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An Over-the-Top Exemption

It's Time to Fairly Tax and Regulate the New Internet Media Services

John Anderson

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Executive Summary

THE RAPID GROWTH of Internet-based media services, in particular over-the-top (OTT) services such as Netflix, Amazon Prime, and Google (YouTube), is transforming how we produce, distribute, and consume television, radio, films, music, news, and books. While these online services are increasingly popular with consumers, their expansion has taken place in a regulatory vacuum in Canada, with significant consequences for Canadian producers, artists, traditional broadcasters, cultural policy, and the Canadian content regime.

Of special concern is that the mostly foreign-owned OTTs are not required to collect and remit value-added taxes and do not pay income taxes in Canada. This creates an uneven playing field that benefits very large foreign-owned companies like Netflix and Google while depriving the government of valuable tax revenues — money that could go toward supporting Canadian culture and media. The study examines these changes and suggests potential regulatory and taxation measures that would support Canadian cultural policy and the production and distribution of Canadian content.

After briefly considering the growth of OTTs over the past decade, the study questions why such firms pay no income tax and are not required to collect sales taxes. The situation is compared to other countries that have recently begun taxing the broadcasting activities of OTTs as they would any other broadcaster, and where measures have been taken to apply national cultural policies to the new foreign-owned media players. In May, for example, the European Commission proposed that video-on-demand services “need to ensure at least a 20% share of European content in their catalogues and should give a good visibility (prominence) to European content in their offers.”[1]

The study then examines how Canada’s unwillingness to regulate new media companies has resulted in a situation where mainly foreign-owned OTTs do not contribute in any significant way to Canadian content or observe any Cancon quotas. Combined with the concentration of media industries, the decreased funding over the last three decades for the public networks of CBC and Radio-Canada, and the relatively low level of funding for Canadian media production, the increase of the unregulated new media is another blow to Canadian culture.

The study delves into recent consultations on television in the new media environment by the Canadian Radio-television and Telecommunications Commission (CRTC), demonstrating how the regulator and federal government have systematically avoided the OTT issue — even when opportunities to regulate have presented themselves and studies have urged action. Instead, the CRTC has tried to level the playing field by deregulating Netflix-like services delivered by Canada’s major broadcasters and introducing new television rules designed to increase “consumer choice,” but which barely skirt the more pressing challenges that OTTs present for Canadian cultural policy and the media environment broadly.

This study does not attempt to be a complete review of the problems confronting Canadian media, including disturbing levels of concentration of ownership and vertical integration among Canada’s major broadcasters. Rather, it focuses on the rise of the new media, in a mainly unregulated and undertaxed fashion, since about the mid- to late-2000s. As the Internet becomes the main delivery platform for all our media and most communications needs, the study concludes it would be more egalitarian and beneficial to Canadian culture for the government to hold foreign-owned OTTs to the same rules as other major Canadian media companies when it comes to online broadcasting.

Toward this end, it recommends the government take the following actions:

1. Regulate OTTs

The CRTC must remove the new media exemption orders for all OTT services and ensure that OTTs begin to comply with Canadian broadcasting regulations. It must ensure there are no more exceptions given to either foreign or Canadian online media services.

2. Collect Value-Added Taxes

All electronic commerce services (above a determined sales threshold) that sell to Canadians should collect and remit GST/HST and PST amounts to federal and provincial governments. This should apply to all broadcast distribution companies or Internet and digital services (with over 2,000 subscribers) that consolidate programming and channels and distribute them in Canada. All digital and online media services that earn subscription revenue from Canadians, sell or rent individual shows or programs, or collect advertising revenue from Canadian companies, governments or individuals should collect HST, PST, and GST where applicable.

3. Collect Income Tax

These same e-commerce companies currently avoiding collecting and remitting value-added taxes on Canadian sales should pay income tax on monies they earn from products or services they sell or rent in Canada. This should apply to other e-commerce companies in other sectors, such as Amazon, Uber, and Airbnb, as well as to the cultural and broadcast sector.

4. Insist on Contributions to Canadian Culture

OTT companies that act as broadcasting distribution undertakings (BDUs) with more than 2,000 subscribers should contribute 5% of their gross revenues from broadcasting-related activities to the creation of Canadian programming through publicly or independently administered funds as other BDUs do.

5. Insist on Higher Levels of Canadian Programming

The regulations on Canadian programming inventory should be applied to all foreign or domestic video-on-demand (VOD) services.

6. Increase Funding for the CBC

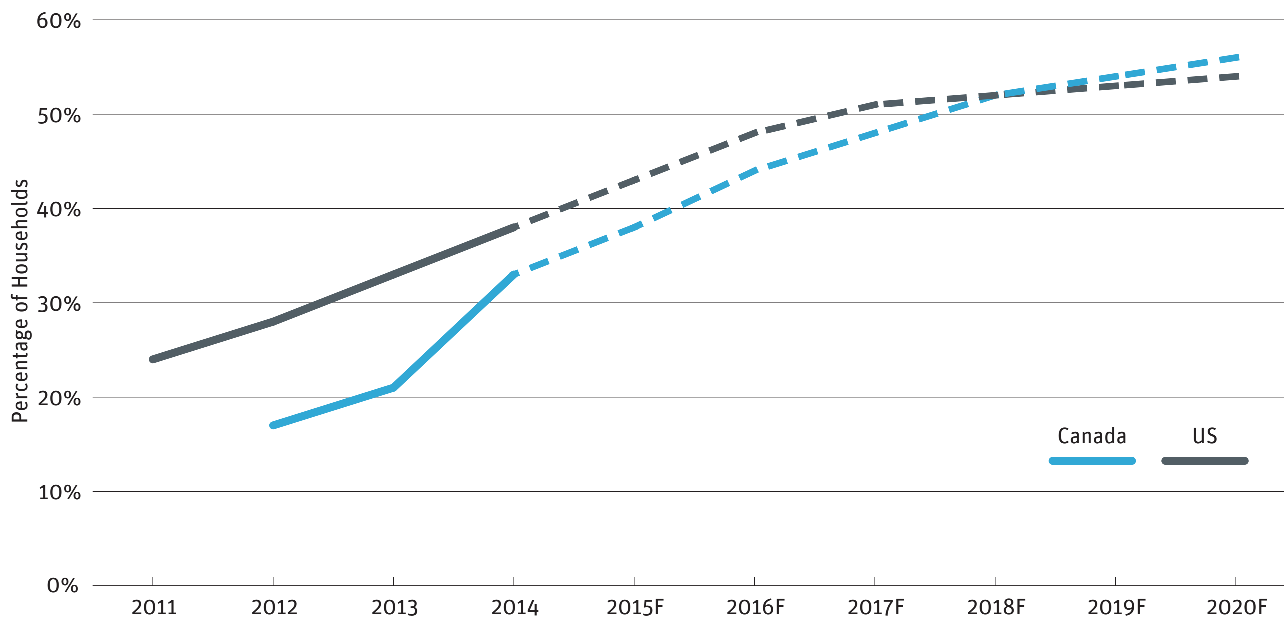
One of the best ways the government could ensure the development of Canadian culture is to increase funding for the CBC and Radio-Canada. The national broadcaster today receives roughly $1 billion a year in public funding for its English and French networks. The federal government should double this contribution and at the same time limit CBC advertising revenues.

