contributions that broadcasters make to the exhibition of Canadian programming and provide a number of recommendations on how this can be achieved within the existing regulatory framework. We specifically address the benefits test as it relates to television transactions, television advertising, and contributions to be made by providers of new digital platforms.

11. On September 1, 2006, the CFTPA filed a submission in response to *Broadcasting Public Notice CRTC 2006-72*, which examined the future environment facing the Canadian broadcasting system. In that filing, we commented on the challenges and opportunities presented by the rapidly evolving communications environment. We

stated that technological advances in the communications sector do not render Canada's existing policy objectives irrelevant. They are applicable in today's technological environment and will continue to be essential in the years to come, especially as new forms of content delivery emerge.

12. The CFTPA proposed that it is time for a new national policy strategy to be adopted that focuses on increasing the efficiency and competitiveness of the Canadian independent production sector, ensures better synergy between and promotes a fairer balance between independent producers and broadcasters, advocates that each element in the broadcasting system makes a significant contribution to Canada's social and cultural objectives, provides an effective financing model for the production of Canadian television content in traditional and alternative formats and platforms, and ensures a predominance of Canadian content on new digital platforms.

CANADIAN PRODUCTION OVERVIEW

13. The world of broadcasting and communications is changing rapidly and the environment in which independent producers operate is less certain than it was seven or eight years ago when the CRTC embarked on its last television policy review. The federal government's recognition of this reality is set out in the Order-in-Council appended to *Public Notice 2006-72*. It provides important direction for those participating in this proceeding.

14. Technological change affects how we communicate, how we express ourselves and how we interact with the media devices that surround us. This has profound economic and social implications for the Canadian public and for the broadcast and telecommunications services that we use in our day-to-day lives. The Government recognizes the broad cultural objectives set out in the *Broadcasting Act* and wants to ensure that "the Canadian broadcasting system … remain[s] relevant in a global digital environment and that Canada … continue[s] to play a leading role in the development and usage of world class communications technologies".

15. The Order-in-Council further states that the Government "seeks to foster Canadian cultural choices by ensuring that Canadian content is available and accessible to Canadians, reflecting the rich diversity of this country"; recognizes that "Canadians seek a broad access to local, regional, national and international information and programming"; and that it "favours a smart regulatory approach that ensures effective and efficient regulation focused on results for Canadians".

16. The Notice of Public Hearing addresses the impact on conventional television broadcasting brought about by the CRTC's licensing of more than 100 new Canadian digital specialty services, and 17 new pay, PPV and video-on-demand services. The Commission notes that Canadian viewers have benefited from the addition of 59 new foreign programming services since 1999, bringing the total to more than 100. The availability of dozens of new programming services has had an impact on viewing to conventional television and has also likely been a stimulus for some of the industry consolidation we have witnessed in the past five or six years.

17. In our September 1, 2006 submission in response to *Public Notice 2006-72*, the CFTPA spoke at some length about the uniqueness of the Canadian television broadcasting system because of its diverse program offerings. No other broadcast system provides its citizens with such a wealth of program choices. What truly distinguishes the Canadian broadcasting system, however, is our original domestic content.

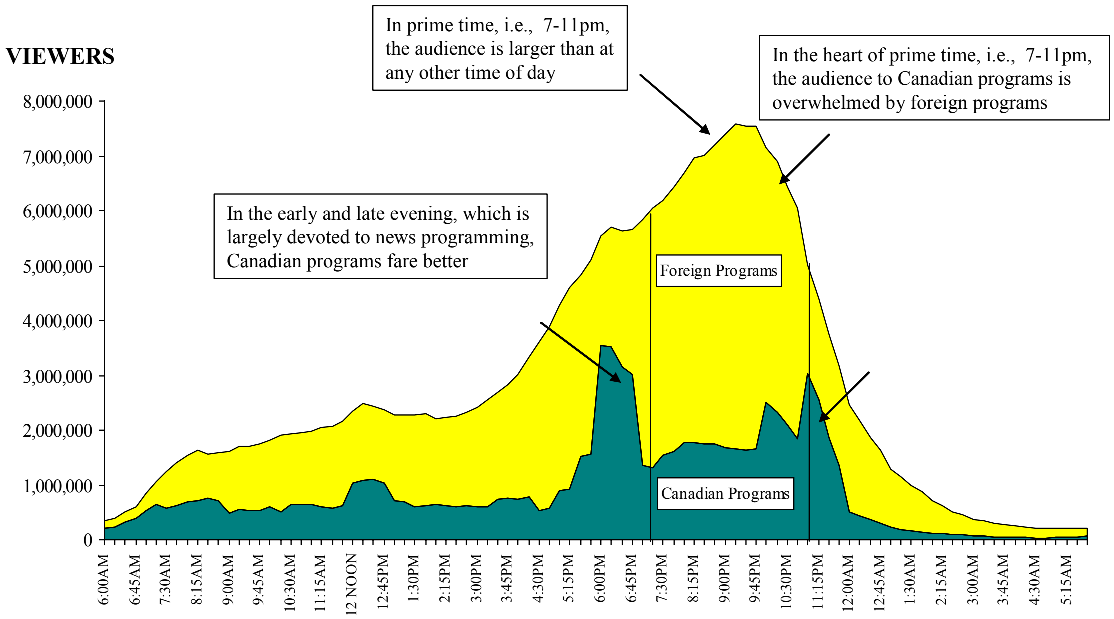
18. From the perspective of the Canadian independent production sector, the single most important element of the *Broadcasting Act* is its encouragement of the development of Canadian expression through a wide range of programming that serves the needs and interests of Canadians. This ensures that Canadian resources are used to display our creative talents as storytellers, actors and performing artists and that our information programs analyze events from a Canadian perspective.

19. It is evident that Canadian broadcasters are the most important outlet for Canadian television programs, and conventional private broadcasters still can lay claim to drawing the largest audiences to the programs they schedule in peak viewing hours. For example, in a typical week in the average minute of prime time more than 400,000 people will be tuned to CBC, 800,000 to Global TV and over 1,000,000 viewers will be tuned to CTV. The top-rated specialty channel will typically have less than 200,000 viewers in the average minute of prime time.

20. "Trends in Canadian Television Audiences, New Technologies, Advertising and Programming", a study prepared for the CFTPA by Canadian Media Research Inc. and filed with our September 1, 2006 submission, indicates (at page 17) that television viewing levels are at historically high levels, at 26.8 hours per week in 2005/06.

21. The following graph from that report (Figure 1) clearly shows that most viewers are watching television in the evening (6 p.m. to midnight), with the greatest number of viewers tuning to television between 7 and 11 p.m. The graph clearly depicts that peaks in Canadian viewing occur in the "shoulder" periods, in early and late evening, when Canadian networks present their news programs. What is equally revealing is that Canadian audiences are largely watching foreign programs during the heart of prime time.

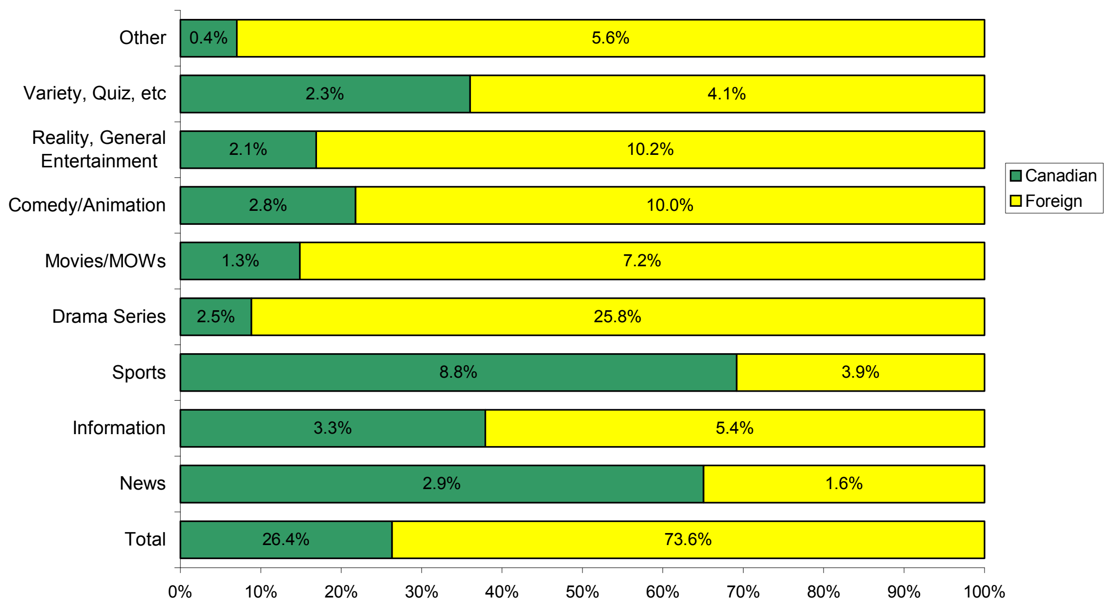
Figure 1: Hourly Viewing Curve of Canadian/Foreign Programs
All English TV, Daily Average 2005



Source: CMRI Estimate based on Nielsen Media Research data.