Canadian Culture in the New Over-the-Top Environment

Over the past decade, the concentration and vertical integration of the media industries has increased dramatically.[2] Fewer and fewer major players control large parts of the telecommunications, television, radio, print, and Internet universe. In Canada, five big media groups (Bell, Rogers, Quebecor/Vidéotron, Shaw/Corus, and Telus) control 73% of the Canadian media economy. A 2015 study on media and Internet ownership found that Canada had the highest levels of vertical integration and cross-media ownership of 28 comparable countries.[3] The same period has also seen the Internet evolve into the predominant delivery platform for all media — from movies, television, and music to news. Advertising has followed the audience online, draining finances from "traditional" forms of media such as cable television and print newspapers.[4]

On one level, these two developments — increased concentration and new Internet delivery of media — have been a boon for Canadian broadcasters and their audiences. At the same time, the recent rise of mostly foreign-based over-the-top competition in this field challenges established nationally owned Canadian firms and content delivery models that have developed according to strict and effective Canadian cultural policies. As Peter Miller

FIGURE 1 Penetration of OTT Services, Canada vs. US



Source Peter Miller/Nordicity, Canadian Television 2020: Technological and Regulatory Impacts, December 2015 http://www.actra.ca/wp-content/uploads/Nordicity-Miller-Lets-Talk-TV-economic-impact-forecast.pdf

put it in his recent report for major Canadian media unions and the Friends of Canadian Broadcasting:

> Digital technology helped spur the Canadian television system to its highest watermark in terms of revenues and contributions to Canadian programming — more capacity, more channels, more Canadian content — all via a "closed" system of broadcast distribution undertakings (BDUs) to which over 85% of Canadians once subscribed. This closed BDU system is now effectively under attack from newer IP-based digital technologies, and their tendency to disintermediate, bypass and disrupt traditional distribution networks and business models. Suddenly, Netflix goes from zero to over a third of Canadian households as subscribers. Suddenly, two Canadian over-the top-television (OTT) services launch with hundreds of thousands of subscribers, and morph from being complementary to BDU offerings to competing with them. Suddenly, the question is not just whether OTT is impacting traditional television, but whether it is destined to replace it.[5]

While this technological challenge to the status quo is new, Canada is no stranger to turning points in the media landscape, and Ottawa has proven its ability to respond in ways that continue to support Canadian cultural production. In the 1930s, for example, we created the CBC to counteract the domination of the English-language airwaves by U.S. radio. In the 1960s, when American television programming flooded Canadian airwaves, we wrote new Canadian content regulations.[6] Today the issue is once again domination, but this time of the Internet by mostly U.S. OTTs, which have become their own distribution networks as well as their own creators of new media.

The Miller/Nordicity report on the impacts of digital media services on Canadian television estimates that over-the-top broadcasting represented 2.5% of the television system revenue in 2015 and could reach 10% by 2020. While this may seem small in comparison with the large share of total television revenues going to Canada's "Big Five" vertically integrated broadcasting companies, the growing share of this market taken by mostly foreign-owned OTTs has broader consequences for Canadian cultural policy and, as explored in the next section, represents considerable lost tax revenues for federal and provincial governments.

Canadian consumers can "cut the cord," so to speak, to purchase content directly from Netflix, Apple, Google and YouTube, with other OTT providers such as Amazon Prime and Hulu ready to enter the Canadian market. Private Canadian broadcasters have developed comparable services such as *shomi* and CraveTV, while CBC has made more programming available online. But it is the foreign-owned OTT services that are capturing the lion's share of the OTT market in terms of both viewers and revenues from subscriptions and advertising.

The media shift to the Internet is occurring as part of a general pattern of increasing e-commerce around the world. Retail e-commerce sales in Canada, according to eMarketer, were expected to reach $29.63 billion in 2015, which is an increase of 16.8% over 2014 spending levels. The media analytics company predicts double-digit sales increases through 2019.[7] Meanwhile, government funding in Canada for public broadcasters and Canadian cultural programming has gone down considerably. Despite a small boost from the Liberal government in its last budget, the CBC remains significantly underfunded compared to public television and radio in many other countries.[8]

The rise of OTT services, abetted in Canada by the government's tax policy, has reduced revenues to traditional Canadian-owned media corporations, as customers cut their cable, satellite, or fibre optic link and choose to consume their favourite media direct from the Internet. Of course, there are important other reasons for the trend in "cable-cutting," notably the avail-

TABLE 1 Internet Advertising: Revenue ($ millions), Market Shares and Concentration

Company	Revenue $	Market Share %
Google	1896.5	50
Facebook	535	14.1
Torstar	126	3.3
Postmedia	88	2.3
Quebecor	82.7	2.2
Power Corp	32.6	0.9
Globe and Mail	24.7	0.7
Rogers	20.1	0.5
Total	**3793**	**74**
CR4 (4 largest control of market)	69.7	
HHI (indicator of high level of concentration)	2721.6	

Sources IAB, 2014 Actual + 2015 Estimated Canadian Internet Advertising Revenue Survey, p. 4, company Annual Reports, and the entries under "Internet Other" sheet in the GoogleDocs Workbook. Table reproduced from the Canadian Media Concentration Research Project (http://www.cmcrp.org/media-and-internet-concentration-in-canada-report-1984-2014/).

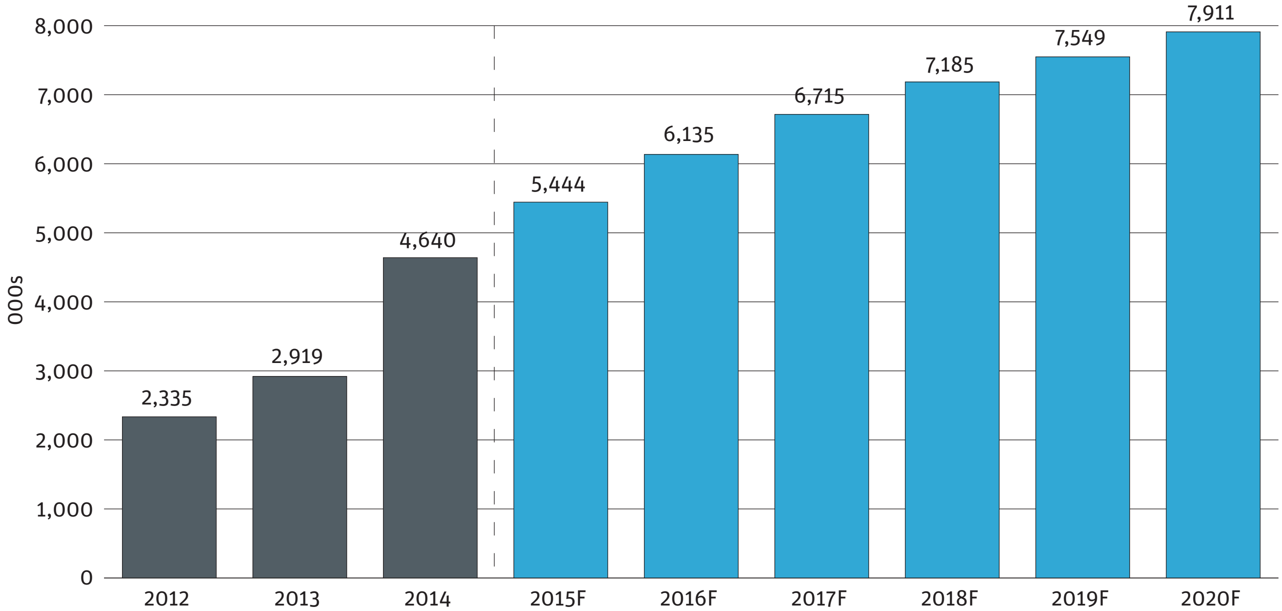
TABLE 2 Ad Spend Shares by Six Major Media, 2014

Rank		$ Millions	% of Total
1	Internet	3,793	34
2	Television	3,361	30
3	Dailies	1,392	13
4	Radio	1,589	14
5	Magazines	472	4
6	Out-of-home	521	5
Total		**11,128**	**100**

Source IAB Canada, 2014 Actual + 2015 Estimated Canadian Internet Advertising Revenue Survey June 29, 2015 http://iabcanada.com/wp-content/uploads/2015/08/IAB-Canada-Internet-AdRev-Survey-2014-15-Jun-2915-waddendum2.pdf

ability online of thousands of shows and new high-quality programming, not to mention the high cost of a monthly cable or fibre television package, which can range from $30 to over $100 plus HST per month depending on what company and what services are chosen.[9] A recent analysis predicts total subscribers to traditional media services will decrease in Canada from 11.6 million in 2014 to 11.1 million in 2020.[10]

FIGURE 2 OTT Subscribers in Canada



Source Peter Miller/ Nordicity, Canadian Television 2020: Technological and Regulatory Impacts, December 2015 http://www.actra.ca/wp-content/uploads/Nordicity-Miller-Lets-Talk-TV-economic-impact-forecast.pdf

However, it is not just the decline of BDU (broadcast distribution undertaking) subscribers that is a challenge for Canadian media, but the shift in where companies advertise. Ad spending has changed dramatically in the past decade, with many companies moving all or some of their ads from television to the Internet. Projections show that by 2020 some 45% of ad share will be spent online.[11]

Thus, much of the total advertising revenue is no longer going to traditional BDUs or Canadian-owned channels (and of course much less to newspapers and magazines) but to foreign-owned Internet services such as Google, Facebook, and others. And these companies are not using this revenue to buy new Canadian programming.

At the 2010 parliamentary hearings on television held by the House of Commons heritage committee, Ferne Downey, president of the Alliance of Cinema Television and Radio Artists (ACTRA), recommended four measures to protect and strengthen Canadian media in the Internet age: effective and enforceable regulation of broadcasting on both conventional and digital platforms; maintaining Canadian control of telecommunications corporations; increasing public and private investment in the production of new Canadian content; and more support for independent media and local voices.[12] Per-

The Rise of Netflix

Netflix is probably Canada's best known over-the-top service company. Its rise, since establishing Netflix Canada in 2010, has been nothing short of spectacular.

Netflix announced in a 2012 report that, after less than two years in Canada, it was already profitable with a modest 10% of Canadian households subscribed.[14] "We achieved a small contribution profit in Canada in Q2 and expect to remain profitable in this market going forward, as we manage our content and marketing expenses to grow more slowly than members and revenue," said the company. A 2011 study noted that, "after only one year, the projected annual revenues of Netflix Canada are already approaching those of Canada's two leading pay TV services (TMN at $136.5 million and Movie Central at $107.8 million) and it has taken each of these services 30 years to reach those levels."[15] By January 2016, Netflix was available almost anywhere in the world except China. Of the world's total broadband market of 550 million homes, Netflix counts 74.76 million subscribers, of which nearly 45 million are in the U.S.[16]

Netflix does not report individual country sales data outside of the United States but groups subscribers into one international block. Thus, we have to rely on outside surveys for information about Canadian Netflix consumers. In one recent Media Technology Monitor (MTM) telephone survey of over 4,000 Anglophone Canadians, 29%, or an estimated 5.8 million people, said they were Netflix subscribers.[17] A year later, in the same MTM phone survey, that number was 39% — a 34% jump in subscriptions.[18] In April 2015, SNL Kagan estimated that over 3.5 million homes were using Netflix in Canada.[19] Another analyst noted in June 2015,

> *The fastest growth will occur among international subscribers where Netflix is expected to see a 57% increase to more than 26.36 million users, up nearly 9.6 million since the end of 2014. The United Kingdom (4.94 million) and Netflix's original international play that launched in September 2010, Canada (3.95 million), are forecast to be the top markets following the United States (43.5 million).*[20]

The latest survey by the Solutions Research Group estimated there were 5.2 million Canadian households subscribed to Netflix in April 2016. This was up from 4.7 million in December 2015 and 4.1 million in June 2015, and would put revenues at $620 million a year at $9.99 per household.[21]

As Netflix said during the CRTC's *Let's Talk TV* hearings, the company offers Canadian content for sale or rental not because it is required to, but rather because of consumer demand. Netflix refused to supply any statistics on its Canadian programming and who watched it.[22] The truth is that, as on other foreign-based OTT services, Netflix does not offer much Canadian content. One unpublished analysis found that Canadian Netflix had only 116 Canadian titles out of a total of 3,185, while U.S. Netflix had 163 Canadian titles out of a total of 5,750.[23] The number of available French programs that were made in Canada is even smaller.[24] Put another way, ACTRA estimated that Canadian content accounted for roughly 5% of Neflix's total programming expense, that 3.3% of its feature films and 13.7% of its television content are Canadian, and that about 1,000 of its 12,020 library hours of content (8.3%) is Canadian.[25]

haps not surprisingly, not one of these four measures was put into place by the previous Conservative government in Ottawa, and they do not appear to be priorities of any major political party today.[13] The government has not even moved to fairly tax foreign-based OTTs as countries around the world are realizing they must in order to create a level playing field for their national media companies.

Taxation of OTTs in Canada and Internationally

IN A COMPLICATED treatment of electronic commerce, the Canada Revenue Agency (CRA) has ruled that if a business has no physical presence in Canada, even if it sells goods and services in the country, it is deemed not to be "carrying on business" for the purposes of tax collection.[26] According to these rules, over-the-top suppliers such as Netflix, which has no office in Canada, are not required to register with CRA, collect Canadian HST and GST, or pay income tax.

The problem was described this way in the recent Godbout Report on taxation in Quebec, but it applies equally to the rest of Canada:

> Taxation authorities are having considerable difficulty applying taxation rules to electronic trade transactions when such transactions are performed by a supplier outside the territory that the authorities control. The new technologies now make it possible to do business in Quebec and maintain a strong economic presence there without owning a stable establishment or operating businesses and, therefore, without being subject to income tax.[27]

The 2014 federal budget announced the government's plan to hold a "Consultation on Tax Planning by Multinational Enterprises." It was meant to invite public input on international tax planning by multinational enterprises and other cross-border tax integrity issues, including "ensuring the effective collection of sales tax on e-commerce sales to Canadians by foreign-based vendors."[28] The consultation was partly prompted by the joint G20–Organization for Economic Co-operation and Development (OECD) "base erosion and profit shifting" project (BEPS), which launched in 2013 to examine tax avoidance and minimization issues, one of them being the effects of the digital economy on taxation.[29]

In Canada, the CRA's current e-commerce rules occasionally produce the absurd situation where a Canadian-based firm sells the same product online (e.g., a movie) as a foreign firm, but at an artificial disadvantage: Canadian firms must collect value-added tax (GST, PST or HST) on sales within Canada while a foreign firm, if it has no physical presence here, can avoid it. For example, if you buy Netflix services through Apple TV in Canada you pay the HST, but if you purchase it directly from Netflix you do not. This is because Apple, in this case, operates through iTunes, which has a Canadian subsidiary, whereas Netflix has no physical Canadian operations.[30]

The timelines for the Department of Finance consultation were tight. Interested stakeholders and members of the public had 120 days to submit comments, and only a handful (five) of the 16 submissions that did come in were made public. Those from Rogers Communications and the Tax Executives Institute problematized Canada's double standard in how it taxes e-commerce.

Rogers recommended that the Canadian government introduce a mandatory registration requirement for foreign-based suppliers of supplies in the digital economy, "similar to the approaches taken in other value-added tax (VAT) jurisdictions."[31] The company noted it collected $1.4 billion in HST/GST in 2013, for both federal and provincial levels of government, on a wide range of digital supplies including e-books, e-magazines, apps, software, and video games, as well as online advertising and its standard movies, television, and music components.