22. The following figure (Figure 2) depicts what audiences prefer to watch in the peak viewing hours of 7 to 11 p.m.

Figure 2:
Audience Share of Different Types of Canadian vs. Foreign Programs On English-language Television, Persons 2-plus, Prime Time 7-11pm, 2005-06



Source: CMRI (Nielsen)

23. Up-to-date financial indicators on the performance of the Canadian film and television production industry indicate that the industry generated $4.5 billion in total production activity in 2004/2005 and employed about 120,000 people in direct and indirect full-time jobs. Film and television production is labour-intensive, and its workforce includes highly skilled crews, creative talent (writers, performers, directors, editors) and business managers.

24. Independent television production accounted for $1.7 billion of this (37% of total production activity), with English-language independent production activity totalling $1.16 billion in 2004/2005. The second largest component of activity last year was in foreign location production, which registered 33% of total activity ($1.46 billion). Broadcaster in-house production accounted for $1.09 billion or 24% of total production activity in 2004/2005, an increase of 5%, while feature film production, at $253 million, accounted for just 6% (a 31% decrease from the previous year).[1]

25. The *Broadcasting Act* recognizes the essential role played by independent producers in the Canadian broadcasting system. In his speech last June at the 2006 Banff World Television Festival, CRTC Chair Charles Dalfen acknowledged the importance of our sector and its crucial role in creating quality domestic content when he stated that the CRTC "is always mindful of the critical role of independent producers" in realizing the Commission's objective of "nurturing Canadian content in our broadcasting system".

26. The independent production sector in Canada is primarily made up of small- and medium-sized companies. The Nordicity report "Analysis of Canadian Broadcaster Financial Performance and Programming Expenditures" (Appendix A, pages 14 - 16) notes that the profit margin (measured in terms of earning before interest and taxes) of television and film producers dropped from 9.4% in 1999 to about 7.5% between 2000 and 2004. While the financial performance of our industry sector is in keeping with the average rates posted by all industries in Canadian economy – 7.25% to 9.0%, it is considerably below that of the large Canadian broadcasters, which ranged from 13.3% to 19.2% between 1999 and 2005. An earning before taxes comparison between the two industry sectors is also revealing. In 2004, the production sector EBT margin was 4.3% while the broadcast industry average was 11.4%. There is a serious lesson in these statistics.

27. In addition, a number of factors over the past five years indicate that the independent television and film production sector in Canada is struggling; large production companies such as Paragon Entertainment and Telescene have disappeared; Fireworks and Alliance Atlantis Communications have made business decisions to scale back or cease domestic film and television production. All of this suggests that there needs to be a more viable business model for the independent production sector.

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[1] An Economic Report on the Canadian Film and Television Production Industry, Profile 2006.

28. In the U.K., government initiatives to strengthen the independent production industry have resulted in strong investment interest in the sector from the financial community. If a similar turnaround were to occur in the Canadian independent production sector, with outside financing to support and sustain productions companies, independent producers in this country would have less need to rely on government support.

29. This proceeding presents the opportunity for broadcasters to make a greater financial contribution to the creation of domestic television programming. As we stated in our September 1, 2006 submission:

> *Over the past decade, production costs have been steadily rising, not just because of standard inflationary elements related to creative and technical services, facilities and infrastructure, but also due to increased costs in acquiring the underlying rights. As foreign investment and pre-sales have decreased, Canadian television production has come to rely increasingly on Canadian broadcasters. At the same time, broadcast licence fees and public funding contributions have remained relatively static…*
>
> *As the production financing gap has increased, producers have been forced to absorb the cost. This has meant deferring fees, reducing overhead, incurring higher interim financing costs, and applying tax credits into production budgets rather than re-investing the credits in their company to help built corporate capacity. Canada's independent producers are effectively forsaking their future sustainability in order to finance projects.*

30. The CFTPA submits that it is imperative to find a solution that will ensure the full financing of Canadian productions within Canada. Gone are the days when we can depend on foreign pre-sales or co-production activities to fill the funding gap between modest domestic broadcast licences, the oversubscribed contributions from public and private production funds, public tax credits, and the investment made by the producer.

31. The long-term wellbeing of the Canadian independent production sector is an important component of the cultural and economic objectives of the *Broadcasting Act*. Independent producers create the priority programming that has the greatest audience appeal and that is a regulatory obligation of conventional television licensees. We provide them with quality domestic content they are required to exhibit, at a small fraction of the cost of creating it. The following chart (Figure 3) sets out broadcast licence fees for CTF and non-CTF funded English-language programming, by genre for the year 2004/05. Appendix B provides the same information from 2000/01 through 2004/05.

Figure 3: Share of Canadian Broadcaster Licence Fees in English-Language CTF and Non-CTF Projects By Program Genre, 2004-2005

Program Genre	Productions with CTF support	Productions with no CTF support
Drama	26.6%	11.7%
Documentary	38.7%	34.0%
Children's & Youth	29.9%	21.7%
Variety & Performing Arts	45.1%	72.3%
Weighted average	**30.5%**	**18.5%**

32. Production companies cannot continue to exist from project to project. We must have sufficient resources for ongoing project development, which is critical to the Canadian program supply and to bear the additional production costs associated with new technology formats including HD, and supplying content to new digital platforms.

33. This means a better partnership between the production and broadcasting sectors, ensuring adequate licence fees for initial broadcast windows, and a fair and equitable sharing of revenues from ancillary rights. One of the most effective means of achieving this is through Terms of Trade monitored by the CRTC. This is addressed later in this submission.

34. It is notable that when Canadian content quotas were first imposed on private broadcasters, they responded by integrating production and exhibition within their operations and offering relatively low-cost programs created in-house or by affiliated production houses. Thirty-some years ago when the Canadian programming requirements became more onerous, increasing from 40% to 60%, broadcasters resorted to stretching the available program creation dollars over more programs. The offering generally included news, public affairs and sports programming as well as relatively inexpensive how-to and discussion programs, storytelling for children, the occasional variety or music programs, religious services, and game shows.

35. To fill the rest of the program schedule, broadcasters concentrated on securing simulcast rights to popular American sitcoms and drama series at a much lower cost than would be required if they were to invest in financing similar Canadian programs.

36. This meant that Canadian audiences developed a taste for entertainment programming, particularly drama series, situation comedies and children's programming, with high production values. Canadian policy makers concluded that domestic productions required adequate financial investment if our own programming was to have any chance of succeeding with Canadian audiences, and, initiated the first public funding support mechanisms for "under-represented" drama, documentary, children's and performance programming.

37. Canadian television broadcasters have obligations beyond scheduling and promoting Canadian content. As we stated in our submission in response to *Public Notice 2006-72*, "Canadian broadcasters' corporate capacity to support Canadian content

has never been stronger and it is time television broadcasters provide greater support for and assume a greater portion of the risk in the financing of independently produced Canadian programming".

38. The CFTPA has reviewed conventional broadcast program expenditures, foreign and Canadian, over the past several years and provides the following table to indicate where broadcasters are investing their programming dollars. The first table indicates that total Canadian program expenditures represent slightly more than 26% of private conventional television revenues (in the period from 2000 to 2005). During this same time frame, the Canadian : foreign program expenditure ratio has changed from **53** : 47 (in 2000) to **48.7** : 52.3 (in 2005).[2]

39. When we examine Canadian drama expenditures, however, the imbalance is even more marked. Over the past six years, the Canadian : foreign expenditure ratio has ranged from a high of **19.6** : 80.4 (2003) to a low of just **17** : 83 (in 2005).

Figure 4: Revenues and Drama Expenditures By Canadian Private Conventional Television Broadcasters, 2000-2005

	2000	2001	2002	2003	2004	2005
Revenues (private TV)	$1.880 B	$1.904 B	$1.893 B	$2.092 B	$2.115 B	$2.198 B
Total Cdn programming expenditures	$488.7 M	$502.5 M	$517.2 M	$536.0 M	$569.0 M	$581.3 M
Cdn : foreign programming expenditures	Foreign = $434 M 53 : 47	Foreign = $466.4 51.8 : 48.2	Foreign = $499 M 50.8 : 49.2	Foreign = $541.8 49.7 : 50.3	Foreign = $567.4 50 : 50	Foreign = $612 M 48.7 : 52.3
Total drama expenditures	$408.4 M	$426.6 M	$442.9 M	$475.2 M	$454.7 M	$483.7 M
Cdn drama expenditures	$ 71 M	$76.1 M	$77.2 M	$93.1 M	$81.9 M	$82.2 M
Cdn drama acquired from independent Producers	$59.3 M	$62.3 M	$61.9 M	$79.6 M	$68.3 M	$71.6 M
Foreign drama	$337.4 M	$350.5 M	$365.7 M	$382 M	$372.8 M	$401.5 M
Cdn : foreign drama expenditure ratio	17.4 : 82.6	17.8 : 82.2	17.4 : 82.6	19.6 : 80.4	18 : 82	17 : 83

Source: CRTC Statistical and Financial Summaries.

[2] All information from CRTC Statistical and Financial Summaries.

40. Above, at paragraph 21, we refer to the times when Canadian audiences are most available to watch television and their program choices. It is hardly surprising that Canadians are mostly viewing foreign drama programs in peak viewing hours since that is what, for the most part, Canadian private broadcasters exhibit between 7 and 11 p.m. The fact that foreign drama expenditures by private conventional broadcasters are so vastly disproportionate is telling.

41. As far as broadcasters are concerned, it is purely a matter of economics. More viewers are available in prime time and that means more advertising dollars. In addition, the CRTC's simultaneous substitution provision tilts the incentive even further towards the foreign acquisition, since broadcasters are permitted to count the audience viewing the identical program on a U.S. channel.

42. This leads to further market distortions, since it devalues the audience to domestic drama programming (which cannot benefit from the audience bonus, which is generally pegged at about 25% to 30%. U.S. programs then become highly sought after commodities for Canadian broadcast program buyers. The "top 20" programs in English Canada are almost invariably U.S., except during the National Hockey League playoffs or when viewer interest is piqued by a *Canadian Idol* final or a star-studded performance special such as *The Junos*.

Figure 5:
Top 20 Programs on CBC, CTV and Global, 2005-06 TV Season

Network	Program	#Telecasts	Start	Persons 2-plus	Rank
CTV	C.S.I.	37	9/1/2005	3094	1
National Global	SURVIVOR:GUATEMALA	13	9/15/2005	3084	2
CBC Full	STANLEY CUP FINALS	7	6/5/2006	3042	3
CTV	AMERICAN IDOL 5 AP	19	1/17/2006	2803	4
CTV	AMERICAN IDOL 5 AR	18	1/18/2006	2672	5
National Global	SURVIVOR XII: PANAMA	17	2/2/2006	2660	6
CTV	DESPERATE HOUSEWIVES	28	9/25/2005	2335	7
CTV	C.S.I. MIAMI	47	8/29/2005	2223	8
CTV	AMAZING RACE 8	11	9/27/2005	2172	9
CTV	E.R.	23	9/22/2005	2120	10
CTV	LOST	16	9/21/2005	2071	11
CTV	GREY'S ANATOMY	29	9/25/2005	2034	12
CTV	AMAZING RACE 9	12	2/28/2006	2031	13
CTV	C.S.I. NEW YORK	37	10/5/2005	1896	14
CTV	CANADIAN IDOL 4 PERF	12	6/26/2006	1748	15
CTV	LAW AND ORDER:SVU	37	8/30/2005	1682	16
CBC Full	NHL PLAYOFFS ROUND 3	8	5/19/2006	1610	17
National Global	HOUSE	47	8/30/2005	1570	18
CTV	CANADIAN IDOL 4 RESU	9	6/28/2006	1568	19
National Global	THE APPRENTICE	15	9/22/2005	1550	20

Source: CMRI (Nielsen)

43. Appendix 5 of the Canadian Association of Broadcasters' submission in response to *Public Notice 2006-72*, "Emerging Trends in the TV Rights Landscape", ascribes a value of approximately $300 million to the simulcast provision, and indicates that the top 20 prime time programs represent "upwards of 80% of private TV revenues".

44. Because of our proximity to the American market, U.S. programs further benefit from the vast promotional and marketing machine that pervades Canadian airwaves and newsstands. In announcing their new season acquisitions, Canadian broadcasters most often boast about the American programs they are bringing to viewers, while their Canadian program lineup gets little mention. Rather than having "pride of place" on our own airwaves, Canadian programs get slotted in around the U.S. shows.

45. Broadcasters argue that economic factors are the reasons for this dilemma. The production industry, however, considers that the existing situation is attributable in part to the traditional pattern or model that has existed for several decades and also to certain misconceptions and opaqueness regarding the actual costs and returns on Canadian versus foreign programming.

46. When broadcasters license U.S. programs, they contract to exhibit the shows two or three times over a year or two. Any further repeat airings require additional compensation payments to the rightsholder.

47. In the Canadian market, broadcasters are seeking longer licence terms as well as the ability to air the same program on various broadcast outlets within their corporate holdings. They are pressuring independent producers to provide them with additional rights to a variety of new platforms including VOD, broadband distribution, online streaming.

48. Broadcasters are expecting producers to re-purpose content for these and other new platforms without additional remuneration or agreeing to share revenues. The CFTPA contends that the ability of broadcasters to present multiple plays of Canadian programs on various broadcast windows and on other platforms, without appropriate compensation, is disrespectful of the natural rights marketplace and impedes the ability of the producer to finance productions and to develop future television projects.

49. The relationship between independent producers and broadcasters is symbiotic. We need each other going forward. But we need a more equitable partnership.

CONVENTIONAL BROADCAST TELEVISION

50. CRTC published data indicates that the Canadian television broadcasting industry is strong. As set out in the CRTC's recently released *Broadcasting Policy Monitoring Report 2006* and the Commission's latest Statistical and Financial Summaries, conventional television broadcasters are faring quite well. Among the highlights:

- in aggregate, conventional private television broadcasters continue to post increased revenues. These broadcasters saw total revenues reach $2.2 billion in 2005, an increase of 4% from 2004 and 14% from 2001. Profit before interest and taxes (PBIT) was $242.2 million in 2005, up from $233.4 million in 2004 and $241.9 million in 2001. The margin of profit before interest and taxes was 11% in 2005, unchanged from 2004 but down slightly from 13% in 2001; and
- private conventional English-language television stations also continue to post increased revenues. Specifically, total revenues were $1.76 billion in 2005, up from $1.69 billion in 2004 and $1.54 billion in 2001.

51. Canada's major conventional television broadcasters have diversified aggressively into the specialty and pay television sector. An analysis of CRTC broadcast ownership data reveals that Canada's three major English-language private conventional television broadcast groups (Bell Globemedia/CTV, CanWest MediaWorks, and CHUM) collectively wholly own 30% (27 services) of English-language specialty television services currently in operation (89 services). Furthermore, these broadcast groups collectively own a majority voting interest in 39% (35 services) and at least some interest in 46% (41 services) of English-language specialty services in operation.

52. On the advertising front, there is no evidence to suggest the advent of new online and mobile advertising opportunities have led to increased fragmentation and a decline in the effectiveness, value, and revenue earned by television advertising. In fact, as we noted in our September 1, 2006 submission, television advertising revenue continues to rise in an environment with new advertising platforms and channels, increasing by 43% from 1997 to 2005.[3] Moreover, the relative levels of advertising revenue earned by the different media have remained relatively constant since 1997. For example, television advertising achieved a 34% share of the pie in 2005, virtually unchanged from 35% in 1997.[4]

53. Canadian television broadcasters enjoy enormous market protection from the Commission, including:

- Canadian ownership requirements;
- must-carry and priority signal carriage provisions for Canadian television stations on broadcast distribution undertakings;

[3] CRTC *Broadcasting Policy Monitoring Report 2006*, page 10.
[4] Ibid.

- careful market assessment before the licensing of competitive over-the-air television broadcasters;
- simultaneous substitution;
- higher degrees of consolidation and concentration than are permitted in other jurisdictions;
- prohibitions on local advertising by cable undertakings (on their community channels and on local avails) and by specialty services;
- the disallowance of advertising expenses placed by Canadian advertisers on U.S. border stations as a business expense;
- time credits for drama and financial support for priority programming from the CTF; and
- genre protection for specialty services (both within the Canadian market and from competing U.S. services).

54. While many of the submissions filed with the Commission in response to *Public Notice 2006-72* spoke about the challenges facing conventional television broadcasters in the new technological environment, there is evidence that they are adapting various strategies to adapt to the challenges that lie ahead. Most major conventional TV broadcasters have applied for HD transmitters to ensure that they will be able to continue to enjoy the benefits of the simultaneous substitution policy once the U.S. market converts to HD in 2009.

55. Broadcasters are positioning themselves for the future. In a speech given September 21, 2006 to the Broadcast Executives Society, Glenn O'Farrell, President and CEO of the Canadian Association of Broadcasters[5], spoke about the challenges that conventional television broadcasters are facing in the changing technological environment. He stated that broadcasters "are aggressively seeking new sources of revenue from existing content, and developing new content for new services".