According to Rogers, the issue was not whether these items were taxable, but rather a matter of "effective collection," or sorting out who should collect the tax and how. Currently, consumers are supposed to pay the tax on these goods directly to the government, though few are aware of the requirement and almost nobody carries it out. Rogers emphasized that the reliance on an "ineffective system of self-assessment" violated the VAT principles of "neutrality, certainty and simplicity and effectiveness and fairness."

The Tax Executives Institute made a similar assessment of the CRA policy in its submission, in which it explained:

> A system where only resident businesses collect GST/HST effectively results in price differences on goods and services purchased from resident and non-resident suppliers — a price difference based solely on the presence or absence of GST/HST on those transactions. While most jurisdictions require purchasers to self-report and remit GST/HST on purchases from vendors that do not charge the tax, [according to a 2014 OECD policy paper] "consumer self-assessment has proven to be largely ineffective."[32] The resulting price differences and corresponding lack of neutrality inherent in such a system conflict with OECD guidelines.

The 2015 federal budget showed the government was not prepared to move on these or other recommendations made during the consultations. Rather, the government simply stated, "Input from stakeholders on these issues has helped shape Canada's ongoing participation in the international discussions related to the OECD/G20 BEPS project," and it "looks forward to the conclusion of the project and to discussions with the international community on the implementation of its recommendations."[33]

While the Canadian government has so far done nothing to collect sales taxes from OTT services, the Godbout report recommended both income and sales tax collection:

> The committee recommends that the Québec government pressure the federal government to step up its efforts within the framework of the OECD's ongoing deliberations with respect to the collection of corporate income tax linked to e-commerce and the collection of sales taxes on transactions carried out with foreign countries by means of e-commerce.[34]

Netflix makes millions of dollars in sales in Canada, but collects no HST, PST, or GST because of the CRA's exception for businesses with no physical presence in the country. Google is also a major OTT undertaking. On top of its other well-known roles, Google rents movies and television shows, but charges no tax on online rentals (including of many CBC shows available free on the CBC website). Through its subsidiary, YouTube, Google is also a distributor of free video channels that depend on advertising and product placement, and it charges for 173 paid subscription channels available in Canadian dollars without HST or GST. Facebook, one of the largest online advertisers, also does not charge HST/GST/PST on advertising in Canada. Governments (federal and provincial) are missing large sums of money, in the millions of dollars, just on uncollected value-added sales taxes.

Google, Netflix, and Facebook are probably the largest OTTs operating in Canada. But let's focus on Netflix, for which we have some idea of sales projections and potential sales tax revenues. Netflix should be paying some $62.4 to $90.48 million per year in value-added taxes in Canada if we take Ontario's 13% HST as a stand-in rate.[35] The estimates multiply the uncollected tax on a monthly Netflix subscription of $9.99 by 12 months by the number of subscribers (four million at the low end and 5.8 million at the high end). The loss of $60–90 million per year is not only draining for governments, it means that Canadian-based services are forced to offer products that are more expensive because they include value-added taxes. For example, a film rented through Bell, Rogers, Videotron, Telus, or Corus includes GST/PST and HST, while a Google-rented film has no HST or GST/PST.

The situation in Canada vis-à-vis foreign OTT services and value-added taxation is very different from what has been happening around the world. Since 2013, the OECD has argued that companies should be compelled to register and collect sales taxes in the countries where they make sales.[36] Its 2014 report, "Addressing the tax challenges of the digital economy," stated that:

> the most effective and efficient approach to ensure an appropriate VAT collection on such cross-border B2C (business-to-consumer) supplies of services and intangibles is to require the non-resident supplier to register and account for the VAT on these supplies in the jurisdiction of the consumer.[37]

The EU has since moved to implement this proposal for VAT on telecommunications, broadcasting, and electronic services, stating that these services "will always be taxed in the country where the customer belongs — regardless of whether the customer is a business or consumer — regardless of whether the supplier (is) based in the EU or outside."[38] As the explanatory text said, "The underlying reason for these changes was to bring the VAT treatment of these services in line with one of the main principles of VAT that, as a consumption tax, revenues should accrue to the Member State in which goods or services are consumed."[39]

Prior EU policy resulted in companies such as Netflix and Google becoming EU businesses, but installing themselves in countries where VAT was lowest, since that rate would apply to sales across Europe. For example, by putting its European headquarters in Luxemburg, Netflix escaped collecting the British VAT of 20% during the period 2011–2015 and instead submitted only the 3% Luxemburg VAT. With the change in policy in 2015, Netflix moved to Amsterdam where it can get other income tax advantages.[40]

In November 2015, more than 100 countries endorsed the new OECD International VAT/GST Guidelines, which similarly recommended “that foreign sellers register and remit tax on sales of e-books, apps, music, videos and other digital goods in the jurisdiction where the final consumer is located.” The guidelines suggested a mechanism “to ensure the effective collection of VAT by tax authorities from foreign sellers, thus helping governments to protect VAT revenues and levelling the playing field between domestic and foreign suppliers.”[41]

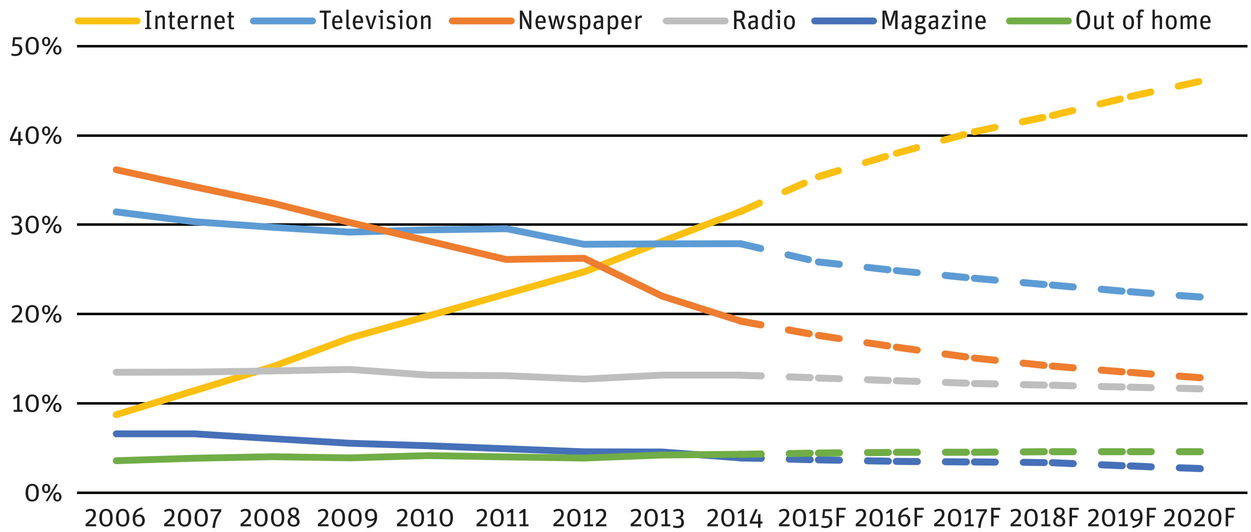
Along with the European Union, New Zealand, Australia, Norway, South Korea, Japan, Switzerland, and South Africa have introduced measures to begin collecting GST or HST equivalents (VATs) on digital online services delivered from outside the country.

In announcing New Zealand’s policy shift in November 2015, which applies GST to all digital services, the country’s revenue minister, Todd McClay, explained, “It is about creating a level playing field for collecting GST and putting New Zealand businesses and jobs ahead of the interests of overseas suppliers.”[42] McClay referred to the “increasing challenge” of collecting taxes on the growing online digital and overseas services market. The new measures, which come into effect on October 1, 2016, will apply to cross-border “remote” services and intangibles (e.g., e-books, music, videos, and software purchased from offshore websites) supplied to New Zealand residents by offshore suppliers, which will be required to register and return GST on these supplies. There is still a big loophole in the form of an exemption for services supplied to New Zealand businesses.[43] And non-resident suppliers of remote services must exceed sales of NZD$60,000 (C$52,939) over a 12-month period before they are required to register and return GST.