> *Everywhere you look, broadcasters are cutting deals, launching innovative ventures, and making advances in the delivery of content across the multiple platforms that new technologies have made possible …. Canadian broadcasters are experienced and very successful content marketers, which means we are better positioned than anyone else to extend Canadian content into new media platforms, fostering a Canadian cultural presence in the new unregulated space.*
>
> *…for these mobile and online offering to work, we need access to the necessary rights….As broadcasters, we maintain that if content is to be leveraged across new platforms, these rights should not be unduly parceled off, or sold to multiple parties in the same territory. It simply makes no sense to compete with our program suppliers for audiences in the same market, with the same program.*

[5] See http://www.cab-acr.ca/english/media/speeches/2006/sep_2106.shtm.

56. This proceeding provides the opportunity to ensure that the contributions conventional television broadcasters make to the creation and exhibition of Canadian programming are in keeping with their responsibilities under the *Broadcasting Act* and their healthy economic state.

57. As stated in the Notice of Public Hearing, the Commission's 1999 television policy made significant changes to the ways in which over-the-air television licensees contribute to the production and exhibition of Canadian programs. The CRTC eliminated expenditure requirements and placed the emphasis instead on priority programming broadcast between the hours of 7 and 11 p.m. While it did not impose specific drama exhibition requirements, it afforded broadcasters time credit incentives of 125% and 150%. The Commission expanded the categories of programming that would qualify as priority programming, and permitted in-house and affiliated productions in certain categories to count towards this requirement.

58. Just a couple of years after implementing its new television policy, the CRTC embarked on a drama incentives initiative, as a means of encouraging television broadcasters (conventional as well as pay and specialty) to place more emphasis on drama programming. *Public Notice CRTC 2003-54* ("Support for Canadian Television Drama – Call for Comments" dated 28 September 2003) noted that "It is through television drama that most Canadians participate in their national culture and share in the evolution of social values and stories of human passion."

59. The CRTC went on to say that although Canadian drama should be a "cornerstone" of the Canadian broadcasting system, "[d]espite occasional hits, English-language drama has never had the consistent success enjoyed by French-language drama." It further stated that "a healthy and successful Canadian broadcasting system must include popular drama programs that reflect Canadian society and project Canada's stories onto the world stage".

60. In its subsequent Notice calling for comment on its proposed incentives for English-language television drama (*Public Notice CRTC 2004-32*), the Commission recognized that "the lack of funding is a key contributor to the difficulties facing Canadian drama…. Those peak time Canadian programs that have garnered audiences of more than one million viewers have generally required significant public funding…. Public support, whether in the form of tax credits, equity investment or grants from federal and provincial governments, makes possible the production and broadcast of drama programs that the market simply cannot support on its own."

61. Much of Mr. Dalfen's speech at Banff this year was devoted to Canadian drama production and the role of producers and broadcasters in ensuring its presence on Canadian television screens. He sounded somewhat disappointed in how broadcasters have been responding to the Commission's drama incentives initiative, noting that the CRTC "hasn't noticed any significant movement in spending on Canadian drama". While spending by conventional broadcasters on all Canadian programming grew by 14% between 2001 and 2005, spending on Canadian drama grew by only 3%. Interestingly, he stated that "all of the increase in drama spending was in French-language productions; spending on English production actually declined during the period."

62. The following section sets out a number of recommendations for regulatory reform of the conventional television broadcasting industry.

RECOMMENDATIONS FOR REGULATORY REFORM

Expenditures on Priority Programming

63. The Notice of Public Hearing clearly indicates that the CRTC has opened the door to reimposing expenditure requirements on conventional television broadcasters. In his speech at the Banff Television Festival in June, Mr. Dalfen suggested that in removing the regulatory requirement for conventional broadcasters to spend a minimum amount on Canadian program, the CRTC's rationale was that "in a highly competitive market, it was expected that licensees would spend whatever was necessary in order to acquire or develop programming that would attract large audiences".

64. The information provided in the table on broadcasters' revenues and expenditures (Figure 4) indicates that the market forces are working in terms of foreign programming. Further, Figure 6 on the next page reinforces that broadcasters are devoting only a very small portion of their revenues to Canadian priority programming, which has been their main regulatory obligation under the 1999 TV Policy.

65. The CFTPA has long argued that expenditure requirements are the surest means of achieving the goal of providing quality Canadian content in peak viewing hours and believes it is appropriate to revisit the issue of expenditure requirements. However, rather than imposing an overall Canadian program expenditure requirement (since over-the-air broadcasters will continue to do news, sports, information, talk and other types of in-house production to reach their audiences), the CFTPA **recommends** that the CRTC impose priority programming expenditure requirements on the largest conventional television broadcasters.

66. We have reviewed the CRTC's Statistical and Financial Summaries for conventional television for the past five years in order to assess the existing level of broadcaster financial contribution to Canadian priority programming. Such expenditures are not

broken out in the data that the CRTC releases to the public. In order to ascribe some value to priority programming expenditures, we have taken the amounts spent by broadcasters in licensing drama, music/variety, other information and human interest programming from independent producers. Clearly, this would provide only an estimate as it is safe to assume that not all independent productions in the "other information" and "human interest" program categories would qualify as priority programming.

Figure 6: Estimated Priority Programming Expenditures By Private Conventional Television Broadcasters, 2000-2005

	2000	2001	2002	2003	2004	2005
Revenues (private TV)	$1.889 B	$1.904 B	$1.893 B	$2.092 B	$2.115 B	$2.198 B
Total Cdn programming expenditures	$488.7 M	$502.5 M	$517.2 M	$536.0 M	$569.0 M	$581.3 M
Drama (independent production)	$59.3 M	$62.3 M	$61.9 M	$79.6 M	$68.3 M	$71.6 M
Music/variety (independent production)	$11.7 M	$11.9 M	$18.5 M	$7.4 M	$14.6 M	$25.6 M
Other info (independent production)	$4.5 M	$7.9 M	$10.6 M	$12.0 M	$12.9 M	$11.0 M
Human interest (independent production)	$16.7 M	$14.2 M	$8.8 M	$18.6 M	$25.8 M	$25.9 M
Estimated total priority programming (independent production)	$92.2 M	$96.3 M	$99.8 M	$117.6 M	$121.6 M	$134.1 M
Human interest (in-house + affiliated production)	$28.9 M	$35.2 M	$28.8 M	$31.7 M	$52.9 M	$55.3 M

Source: CRTC Statistical and Financial Summaries.

Notes for Figure 6:

- The 7th row "Estimated total priority programs acquired from independent producers" is the total of broadcast acquisitions from independent producers in the categories of drama, music/variety, other information (assumed to be long-form documentaries) and human interest.
- If all the independent production acquisitions qualify as priority programming, on average, about 20% of Canadian program expenditures are allocated to such programming. This represents on average 5.45% of private broadcast television revenues.
- This estimate does NOT include eligible in-house/affiliated production company "regional" or entertainment magazine programs, which do qualify as priority programming.
- As a proxy for that number, we have assumed the value of in-house / affiliated productions from the human interest category. On this basis, the estimated total priority programming would represent, on average, 7% of private broadcast revenues.

67. However, even with this caveat, it is clear that conventional television broadcasters for the period 2000 through 2005 have allocated approximately 20% of their Canadian programming expenditures to priority programming. As a percentage of their revenues, this represents, on average, 5.45%. Even if one includes all in-house and affiliated production in the "human interest" category, not all of which would qualify as priority programming, as a proportion of broadcast revenues, this would represent, on average 7%.

68. Given that the creation and exhibition of Canadian priority programming in prime time has been the CRTC's key focus for the past several years, the CFTPA is dismayed at the modest financial expenditure this programming represents in terms of the revenues of private conventional television broadcasters.

69. The CFTPA would like to clarify that our analysis was done on the basis of the aggregate statistical information provided for private conventional television broadcasters. We do not have access to the annual financial returns of the conventional broadcasters by ownership group, and the statistical information published by the Commission does not distinguish broadcasters by language, by ownership or market size. The broad statistical information aggregates English- and French-language broadcasters as well as multicultural broadcasters.

70. Given that this is aggregate data across the entire television broadcast industry, it is not possible for us to know whether this is an accurate assessment of actual priority expenditures by the large ownership groups who are required to meet the priority programming requirements.

71. Nevertheless, it does provide some measure of assessing broadcaster commitment to priority programming. Since the CRTC has access to actual broadcaster expenditures by each licensee, the CFTPA **recommends** that the Commission publish this information for CanWest, CTV, CHUM, Craig and Toronto One/SunTV prior to the 27 November hearing.

72. As a means of taking back our prime time, of increasing shelf space, of ensuring a predominant presence on Canadian programming in the heart of prime time, the CFTPA **recommends** that the CRTC increase the priority programming obligations of conventional television broadcasters (the large ownership groups) from 10 hours per week to 12 hours at the beginning of the new licence term, increasing to 15 hours by the end of the licence term. There are 28 hours in the peak viewing hours of 7 to 11 p.m. Fifteen hours represents just one hour more than half of this amount, which would constitute a simple preponderance rule.

73. Parallel with the above recommendation, the CFTPA **recommends** that commencing with the new broadcast licence terms in 2008/09, those conventional television broadcasters who are required to meet the priority programming requirement should do so on the basis of 12% of broadcast revenues, increasing to 15% over their next licence term.

74. The CFTPA concurs with CCAU that a particular allocation should be made to Canadian drama programming and that this requirement should have the same 5% flexibility as applies to pay and specialty television licensees. CCAU has recommended that private conventional broadcasters should be required to allocate 7% of revenues to Canadian drama programming. They have calculated that had this requirement been in place in 2005, private TV broadcasters in English Canada would have spent $117.8 million to support Canadian drama, which is double the amount they actually spent ($54.5 million).

75. However, because we have taken a somewhat different approach in advocating program expenditure requirements for overall priority programming, which should increase over time, the CFTPA recommends that a larger percentage of broadcaster revenues of the large ownership groups should be allocated specifically to drama. We **recommend** that this amount be 10% of revenues, increasing to 12% of revenues over the next licence term, in step with the increased priority programming requirements we have recommended.

76. We also concur with CCAU's position that a reasonable proportion of TV broadcaster drama expenditures should be allocated for script and concept development and for the licensing of Canadian feature films. In our view, it is appropriate for the individual broadcasters to make specific commitments in these areas, when they prepare their renewal applications.

77. Further with regard to priority programming, the CFTPA **recommends** that the CRTC eliminate the 150% time credit for 10-point drama and the 125% time credit for 6- to 9- point drama. Such time credits actually serve to diminish the amount of drama programming that appears on our television screens in the heart of prime time. Further, a clear statement of broadcaster's actual outlay on Canadian priority (and drama) programming is in keeping with the Association's stated aim of ensuring transparency and fairness in our relationships with our broadcast partners.

78. For purposes of clarity and transparency, as a means of assessing the true contribution of each broadcast ownership group, the CFTPA **recommends** that conventional television broadcasters not be permitted to include the CTF licence fee top up in calculating required programming expenditures.

79. The CFTPA further **recommends** that the CRTC remove the drama incentives provisions once it implements the regulatory changes resulting from this hearing. In our view, a regulatory regime for private conventional television broadcasters based on the recommendations put forward in this submission will be both more efficient and more effective in achieving the Commission's objective of seeing more original domestic drama programs in peak viewing hours. The methods of calculating expenditures that we propose are straight-forward and will be less burdensome for the broadcasters.

80. We **recommend** that the CRTC monitor eligibility of entertainment magazine programs, prior to the licence renewal hearings for the conventional television broadcasters. Such programs are meant to be important promotional tools for

Canadian programming, and their eligibility as priority programming is questionable if they are primarily vehicles to promote American stars, TV programs and films. If the Commission finds that such programs are not adhering to the prescribed definition, the CFTPA **recommends** that the Commission tighten the definition.

Terms of Trade

81. The CFTPA submits that conventional broadcasters can be successful in achieving significant audiences to quality Canadian drama and entertainment programs, particularly those given scheduling and promotional support. Our membership, however, is also telling us that certain types of productions (notably features, MOWs and documentaries) are not given repeat showings, even though the broadcaster has licensed a certain number of exhibitions over an established period of time. This effectively prevents the producer from exploiting the value of the production during the period that the broadcaster has purchased exclusive broadcast rights.

82. Another area of contention is the practice, by some broadcasters, of seeking to obtain “corporate” broadcast rights to enable them to exhibit a program on whatever and however many separate broadcast platforms (conventional and specialty) they have available.

83. In addition, with the growing interest by broadcasters in providing program content to viewers “how and when they want”, broadcasters are making efforts to work more closely with producers to explore multiplatform opportunities. While in the past broadcasters have stated that there is no business case for the exploitation of new digital platforms, they are now recognizing that digital platform elements (such as “mobisodes”, “podcasts” and/or “streaming”), which are outside the broadcast licence, are integral to the project.

84. John Cassaday, President and CEO of Corus Entertainment Inc., was recently quoted as saying that Corus has met with the production community to explore multiplatform opportunities. “Our message to the independent production sector is that working through us, you have a better chance at monetizing the value of your investment in programming by taking advantage of our abilities to aggregate content”.[6] This statement is an indication of the strategy that this broadcaster and others are pursuing in the new technological environment.

85. Canadian broadcasters are pressuring independent producers to accord them corporate licensing rights rather than licensing each separate broadcast window. They are asking for longer licence terms, without providing more compensation to the producer. They are requiring producers to deliver ancillary material for broadband delivery systems, mobile broadcasting, internet streaming or downloads without covering the costs or agreeing to share revenues from such activities. These are but some of the issues that must be resolved through terms of trade.

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[6] O’Brien, Greg, “UPDATE: New pay TV player contributes to Corus restructuring,” cartt.ca, September 13, 2006, (subscription required).

86. We consider such agreements to be the best means of ensuring fair and equitable dealings between producers and our broadcast partners. The agreements set out key principles concerning licensing procedures and terms, rights remuneration and exploitation and terms of reference with respect to such activities as production development, digital platform rights and the business practices that would govern individual contractual relationships. It is essential that such agreements have a mechanism for regular review and update, an annual reporting procedure, and a procedure for dispute resolution.

87. The CFTPA is convinced that terms of trade agreements are the best basis for establishing a clear framework of negotiation in the contractual arrangements between independent producers and broadcasters. They also provide a basis for the Commission to monitor broadcaster/independent production activities without intervening in contractual arrangements.

88. As conventional broadcast ownership groups become larger and more powerful, it is essential that the independent production sector have in place clear, transparent terms of trade agreements with each separate broadcast ownership group. The CFTPA has already negotiated an Independent Production Protocol with the CBC, which needs to be updated to reflect some of the concerns expressed in this submission.

89. Appendix E provides some background on how the production community, broadcasters, and the broadcast regulator in the U.K. have dealt with this matter.

90. While we are not suggesting that the U.K. model, wherein legislation requires collective terms of trade supervised by the regulatory authority, be imposed on the Canadian marketplace, given the different environmental circumstances and industry practices, we consider that there are important lessons to be taken from the U.K. experience.

91. The CFTPA submits that there is enormous disparity in the relationship between Canadian corporate broadcast groups and small- and medium-sized independent production companies. We are on record with the federal government proposing that to rebalance the inequitable relationship that has developed between Canadian television broadcasters and independent producers, an amendment to the *Broadcasting Act* is required that would explicitly state that a healthy independent production industry is key to the creation of a diversity of Canadian media product. In addition, we have suggested that the legislation should state that the programming provided by the Canadian broadcasting system should include a <u>predominant</u> contribution from the Canadian independent production sector, and that the strengthening of corporate capacity in the independent sector is critical to a healthy industry and an important objective of the *Act.*

92. Of primary importance is the acknowledgement that producers own the rights in the programs they produce, that they should be fairly remunerated for these rights and the rights should be fully exploited. This means that value must be ascribed to each broadcast exhibition window and digital platform right.

93. The CFTPA appreciates the role that the CRTC has played in encouraging broadcasters to negotiate terms of trade with the Association. However, in light of the serious imbalance in the negotiating position of producers and large broadcast conglomerates, we consider it appropriate that the CRTC take a more active role in this matter. In particular, we **recommend** that the Commission put in place a dispute resolution mechanism, similar to that it has established for contractual disputes between BDUs and programming services.

94. We **recommend** that the CRTC require broadcasters to negotiate terms of trade, by condition of licence, similar to its requirement that individual broadcasters subscribe to industry protocols on such matters as violence, gender portrayal and advertising to children. We further **recommend** that, as part of this obligation, broadcasters file annually with the Association and with the Commission details pertaining to their dealings with independent producers, on a confidential basis.

Benefits Test

95. Another question posed in the Notice of Public Hearing is whether any changes should be made to the Commission's benefits policy. Three policy statements set out what the CRTC expects in regard to benefits in ownership transactions involving a change of ownership or control of television undertakings. *Public Notice CRTC 1989-109* establishes the general framework the Commission had put in place in dealing with applications involving transfers of ownership or control. It states that because the CRTC does not solicit such applications and because just one proposal is put forward, the onus is on the applicant to prove that this is the best possible proposal "in the public interest".

96. Among other things, the applicant is required to propose a package of "significant and unequivocal benefits" that will result in measurable improvements to the communities served by the undertaking(s) and to the Canadian broadcasting system as a whole. The Commission assesses whether the proposed packages of benefits is "commensurate with the size and nature of the transaction" taking into account such factors as "the characteristics and viability of the broadcasting undertakings in question … and the financial and technical resources available to the purchaser".

97. This policy was elaborated further in *Public Notice CRTC 1993-68*, wherein the Commission attempted to clarify the types of quantifiable benefits that would be considered eligible and the regulatory procedures to be followed. This policy statement also explained that the Commission would direct the applicant to "redirect" to other initiatives any benefits proposals it deemed unacceptable. In addition, the Notice enunciated the principle that unfulfilled benefits remained an obligation of the licensee regardless of ownership changes.