Australia has announced similar rules that will come into effect on July 1, 2017. The country’s 10% GST will, as of that date, apply to the cost of Netflix, music downloads, and e-books on digital products bought overseas. The so-called “Netflix tax” will raise AUD$350 million (C$330 million) over four years with all funds going to the states and territories. Australian treasurer Scott Morrison said the legislation “ensures Australian businesses selling digital products and services are not disadvantaged relative to overseas businesses that sell equivalent products in Australia.”[44]

In Japan a new 8% consumption tax on e-commerce supplies by foreign companies selling to Japanese consumers came into force on October 1, 2015. Foreign e-commerce suppliers must register in Japan by designating a tax agent in the country for the purpose of remitting the tax collected.[45]

FIGURE 3 Ad Spend Shares by Media



Source Peter Miller, Canadian Television 2020: Technological and Regulatory Impacts 2015

In Canada, OTTs not only avoid collecting VAT (sales) taxes, it is uncertain whether they pay any income taxes to any level of Canadian government, since this is also based on whether a company has some form of permanent establishment in Canada:

> A non-resident who is a resident of a country having a tax treaty with Canada will be taxable under Article 7 of the relevant treaty on business profits derived in Canada only if the non-resident maintains a permanent establishment (PE) (a term defined in the Treaties) in Canada. Generally a PE exists if there is a place of business, an office or employees in Canada.[46]

Even if we accept that a company's activities should not be double-taxed when it engages in cross-border trade, it is well-documented how digital services firms engage in aggressive tax avoidance to avoid remitting even legitimate income taxes to government.

In the United Kingdom, a major public campaign resulted in Google paying back income taxes worth £130 million (C$237 million) owed for the period 2005–2014, an amount critics still call too low. Google generated sales of £24 billion in the U.K. during that time and reported profit margins of 25% to 30%, giving an estimated profit of about £7.2 billion. As it already agreed to pay about £70 million in addition to the £130 million settlement, Google's effective tax rate is between 2% and 3%, compared to the 20% regular corporate tax rate.[47] But as critics pointed out, “The company’s accounts show that the government was only able to claw back less than £100m in corporation tax from Google for the 2005–2014 period, and not the £130m the chancellor claimed.”[48] While Google has some employees in Canada, it publishes no data on the taxes it remits to the government.

Another example is Facebook, which like Google makes large sales in advertising in Canada. In the U.K., Facebook paid only £4,327 ($8,211) in corporate income tax in 2014.[49] It was routing its U.K. advertising sales through Ireland, which had a much lower tax rate. Facebook has now said it will start paying major taxes in the U.K. in 2016.[50]

Canada's Reluctance to Regulate Online Media

CANADA'S RELUCTANCE TO fairly tax foreign-based OTTs is surpassed only by its hands-off approach to regulating the broadcasting activities of Internet companies. It's all based on a fateful decision made 17 years ago. In December 1999, the CRTC issued its first ruling on Internet media services, the "Exemption order for new media broadcasting undertakings," which, as the title suggests, exempted:

> … from regulation, without terms or conditions, all new media broadcasting undertakings that operate in whole or in part in Canada. New media broadcasting undertakings are those undertakings that provide broadcasting services delivered and accessed over the Internet. This means that new media broadcasting undertakings are not subject to licensing by the Commission. The Commission wishes to emphasize that the exemption order does not apply to the licensed broadcasting activities (e.g. over-the-air radio and television broadcasting) of a company that also operates a new media broadcasting undertaking.[51]

So, right from the dawn of Internet broadcasting, we have had this double standard that covers the CBC, CTV and other already regulated companies with one set of rules, and the Internet start-ups with another. An important consequence of this order is that new OTTs "have no regulatory obligations to contribute toward realizing Canada's broadcasting policy objectives as established the Broadcasting Act ('the Act')."[52] The 1968 act explained:

> ...broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements; the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich, and strengthen the cultural, political, social and economic fabric of Canada.[53]

The CRTC was created with a mandate to regulate and supervise the whole broadcasting system.[54] The commission can limit the level of foreign ownership and even foreign presence in cable packages, which it did in the early years, and set requirements for Canadian content. The CRTC moved early, in spite of initial controversy, to control direct-to-home satellite transmission when they were a brand new form of television transmission.[55]

It is unclear how Internet-based transmissions are fundamentally different. Though Netflix did not quite exist at the time the exemption order came out, it was not impossible to predict where Internet broadcasting was heading. And yet the CRTC decided that "to impose licensing on new media would not contribute in any way to its development or to the benefits that it has brought to Canadian users, consumers and businesses [and] will not contribute in a material manner to the implementation of the policy objectives set out in section 3(1) of the Act."[56]

This designation of OTT undertakings as exempt from Canada's broadcasting rules, with their intricate built-in cultural protections, is what has set these firms apart. One could perhaps understand the CRTC's caution not to regulate in the early stages of this new technology, but it is hard to understand how, given evidence of the unequal playing field it created, and in spite of successive hearings and studies on this issue, the exemption order has become a permanent fixture of the Canadian media scene.

One result of the CRTC's unwillingness to reconsider its 1999 order is that Netflix, Google, and other Internet services are exempt from having to channel part of their revenues to Canadian culture. For example, BDUs (e.g., Bell, Rogers, Cogeco-Shaw, Telus, and Videotron) with more than 2,000 subscribers must:

> ... contribute 5% of their gross revenues from broadcasting-related activities to the creation of Canadian programming via publically or independently administered funds. At least 80% of a BDU's total contribution must go to the

> Canada Media Fund (CMF), which fosters, promotes, develops and finances the production of Canadian content and relevant software applications for audiovisual media platforms. The remaining amount must flow to one or more independent production funds certified by the Commission (CIPFs).[57]

Total contributions just to the CMF amounted to over $228 million last year with an additional $26 million from past years after an audit of remittances. If in Canada OTTs avoid having to make such contributions, they do not get off so easily elsewhere. Since 2014, the French government has required Netflix to contribute the standard 2% of revenues to the *Centre National du Cinéma et de l'Image Animée* (CNC), an organization that "collects and administers the funds levied on broadcasters and distributors to support content creation in France."[58] This change came about after the EU decided value-added tax (VAT) on Internet media providers should be collected in the country of sale.[59]

The New Media Project Initiative

In 2007, the CRTC launched the New Media Project Initiative "to examine the cultural, economic and technological issues associated with broadcasting in new media." The results of this initiative were published in *Perspectives on Canadian Broadcasting* in *New Media* on May 15, 2008. Later that year, the CRTC initiated a public proceeding on the significance of broadcasting in new media and its impact on the Canadian broadcasting system, focusing on six themes:[60]

1. a definition of broadcasting in new media;
2. the significance of broadcasting in new media and its impact on the Canadian broadcasting system;
3. the necessity or desirability of incentives or regulatory measures for the creation and promotion of Canadian broadcasting content in new media;
4. issues concerning access to broadcasting content in new media;
5. other broadcasting or public policy objectives; and
6. the appropriateness of the new media exemption orders.

At the end of these hearings, the CRTC again determined it "does not consider that broadcasting in new media currently poses a threat to traditional broadcasting licensees' ability to meet their obligations."[61] According to the CRTC, OTT services were in fact used in "a complementary manner by many broadcasters for activities such as providing audiences with the ability to catch up on missed programs, promoting broadcast offerings and building brand loyalty."