98. Finally, the 1999 television policy statement (*Public Notice CRTC 1999-97*) established a benchmark regarding the value of the tangible benefits package in television transactions, stipulating that the purchasers must commit to benefits representing a financial contribution of 10% of the value of the transaction.

99. It should be noted that the 10% threshold is considered by the Commission to represent a floor and that there are instances where applicants have proposed a higher level of benefits, congruent with the nature of the transaction.[7]

100. While some broadcasters might consider the CRTC's benefits policy as a tax on earnings and an impediment to business dealings, the CFTPA submits that it is an important policy tool to stimulate the production of high-quality Canadian television programming.

101. We strongly believe that the Commission's benefits policy, as it pertains to television transactions, has resulted in substantial net improvements to Canadian program creation and presentation. One outcome is that funds, often substantial, are committed for specific purposes. A drawback to this mechanism is that the benefits are tied to a specific timetable, generally related to the term of the broadcast licence, generally for five to seven years.

102. This means that one-time commitments by television broadcast licensees to spend hundreds of thousands or millions of dollars to create new original Canadian programming effectively have a "sunset" provision. The only way around this would be to invest the funds on a permanent (or revolving) basis, allocating a certain amount to be dispensed each year. To the best of our knowledge, this has only happened once, in the case of the Independent Production Fund (IPF), established as a result of Maclean Hunter's divestiture of its broadcast properties in 1991. In that particular case, a capital endowment of $29.2 million generates annual revenues that it uses to provide equity investment for independently produced prime time drama series and dramatic children's programming for exhibition by private Canadian broadcasters. Since its inception, the IPF has provided more than $37.6 million, generally averaging about $3 million a year.

103. Another issue with the existing benefits policy, as was revealed in the recent Bell Globemedia ownership restructuring (*Broadcasting Decision CRTC 2006-309*, dated July 21, 2006), is what the Commission has itself termed "multi-step transactions" and stated that it "reserves the right in the future, in the case of such transactions, to review not just the final step, but the entire sequence of events … in order to determine the appropriateness of any proposed benefits package." The CFTPA had intervened in that particular application, stating our belief that the proposed transaction did, in fact, constitute a change of effective control and should be subject to the benefits test. We further argued, that "given the value of the assets at play in the proposed transaction, we firmly believe that the CRTC has the jurisdiction to assess what benefit ... should be assessed in this instance".

104. In addition, the CFTPA recommended that the CRTC close the loophole in its benefits policy that "has afforded this applicant the opportunity to avoid sharing the benefits of this transaction with the viewing public …. Otherwise, approval of this

[7] See, for example, *Decision CRTC 2000-221*, in which CanWest Global committed to provide 12% of the value of its acquisition of WIC's regulated television assets to public benefits. This was largely because CanWest was seeking an exception to the Commission's policy that limits ownership of television stations in a given market to one station per broadcast group.

application could spark a multitude of similarly structured transactions that take advantage of this means of recapitalizing their companies with no regard to improving upon the ability of the affected broadcasting undertakings to meet or expend upon their commitments to Canadian program creation." The Commission's decision on this transaction referenced this argument and suggested that the appropriate venue for such argumentation would be the present proceeding.

105. The CFTPA hereby **recommends** that the Commission amend its benefits policy to require tangible benefits in ownership transactions that may not represent a clear-cut change of control, where the assets in question are of national consequence by virtue of the importance of the holdings and / or the size of the transaction.

106. Nevertheless, on balance, the CFTPA solidly supports the Commission' s benefits policy and considers that it has proven to be an effective and transparent means of attaining incremental Canadian program expenditures from television broadcasters.

107. The recently announced purchase of CHUM by BGM (which is subject to regulatory approvals by the CRTC and the Competition Bureau), has precipitated speculation that other major ownership changes involving television properties will be forthcoming. The CFTPA can envision a broadcasting system with but two or three strong players in terms of English-language conventional/specialty/pay television.

108. There is, of course, the possibility that new parties – whether telcos, pension funds or other large corporate interests – will want to enter the Canadian television marketplace. Whether traditional players or new entrants, these will undoubtedly be large conglomerates with a careful eye on the bottom line and shareholder returns. We **recommend** that the Commission forestall requests by such parties to eliminate the imposition of tangible benefits valued at 10% of the transaction by clearly articulating that benefits are intended to serve the public interest and the public good.

109. Because benefits contributions have a "sunset" aspect inasmuch as they are dispensed in accordance with a timetable tied to the licence term, the CFTPA **recommends** that the CRTC direct potential purchasers of the assets of existing broadcast television undertakings to direct a higher percentage of the benefits to Canadian program expenditures. In this way, the public benefit of the transaction will be long term.

110. In this regard, we ask the CRTC to review the financial statements of broadcasters, giving particular attention to the debt charges on their balance sheets. Ongoing broadcaster contributions to production and exhibition of Canadian programming, which are their main responsibility and obligation under the *Broadcasting Act*, should not be curtailed by interest charges on mergers and acquisitions.

111. As a means of responding to some of the concerns we have raised regarding benefits, the CFTPA **recommends** that the Commission implement a sliding scale of tangible benefits, to be calculated on the basis of the nature of the proposed transaction and with clear statements as to where control will rest. We propose that the CRTC should require the payment of benefits at each of the thresholds (20% and

30%) at which it takes notice of changes in the ownership of assets of broadcasting undertakings as well as the 50% threshold or when there is a transaction involving clear-cut control. We propose that at the lowest threshold, a significant minority position, the purchaser should be required to put forward benefits valued at 10% of the cost of the share purchases. A valuation of 12.5% should be required on more substantial changes in ownership. A benefits package in the amount of 15% should apply to transactions involving an effective change of control.

112. The CFTPA **recommends** that in establishing benefits, TV licensees should be required to allocate at least 90% of the funds to what the Commission has defined as "on-screen presence", meaning the creation of incremental, original domestic programming content. These expenditures must be incremental to ongoing program requirements (to ensure the creation of greater number of episodes, higher licence fees, etc. Up to 10% of the total benefits package may be allocated to other initiatives (such as industry festivals, mentoring programs, or to eligible independently administered production funds) provided such initiatives are clearly public benefits that offer substantive support to individuals or to the production community as a whole.

113. We further **recommend** that, at minimum, 85% of the "on-screen presence" initiatives be allocated to independent producers. We also submit that the majority of these commitments must be directed to the benefit of the Canadian broadcasting system as a whole, rather than to the specific television market(s) in question.

Advertising Regulations

114. The CFTPA agrees with CCAU that it may make sense for the CRTC to increase the limit on commercial advertising messages to an average of 14 minutes per hour, as a quid pro quo for Canadian program expenditure requirements. However, the Association continues to have concerns that broadcasters do not make sufficient provision to promote Canadian programs. Accordingly, the CFTPA **recommends** that conventional broadcasters be permitted to exhibit on average 14 minutes of commercial messages, provided the broadcasters commit to exhibit a specific number of Canadian program promotional messages per year, to be aired in unsold advertising time.

115. The Commission must ensure that, in addition to promoting Canadian programming services (which enables broadcasters to promote the non-Canadian programs they have acquired for exhibition), broadcasters take responsibility for promoting Canadian programs.

116. The CFTPA also has considerable concerns about product placement. As reception and recording devices enable consumers to view programs at the time of their choosing (and to skip the commercials in the process), advertisers are aggressively pursuing other means of reaching television audiences. Product placement has moved from the feature film industry into television and broadcasters are aggressively suggesting that producers include specific products in their programs.

117. While this is likely a matter that will be discussed with broadcasters in the context of terms of trade, we ask the CRTC to be aware of this practice and to require broadcasters to report the associated revenues. The CRTC should also make clear to broadcasters that the decision as to whether or not to include a particular product on a television program rests solely with the producer.

Fee for Carriage

118. In respect of clarity regarding broadcast costs and revenues, the Notice of Public Hearing asks the specific question as to whether the Commission should "consider permitting a subscriber fee for the carriage of certain over-the-air television signals by broadcasting distribution undertakings".

119. The fact that the Commission is seeking comment on whether over-the-air television broadcasters should be compensated, presumably in response to the suggestion of some broadcasters that conventional television services should have access to a dual revenue stream (subscriber fees as well as advertising, as is the case for specialty programming services), begs the question as to whether the CRTC has jurisdiction in this matter. This depends on the mechanism that would be put in place.

120. If over-the-air broadcasters receive compensation from BDUs in relation to a payment charged to subscribers, this raises concerns about how the level of compensation would be determined, how much markup is appropriate, and whether consumers would accept the imposition of payment for "free TV". Higher cable and satellite TV subscriber fees for mandatory services could well lead to a reduction in consumer interest in and take up of discretionary services (specialty, pay, PPV, and other optional programming selections).

121. It could be argued, as the CRTC itself stated in its summation of the Structural Public Hearing (*Public Notice CRTC 1993-74*), that this is "essentially a copyright issue … most appropriately be dealt with by bodies other than itself". To the extent that the signals retransmitted are distant, they are captured by the compulsory licence regime in the *Copyright Act.* It requires BDUs to pay an established tariff for such to retransmission collectives set up for this purpose.

122. Alternatively, the matter could be looked at as a variation on the concept of creation of the Cable Production Fund (now the CTF), which originated at the same Structural Hearing). The CRTC determined that "new initiatives to fund Canadian programming are essential to ensure that Canadian programs remain available and attractive to Canadians". It determined that additional financial support was needed and put in place a mechanism to ensure this support through mandatory contributions of 5% of revenues from broadcasting activities to qualifying independently administered production funds and through contributions to local expression.

123. If such an approach is taken, it would be deemed a further contribution from BDUs to support the creation and presentation of Canadian programming rather than a “fee for carriage”. The CFTPA would endorse such a mechanism provided that the additional contribution is directed to the CTF to address the demonstrated demand. Such payment could be directed to conventional broadcaster envelopes.

124. If such a mechanism is put in place, the CFTPA **recommends** that the required contribution “make whole” the original intention that BDUs would contribute 5% of revenues to an independently administered production fund accessible for independent production of quality programming in under-represented program categories.

125. This would erase the diminution in BDU contributions to the CTF resulting from permitted payments for local expression on the community channel by cable undertakings and the provision that direct-to-home satellite TV operators compensate small market broadcasters in lieu of effecting program deletion.

126. Throughout this submission we have argued that while conventional television broadcasters are strong and profitable, they are not making sufficient expenditures to quality Canadian priority programming, particularly drama. If the Commission decides that TV broadcasters are to receive a secondary revenue stream (i.e., a “fee for carriage”), it must mandate that these funds be used only to fund additional expenditures related to the acquisition of original Canadian television programming from independent producers.

127. Accordingly, the CFTPA **recommends** that the CRTC give careful consideration to this matter and ensure that any mechanism put in place results in a greater contribution from broadcasters and BDUs to the financing of Canadian independent television production.

New Entrants / New Platforms / HD Content

128. As discussed above, the CFTPA believes that the cultural and social objectives set out in the *Broadcasting Act* remain relevant today and for the future. We are convinced that the Canadian broadcasting system will continue to be the most important means by which Canadian viewers, regardless of where they live in this country, have access to the widest range of original program content that informs them, provides an outlet to express their experiences whatever their cultural background or social ties.

129. Technology and the resulting shifts in market economics are unquestionably eliminating the distinctions between the broadcasting and telecommunications industries. Broadcast and telephony services (including cellular networks) are increasingly used to transmit data and video content, including content previously distributed on network television. Broadcast distribution undertakings offer high-speed internet service and local telephony. Telephone companies are getting into the broadcasting business, using the digital platforms traditionally used to transmit

voice and data. Moreover, the broadband capacity of both broadcast and telecommunications distribution networks has grown immensely over the last decade and continues to expand.

130. In fact, it is perhaps no longer appropriate to speak of broadcast and telecommunications as if they are separate technologies, with different functions rooted in their distinct historical backgrounds. The overlapping interests and functions suggest that what is emerging is a communications infrastructure, a multi-purpose, inter-connected information technology backbone. Canada's communications infrastructure is a key engine driving economic growth.

131. However, this structural foundation is nothing but a pipeline (whether cable conduit or telephone network) without the content that is "piped" over it. The reach of these new digital platforms is global, effectively eliminating geographic boundaries. Given this, it is essential that Canadian content is produced for distribution on these platforms and is accessible to Canadians and to people from other nations.

132. The CRTC has shown reluctance to regulate mobile television broadcasting, stating in its public notice detailing the regulatory framework for these services that "at present, Bell, TELUS and Rogers offer predominantly Canadian channels on their services".[8] Further, in addressing requests to review its New Media Exemption Order in the same notice, the Commission stated that:

> *The Commission based its 1999 decision to exempt new media broadcasting undertakings from licensing on several factors. One of these factors was that new media were making a positive contribution to the attainment of the objectives of the Act by enhancing opportunities for Canadian expression. The Commission also found that a significant amount of Canadian content was present on the Internet and that this content was being created and made available in the absence of regulation. Further, the Commission found that local Canadian content was important to the development of Canadian new media businesses.*[9]

133. The CFTPA contends that the new digital platforms provide our nation with the ability to define itself, effectively and economically. Failure to promote the creation of and ready access to interactive Canadian content could both undermine Canada's distinctive identity and disenfranchise younger generations for whom the computer and the cell phone are the primary communications tools.

134. We believe that policy measures that encourage the creation and promotion of Canadian content are essential to the new technological / communications environment. The introduction of new digital platforms has resulted in hiccups and gaps and disconnects as the broadcast and telecommunications sectors adapt to enabling the creation and distribution of innovative, relevant content that is entertaining, informative, timely and interactive.

[8] *Public Notice CRTC 2006-47*, Regulatory framework for mobile television broadcasting services, April 12, 2006, paragraph 44.
[9] Ibid, paragraph 36.

135. This has placed new demands on product development that has increasingly necessitated cross-platform strategies. The financing of quality Canadian interactive media content is a major challenge. It is expensive, if done well, and requires imagination, innovation and responsiveness. Despite the fact that this sector represents the future, the creation and promotion of interactive content for the new digital platforms does not currently benefit from public policy measures such as those accorded to broadcast programming, feature film production, book publishing and sound recording.

136. The Canadian interactive media sector has little direct federal funding ($14 million a year under the Canada New Media Fund, administered by Telefilm Canada) and receives relatively modest financial support from the broadcast distribution sector (the Bell Broadcast and New Media Fund contributes about $6 million a year to support the production of interactive media related to broadcast program content).

137. The CFTPA contends that, just as each element of the broadcasting system is expected to contribute to the creation and distribution of Canadian programming, telcos, BDUs, internet platform providers and other players that enable the dissemination of multimedia digital content should be required to contribute a portion of their revenues to an independently-administered, dedicated interactive media fund that is mandated to support the development and production of quality interactive media content.

138. Our filing in response to *Public Notice 2006-72* submitted that a new national policy strategy needs to be adopted that, among other things, "provides an effective financing model for the production of Canadian television content in traditional and alternative formats and platforms" and ensures a Canadian presence on new digital platforms.

139. That submission also contained a number of recommendations intended to stimulate and encourage more Canadian content production in HD. The CFTPA proposes to work with officials at Finance, Industry Canada, Canadian Heritage, and Canadian broadcasters for the purpose of establishing a tax credit to encourage greater production in HD. We are also working with industry stakeholders to encourage additional government support through the CTF to ensure that all CTF-supported programs be produced in HD.

CONCLUSION

140. Independent producers work in a broad range of program genres and formats to give expression to Canadian stories, interests and concerns from the perspective of our own experiences and in the context of our unique culture and geography. A partial list of recent drama (including comedy series, MOWs, and mini-series) and documentary programs broadcast on Canadian conventional TV is included below.

Figure 7: Sample List of Recent Independently Produced Canadian Programs Broadcast on Canadian Conventional Television

Program Title (by genre)	Producer	Broadcaster
Documentaries		
Checklist: A measure of Evil	The May Street Group	CTV
Girls Don't Fight	Infinity Films	CTV
Greenpeace: Making a Stand	Omni Film Productions	Global
Monster in the Family	J.S. Kastner Productions	CTV
Running on a Dream: The Legacy of Terry Fox	Omni Film Productions	CTV
Shake Hands with the Devil: The Journey of Romeo Dallaire	White Pine Pictures	CBC
The Secret Mulroney Tapes	90th Parallel Film and Television Productions	CBC
Queen of Diamonds	3ML Mark Miller Media Link	Global
Comedy series		
Corner Gas	Prairie Pants Productions (Vérité Films, 335 Productions)	CTV
Jeff Ltd.	Seymour & From Productions 2, S&S Productions	CTV
Hatching, Matching and Dispatching	2M Innovative, Insight Production Company	CBC
The Jane Show	Shaftesbury Films	Global
This Hour Has 22 Minutes	Halifax Film Company	CBC
Drama series		
Alice, I think	Slanted Wheel Entertainment, Omni Film Productions	CTV
Da Vinci's City Hall	Haddock Entertainment, Barna-Alper Productions	CBC
DeGrassi: The Next Generation	Epitome Pictures	CTV
Falcon Beach	Original Pictures, Insight Productions	Global
Godiva's	Keatley Films	CHUM
Renegadepress.com	Vérité Films	Global/CH
The Collector	No Equal Entertainment	CHUM
The Eleventh Hour	Norstar Filmed Entertainment, Eleventh Hour Productions	CTV
This is Wonderland	Muse Entertainment, Indian Grove Productions	CBC
Whistler	Boardwalk Productions, Blueprint	CTV
MOWs		
Choice: The Henry Morgentaler Story	Barna-Alper Productions, Great Blue, Park Ex Pictures	CTV