The regulator concluded that "traditional broadcasting frameworks should not be imposed in the new media environment without evidence that intervention is warranted." Once again, the CRTC maintained that its exemption of new media broadcasting undertakings "will enable continued growth and development of the new media industries in Canada, thereby contributing to the achievement of the broadcasting policy objectives, including access to those services by Canadians."[62]

The CRTC's analysis, "that a successful commercial business model for broadcasting in new media has yet to emerge," held some weight, as, for example, Netflix had not begun its online operations by then.[63] While continuing the exemption order for Internet media providers, the CRTC said it would, "conduct the next review of broadcasting in new media environment within five years, or at such time as events dictate."

The CRTC also emphasized again that "it does not intend to regulate in any way the content, quality or availability of material created by individual Canadians in a personal capacity," as if that was the major issue confronting Canadian media at that time. As to the issue of how to support Canadian programming, the CRTC supported the establishment of the Canada Media Fund (CMF), which the federal government launched in March 2009. The CMF combined the previously existing Canadian Television Fund (CTF) and the Canada New Media Fund (CNMF).

Reinforcing the CRTC's position, then chairman Konrad von Finckenstein said regulation was not necessary because online media was not an immediate threat to traditional broadcasting: "We found that the Internet and mobile services are acting in a complementary fashion to the traditional broadcasting system.... Any intervention on our part would only get in the way of innovation."[64] Ken Englehart, then vice-president of regulatory affairs for Rogers Communications, supported the ruling, saying, "The reason the Internet has been so powerful and changed so much of our lives is because it hasn't been regulated and hasn't been taxed, and it's been allowed to grow and develop in ways that users wanted it to grow.... Government regulation and taxation would slow us down."[65]

Unions including ACTRA thought the CRTC was making the wrong decision. "Broadcasting is broadcasting, and the CRTC has a duty to regulate it, whether it's on a TV, a laptop or a BlackBerry," said Ferne Downey, ACTRA's national president, in a June 2009 press release. "Failing to do so will mean less Canadian content and reduced Canadian presence in an era when we are already being submerged in U.S. content on our TVs, and now online."[66]

Heritage Committee, CRTC Hold New Hearings

Shortly after the launch of Netflix Canada in 2010, the situation began to change. A House of Commons heritage committee opened a study on "the impact of private ownership changes and the move towards new viewing platforms." In its final report of May 2011, the committee recommended that the CRTC "examine the growing emergence of non-Canadian broadcast players in the new digital realm and initiate a public consultation process to determine whether and how such non-Canadian companies should support Canadian cultural programming.[67]

Canada's regulated broadcasting companies perked up at this point as well. During an industry summit in Ottawa in 2011, about 35 organizations including BCE Inc., Rogers, Astral Media, ACTRA, and others formed a working group on OTT services to try and deal with Netflix's expansion into Canada.[68] In April that year, the group wrote a letter to the CRTC that endorsed the heritage committee's recommendations. The letter, which was published in the *Globe and Mail*, noted that "foreign over-the-top services are becoming a significant presence in the domestic market," that one of them had "commissioned new exclusive dramatic content, including for the Canadian market, which Canadian programming services were eyeing," and the CRTC was within its rights "to require information from these new services."[69]

In May, a month after receiving the industry letter, the CRTC announced there would be a "fact-finding exercise" on over-the-top programming services, in recognition that there had been, "an acceleration of technological, market and consumer behaviour trends that may influence the Canadian broadcasting system's ability to achieve the policy objectives of the Broadcasting Act. Increasingly, programming is being provided by entities on multiple platforms and separate from the physical infrastructure over which it is delivered."[70]

In their joint submission to the CRTC process, ACTRA, l'Association des producteurs de films et du Télévision de Québec, the Canadian Media Production Association, the Directors Guild of Canada, and the Writers Guild of Canada argued the growth of OTT services, "in no way justifies any reductions to the contributions which licensed Canadian broadcasters currently make to support Canadian programming; instead, it is now time for the Commission to ensure that these new OTT players in the system also contribute in an appropriate manner to the creation and presentation of Canadian programming, as required by the [Broadcasting] Act."[71]

Radio broadcaster Astral Media (which has since been taken over by Bell) outlined, as follows, three occasions where government regulation to address new technologies or business models strengthened broadcasting in Canada:[72]

- In 1969, for example, it took great courage for the Canadian government to order the divestment of foreign interests in excess of 20% in any of Canadian broadcasting undertaking, including cable companies that were then controlled largely by American interests, to give effect to the principle of Canadian-owned radio, television, and cable undertakings set forth in the Broadcasting Act of 1968.
- In the mid-1980s, the Conservative government did not hesitate to revise the Investment Canada Act to further stimulate the Canadian film distribution sector and to strengthen the enforcement of Canadian distribution rights as being distinct from North American or global rights.
- In the mid-1990s, many people thought that direct-to-home satellite broadcasting distribution could only be North American and controlled from the United States. The Canadian government and the Commission, however, introduced rules that allowed the development of Canadian direct-to-home satellite distribution, while creating conditions for fair competition with regard to terrestrial distribution.

However, Astral felt the solution to the current "crisis" in Canadian media was "a reduction in the obligations of licensees and an increase in the obligations of the exempt undertakings of new media broadcasting." In other words, the broadcaster wanted the government to enforce some regulations on the online competition in a partly deregulated market. Corus Entertainment said that while Netflix was driving up production rights, "At this time we have no evidence that OTT is hurting the market for premium TV services in the markets we serve."[73] Like Corus, Rogers concluded, "the answer is to regulate OTTs, given consumers' expectations. Instead, the CRTC "should look to deregulate those parts of the Canadian broadcasting system that directly compete with OTT services."[74]

Netflix, on the other hand, submitted that "its contributions, made in the absence of any regulatory obligation, are both significant and appropriate given the nature of OTT services," and "lend considerable weight to the Commission's determination to exempt OTT services from regulation." It criticized those who wanted more regulation, stating that many licensees appear to be asking OTTs "to subsidize linear broadcast programming, thereby stifling the growth of new media and harming consumer choice." Google noted:[75]

> Canadian creators are making money from uploading their videos to YouTube, resulting in a flow of funds directly to artists, enabling them to create even more Canadian content. Artists are able to reach their audiences and be compensated, without having to work through studios, marketing companies, broadcasters or distribution undertakings. In the past year alone, YouTube's partners (i.e., content creators, including Canadians) made nearly 300% more from advertising revenue on YouTube than they did the previous year.[76]

Google went on to say that regulation would be a burden to the new media, which, "by virtue of its nature on the Internet, cannot enjoy any of the benefits of broadcasting regulation, such as genre protection, simultaneous substitution and other regulatory benefits that are handed out in the walled garden world of traditional media. This would be an unfair result and not in the public interest."[77]

In the CRTC's report on the results of its fact-finding exercise, the regulator proclaimed "a significant change" was underway in the communications sphere, but emphasized the positive developments.[78] "New technologies, service providers and consumer behaviour underpin a transformation that is characterized by greater choice, a global marketplace and new opportunities for Canadian creators," said the report. The CRTC nonetheless recognized "uncertainty with respect to established business models and associated support for the creation and presentation of Canadian content, as well as for investment and innovation."

But in the end, as over the previous 12 years, the CRTC concluded "the evidence does not demonstrate that the presence of OTT providers in Canada and greater consumption of OTT content is having a negative impact," and that there were no "structural impediments to a competitive response by licensed undertakings to the activities of OTT providers." There was no proof regulation was needed, in other words.

"Stakeholders calling for the imposition of regulatory obligations on OTT providers…did not submit evidence of harm to the traditional broadcast system." On the contrary, "Google, the NFB (National Film Board) and

Shaw expressed concerns that regulation could be a disincentive to innovation. Shaw added that regulation could impair the ability of Canadian media companies to compete globally."

The CRTC even challenged the idea that OTT services might encourage people to drop their cable, fibre, or satellite broadcasting services:

> Some parties stated that there may be a reduction of revenues in the regulated system as a result of 'cord-shaving,' 'cord-cutting' or reduction of advertising revenues attributable to the operation of OTT services in Canada. Shaw and RNC media presented evidence that showed revenues for private conventional TV declined slightly from 2006 to 2009 but rebounded in 2010. However, they did not demonstrate that the consumption of OTT content was the cause of this decline. Shaw and the NFB presented evidence that showed that pay and specialty revenues have continued to grow over this period.[79]

The CRTC once again concluded it should do nothing: "In light of the above, the Commission will not at this time consider a general review of the New Media Exemption Order, nor a review of potential policy changes to increase the regulated players' flexibility to respond to the activities of OTT providers."[80]

New Government Wants "Choice" in Media

Two years later, the CRTC would be asked to re-open the debate, but with a focus on traditional television options, not the OTT competition. After its election in 2011, the federal Conservative majority government sought to add what it called "more choice" to the Canadian media landscape. In line with its market-driven ideology, that meant less government regulation rather than a consideration of how to increase the amount of quality, affordable Canadian programming available on television and online.

In an interview just before the Speech from the Throne of that year, James Moore, then heritage minister, stated: "We don't think people should be forced to buy bundled television channels when they're not interested in watching those channels and those shows. We should have a pick-and-pay model when it comes to television channels."[81] Thus there was no surprise when the throne speech itself read: "Our Government believes Canadian families should be able to choose the combination of television channels they want. It will require channels to be unbundled, while protecting Canadian jobs."[82]

To seal the deal, on November 7, 2013, the Harper government issued an Order in Council directing the CRTC to: "make a report as soon as feasible, but no later than April 30, 2014, on how the ability of Canadian consumers to subscribe to pay and specialty television services on a service-by-service basis can be maximized in a manner that most appropriately furthers the implementation of the broadcasting policy for Canada.[83]

The CRTC is technically an administrative body, subject to Orders in Council, but with some functional autonomy, at least historically. However, it received this proposal as its marching orders. Rapidly thereafter (unlike its response to the debate on OTT services), in April 2014, the CRTC published a paper, "Maximizing the ability of Canadian consumers to subscribe to discretionary services on a service-by-service basis: Response to Order in Council P.C 2013-1167," which clearly enunciated what the new form of consumer choice would be.[84] The commission said it intended to explore asking distributors to:

- offer subscribers a small, all-Canadian basic service that includes only local Canadian conventional television stations, and provincial educational services, as well as in some cases the community channel and the provincial legislature programming service;
- promote this small basic service to Canadians so that they are aware of its availability;
- allow subscribers to select all discretionary programming services on a stand-alone basis (pick-and-pay); and
- allow subscribers to build their own custom packages of discretionary programming services (build-your-own-package).[85]

As Canada's cultural industries and workers pointed out at the time (and continue to do so), the problem with this direction is that many Canadian channels are mainly sustained through funding that is based on customers purchasing a broad group of channels. When the customers opt for a "skinnier package," overall available funding for all channels is likely to decrease in line with a drop in overall package sales by the BDUs. This will also affect how much money goes toward support for Canadian programming (currently 5% of BDU revenues). The end result could very likely be major cuts to funding of some Canadian channels, their cancellation altogether, and the job losses associated with both outcomes.

Summary of the *Let's Talk TV* Consultation

Around the same time, in October 2013, the CRTC kicked off *Let's Talk TV*, dubbed "a conversation with Canadians on the future of their television system." The commission received 1,300 comments from the public in the first stage of the consultation, which asked Canadians "whether they have enough information to make choices about television programming and whether they know where to turn if they are not satisfied."[86] In Phase 2, starting in February 2014, the CRTC invited public comment on "the difficult choices to be made regarding their television system," asking respondents to "consider the interests and needs of all Canadians." A "choicebook" containing options was filled out by about 7,500 people.[87]

Finally, Phase 3 of *Let's Talk TV* involved, "a formal review of the Commission's policy approach to the television system that draws on the issues and priorities identified by Canadians in Phases 1 and 2." This phase included written submissions and major public hearings in September 2014 in Gatineau, Quebec, at which most of the major stakeholders appeared.[88] The 2014 hearings were in many ways the Olympics of CRTC presentation drama. Canada's BDUs, media unions and associations, provincial governments, and the two major OTT firms all competed, as did several NGOs and more than 2,700 individuals.[89] Though the hearings dealt with several other issues, we will focus on stakeholder positions on the OTT issue.

Bell (BCE), whose total media market share in Canada was estimated to be over 27% in 2014, stressed the need for what it called a "balanced system." While praising the value of an unregulated market for ensuring "content finds the most efficient way to get to viewers," the company said foreign OTTs:

> have clearly rejected the possibility that the rules could apply to them. If the regulatory system creates more complexity and new obligations and rules, or interferes with the market-based responses of Canadian companies, there is no doubt that will further accelerate the migration of content outside the system. It is difficult to see how that is good for Canada or consistent with the objectives of the Broadcasting Act.[90]

Bell worried about Netflix's $3-billion annual global bill for content compared to the $1.5 billion the Canadian firm spends on all kinds of programming. Bell was concerned that "local and national news, current affairs, live events, and appointment viewing" were getting displaced by "streaming OTT, time-shifting and on-demand, buzzworthy, edgy dramas.... The regulatory environment must support investment in the business models that will allow all of it to thrive."

In its submission, Rogers criticized Netflix and Google as tax renegades with an unfair advantage over new Canadian online services because they "operate without having any obligation to make contributions to the Canadian broadcasting system and without any obligation to collect or pay Canadian taxes."[91] One of the new issues the CRTC was considering in *Let's Talk TV* was the idea that revenues from new Canadian-owned OTT services such as *shomi* and CraveTV should be included in the total broadcasting revenues of their parent companies for assessing the 5% contribution to Canadian content. Rogers protested that:

> ...requiring the Canadian broadcasting industry to contribute more money to fund Canadian programming for purely OTT services, while exempting every other Canadian and foreign operator of an OTT service in Canada, would not be good public policy.... Under the CRTC's proposal, the costs incurred by Canadian broadcasters would substantially increase, giving a significant competitive cost advantage to unlicensed Canadian and foreign OTT services.[92]

Rogers argued its *shomi* service will voluntarily (without regulation) offer more than three times the amount of Canadian content than Netflix, and that "Canadian content will be our distinguishing feature" if the BDUs are allowed to develop new online offerings.[93] They opposed keeping the 50% Canadian content quota for prime time television, asking that it be reduced to 35%, and put forward two suggestions for improving on programming: let broadcasters share in the downstream foreign sales of major new programs, and allow marketing and promotion expenses to be counted as part of Canadian programming expenditures.[94]

Québecor warned, "If the Commission fails to act by lightening the regulatory burden on Canadian broadcasting undertakings, Netflix will become Canada's largest television distributor and broadcaster in the not-so-distant future."[95] Being free of all regulatory obligations, "Netflix could offer television distribution services for as little as $19.99 or $29.99," argued the company. Moreover, said Quebecor,

> in light of the recent agreement signed by Netflix to produce a new late-night talk show,[96] its business model appears to be constantly evolving and is growing increasingly similar to that of traditional broadcasters.... Companies such as Québecor Media will probably be able to coexist, but their

future condition will depend in large part on the decisions the Commission takes at the conclusion of this proceeding.[97]

Québecor worried about the list of regulatory requirements that fell on BDUs and not OTT operations, including "the obligation to make large contributions to Canadian programming, the requirement to exhibit minimum hours of Canadian content, the absolute prohibition on the acquisition of exclusive content for video on demand, the obligation to require a subscription to basic service, the requirement to comply with linkage and access rules."