Crazy Canucks	Alberta Filmworks	CTV
Doomstown	Sarrazin Couture Entertainment	CTV
Eight Days to Live	Shaftesbury Films	CTV
Hunt for Justice: The Louise Arbour Story	Galafilm	CTV
HeyDay!	Triptych Media, Pope Productions	CBC
Human Trafficking	Muse Entertainment	CHUM (CITY)
Last Exit	Forum Films, Foundry Films	CTV
Selling Innocence	ImagiNation Productions, Cité-Amérique	CTV
Shades of Black: The Conrad Black Story	Shades of Black Productions (Screen Door & BOX TV, U.K.)	CTV
Spirit Bear: The Simon Jackson Story	Tapestry Pictures (Screen Door, Massey Productions)	CTV
The Collector	No Equal Entertainment	CHUM
Waking Up Wally: The Walter Gretzky Story	Alberta Filmworks	CBC
Mini-series		
Canada Russia '72	Summit Films, Dream Street Pictures	CBC
Dragon Boys	Anchor Point Pictures (Omni Film Productions)	CBC
Indian Summer: The Oka Crisis	Ciné Télé Action	CBC
Lives of the Saints	Capri Films, RTI (Italy)	CTV
October 1970	October Crisis Productions, Apprehended Films (Barna-Alper Productions, Big Motion Picture)	CBC
René Lévesque	Ciné Télé Action	CBC
The Tommy Douglas Story	Mind's Eye Entertainment	CBC
Whiskey Echo	Whiskey Echo Productions (Barna-Alper Productions & Little Bird Television, Ireland)	CBC

141. We have provided these program titles as a means of illustrating to the Commission and other interested parties that the independent production community is a vital component of the Canadian broadcasting system. Our broadcast partners, who exhibit and promote our programs, often claim our programs as their own. We want to make it perfectly clear that it is independent producers who create these shows. It is our work and we are proud of it.

142. The Canadian television market faces a particular challenge because of our proximity to the U.S. The virtually universal availability throughout Canada of a vast array of non-Canadian programming from our neighbour to the south means that this country is in grave danger of losing our Canadian voice and presence on the most powerful communications platform – television – unless there is a strong production industry that has ready and assured access to Canadian airwaves.

143. This submission contains 22 recommendations. Ten of these relate to production expenditures regarding priority programming and drama. There are three recommendations concerning terms of trade, six regarding the CRTC benefits policy, and others on advertising and fee for carriage.

144. The Canadian government has long recognized that the limited size of the domestic marketplace makes it exceedingly difficult for the Canadian broadcasting system to provide a sufficient quantity of quality Canadian content with high production values unless there are a number of support mechanisms in place (tax credits, the production funding support programs provided by the CTF and Telefilm Canada, and initiatives by various provincial governments).

145. In addition, the CRTC has ensured the establishment of a number of independently administered production funds, several of which were created as benefits in ownership transactions, to support independent production. Information about this "supply" side of the equation is enumerated below.

146. However, the continued ability of these various support measures to sustain the existing (let alone an increased) level of production is highly doubtful in the long term. This proceeding presents the opportunity to redress the imbalance in the supply-demand continuum in respect of private conventional television. The CFTPA has made several recommendations that, if implemented, would ensure that television broadcasters pay more for the Canadian programs they license from independent producers.

147. The CFTPA is convinced that it is only through the continued presence, in significant amounts, of quality Canadian programming that we can be assured that a distinctive Canadian broadcasting system will continue to exist in the future. It is necessary to ensure Canadian content options in the system, regardless of how content is distributed.

148. Each element of the system – traditional broadcasters and the new digital content platform providers – must contribute to the broad cultural objectives of the *Broadcasting Act*. We endorse new policy initiatives and support structures to support and sustain those goals.

149. The recommendations in this submission have been framed as a means of assisting the Commission to devise "smart regulation" to ensure the creation, exhibition and promotion of appealing Canadian programming. The basis of our proposals is clarity, transparency, and fairness. This involves a recognition that domestic production must be fully funded in the Canadian marketplace, that Canadian broadcasters can and should make a greater contribution to independent productions through higher licence fees, required expenditures on Canadian priority programming, and making available more shelf space to exhibit that programming in the heart of prime time. It involves a rebalancing of the partnership between producers and broadcasters and recognition that the benefits payable in ownership transactions are a mechanism for serving the public interest.

150. At paragraph 18 of the Notice of Public Hearing, the Commission states that the regulatory framework for television is based on a balance between ensuring appropriate contributions to the social and cultural objectives of the Act and creating conditions for a healthy private sector. It is our contention that it is also incumbent on the CRTC to ensure a healthy independent production sector.

151. The CFTPA appreciates the opportunity to provide its comments in this important proceeding and reiterates our request to appear at the 27 November public hearing.

SUMMARY OF RECOMMENDATIONS

- The CRTC should impose priority programming expenditure requirements on the larger conventional television broadcasters.
- The Commission should publish the actual priority expenditures of conventional television licensees CanWest, CTV, CHUM, and Toronto One/SunTV prior to the 27 November public hearing.
- The CRTC should increase the priority programming obligations of the largest conventional television broadcasters, from 10 hours per week to 12 hours increasing to 15 hours over the new licence term.
- Commencing with the new conventional television broadcast group licence terms in 2008/09, those broadcasters that are required to meet the priority programming requirement should do so on the basis of 12% of broadcast revenues, increasing to 15% over their next licence term.
- The large conventional TV broadcast ownership groups should be required to allocate 10% increasing to 12% of their revenues over the new licence term to Canadian drama programming. Broadcasters should be required to make specific spending commitments for script and concept development and for the licensing of Canadian feature films when they prepare their licence renewal applications.
- The CRTC should eliminate the 150% time credit for 10-point drama and the 125% time credit for 6- to 9-point drama aired as priority programming.
- Broadcasters should not be permitted to include the CTF licence fee top up in calculating required programming expenditures.
- The CRTC should remove the drama incentives provisions once it implements the regulatory changes resulting from this hearing. The methods of calculating expenditures that we propose are straight-forward and will be less burdensome for broadcasters.
- The CRTC should monitor eligibility of entertainment magazine programs prior to the licence renewal hearings for the conventional television broadcasters.
- If the CRTC finds that such programs are not adhering to the prescribed definition, the Commission should tighten the definition.

- The CRTC should require broadcasters to negotiate terms of trade with independent producers, by condition of licence, similar to its requirement that individual broadcasters subscribe to industry protocols on such matters as violence, gender portrayal, and advertising to children.

- The Commission should put in place a dispute resolution mechanism, similar to that it has established for contractual disputes between BDUs and programming services.

- We further recommend that, as part of this obligation, broadcasters file annually with the CFTPA and with the Commission details pertaining to their dealings with independent producers, on a confidential basis.

- The CRTC should amend its benefits policy to require tangible benefits in ownership transactions that may not represent a clear-cut change of control, where the assets in question are of national consequence by virtue of the importance of the holdings and/or the size of the transaction.

- The Commission should revise its benefits policy relating to changes in control of television broadcasting assets and clearly articulate that benefits are intended to serve the public interest and the public good.

- The CRTC should require potential purchasers of the assets of existing broadcast television undertakings to direct a higher percentage of the benefits to Canadian program expenditures.

- The Commission should implement a sliding scale of tangible benefits, related to the various thresholds (20% and 30%) at which it takes notice of changes in the ownership of assets of broadcasting undertakings as well as when there is a transaction involving clear-cut control. Benefits commitments should be assessed at 10%, 12.5% and 15% of the value of the transactions.

- TV licensees should be required to allocate at least 90% of the benefits to "on-screen presence" (the creation of incremental, original domestic programming content). Up to 10% of the total benefits package may be allocated to other initiatives (such as industry festivals, mentoring programs, or to eligible independently administered production funds) provided such initiatives are clearly public benefits that offer substantive support to individuals or to the production community as a whole.

- At minimum, 85% of the "on-screen presence" initiatives should be allocated to independent producers. The majority of these commitments should be directed to the benefit of the Canadian broadcasting system, beyond the television market(s) in question.

- Conventional television broadcasters should be permitted to exhibit, on average, 14 minutes of commercial messages, provided they commit to exhibit a specific number of Canadian program promotional messages per year, to be aired in unsold advertising time.

- If the Commission decides to put in place a “fee for carriage” mechanism for conventional television broadcasters, the required fees payable by BDUs should “make whole” the original intention that BDUs would contribute 5% of revenues to an independently administered production fund.

- The CRTC should give careful consideration to the implementation of any “fee for carriage” mechanism to ensure that it results in a greater contribution from broadcasters and BDUs to the financing of Canadian independent television production.

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