But the solution presented by Québecor was essentially to reduce regulation for Canadian firms, not strengthen it for foreign OTTs, with the argument this might "slow the trend towards cord-cutting and cord-shaving."[98] The company proposed eliminating genre protections for certain channels, and carriage exclusivity for certain BDUs; it had no proposals for Canadian programming.[99]

CBC/Radio-Canada also asked for more CRTC regulation of OTT services.[100] "In the Corporation's view, it is no longer possible for the Commission to maintain its current exemption order for broadcasting services via the Internet given the size and importance of OTT service activity in Canada," it told the hearings. The Broadcasting Act is clear that "all elements of the Canadian broadcasting system should make an appropriate contribution to that system," said the CBC, which asked for "a contribution of 5% of Canadian broadcasting revenues" from OTT services with annual Canadian broadcasting revenues (advertising and subscription) over $25 million. The CBC also asked that, "At a minimum, the current digital exemption order should...require OTT services...to increase visibility and discoverability for Canadian content."[101]

The Canadian Media Production Association, which represents more than 350 independent television, film, and digital media producers, also came out in favour of OTT regulation: "Specifically, we submit that the NMEO (New Media Exemption Order), which encompasses most if not all of the newer and emerging broadcasting services...should be amended by: adding a Canadian program funding obligation; and adding an obligation to include Canadian programs in their inventory, much the same way [as] for licensed VOD services."[102]

The major communications unions were also critical of the effects some of the new policies proposed by CRTC could have on the industry, such as to remove simultaneous substitution (substituting Canadian for U.S. commercials in programs broadcast at the same time in both countries), "introduce a regime of pick and pay, lower barriers to entry for non-Canadian programming services and the associated reduction in CPE." They estimate these reforms could cost the economy 31,460 jobs (measured by full-time equivalents) and $2.9 billion in lost Canadian GDP.[103]

UNIFOR, Canada's largest private sector union, recommended rejecting the pick-and-pay model for its "destabilizing effect on television revenues and, thereby, on Canadian programming services." On Canadian culture they recommended maintaining Canadian preponderance rules and asked the CRTC to "require foreign programming services to prove their entry into the Canadian market will cause 'no substantial harm.'"[104] Unifor also asked that the definition of broadcasting revenues be updated "to reflect all broadcasting activities of licensees" and make OTT services put 10% of revenues into Canadian programming expenditures.

UNIFOR asked the CRTC "to begin the process of determining what a licensing regime might look like for OTT providers," suggesting "it is simply inconceivable to assert that growing OTT video-on-demand services (such as Netflix) remain a complementary part of the Canadian television market." These were now elements of the broadcasting system, according to the union, they should be contributing to the funding, production and prominent placement of Canadian content.[105]

ACTRA, which represents 22,000 professional performers working in English-language media, and the Canadian Federation of Musicians (CFM), representing 17,000 professional musicians across Canada, agreed with Unifor that OTT services are, in fact, broadcasting services, "albeit on another platform," and that the 1999 exemption order should be revoked so that they might "begin contributing to the independent production funds that help fuel Canadian content creation."[106] They were also concerned that the pick-and-pay model would reduce BDU revenue and therefore contributions to Canadian programming, killing jobs as a result.

In their final submission to the *Let's Talk TV* consultation, ACTRA and the CFM returned to three proposals they had made previously on OTTs: they should be required to contribute 5% of gross revenues toward existing independent funds for Canadian programming; they must allocate "an appropriate percentage" (e.g., 30%) of their content libraries to Canadian content; and they should showcase and promote this content better in their libraries.[107] The unions then delivered a warning to the CRTC about the growth of a dual system of program content should it heed industry demands to deregulate the OTT services of BDUs rather than fairly regulate the foreign-based competition:

> If the Commission does not review and rescind the New Media Exemption order and impose requirements upon domestic online broadcasters it may find itself in the position of having certain domestic broadcasters deliver two types of content to Canadians: regulated programming through its traditional broadcast arm and unregulated programming on its Over-the-Top service.[108]

The Provincial Communications Sector Council of the Syndicat canadien de la fonction publique (SCFP/ CUPE) also concurred with the need to now regulate Netflix and others.[109] The Friends of Canadian Broadcasting (FCB) pointed out that France has successfully negotiated European and French content quotas with Netflix of 50% and 15% respectively. While Netflix Canada reportedly spends up to 5% of its Canadian revenues on Canadian content, the FCB said, "It is not known whether the rights purchased for this sum refer only to Canadian rights or include other territories," adding that the average Canadian expenditure rate of private Canadian broadcast groups is 30%. Given that Netflix and similar OTT services such as Crackle and Canal+ are part programmer and part distributor, the FCB suggested Canadian expenditures of 5% to 30%, and that a minimum 5% of Canadian revenues be directed to the CBC/Radio-Canada for programs of national interest.[110]

Two provincial governments decided to express their views on the issue for the first time. The Ontario government said it too would like the CRTC to reverse its new media exemption. Kevin Finnerty, assistant deputy minister of tourism, culture and sport, noted that "broadcasting and screen-based industries are a key component of Ontario's Cluster, which is a significant driver of economic value and growth." The sector employs over 200,000 people in Ontario and generates over $12 billion in direct industry GDP, he said.[111] "In 2013, Cancon accounted for 50% of Ontario's total film and television production volume, generating close for $1.2 billion."

Many of Ontario's 29 proposals complemented the position of the media unions and FCB, including that the CRTC should count the OTT activities of Canadian broadcasters when calculating Cancon obligations, and that these obligations should be met for foreign-based OTTs as well. Finnerty added, "These Cancon financial obligations for foreign over-the-top providers should be addressed as soon as possible in a separate proceeding," with the aim of increasing "regulatory symmetry with traditional TV."[112] The Quebec government's Ministry of Culture and Communications (MCC) also supported these suggestions: "Although we do not yet have reliable data on the revenues raised by these [OTT] services, the Department believes that these for-profit activities should be considered broadcasting activities, and therefore should support Canadian programming in the same way that licensed broadcasting services do."[113] The Federal government also waded into the hearing debate when Prime Minister Harper said that his government would "oppose any tax on services like Neftlix and YouTube." Shelly Glover, then Heritage Minister, had put pressure on the supposedly arms length CRTC when she noted, "We will not allow any moves to impose new regulations and taxes on internet video that would create a Netflix and YouTube tax."[114]

The interventions by Netflix and Google during this process have been removed from online records by the CRTC because both companies refused to submit customer numbers and usage figures, even though these statistics would have remained confidential to CRTC. In its oral presentation, which is still available on CPAC, Netflix touted its "consumer focused approach," using phrases such as "increased choice," "interactive and demand driven," and how we now live in a world of "Internet abundance." It viewed the BDUs as "broadband gatekeepers," but maintained that Netflix was only being used to "supplement traditional broadcasting" and would not replace the BDUs.

Netflix spent much less time in its presentation on the issue of Cancon beyond claiming "Canadian content is thriving on Netflix." The company spokesperson, Corey Wright, noted how it had acquired Canadian content in response to subscriber demand and not because of regulation. Interestingly, a large part of the OTT firms' Canadian content comes from deals with CBC and the National Film Board.[115] Netflix asserted that regulatory intervention with the aim of increasing Cancon was "unnecessary" and would be harmful to consumers. Jason Kee, public policy and government relations counsel at Google Canada, also said no to regulation and to Google making a contribution to Canadian culture: "Mandatory contributions would likely increase cost to consumers in the form of increased subscription fees and creators in form of diminished license fees or revenue share for them."[116]

Perhaps the biggest failure in all of the hearings was Netflix's refusal to give the CRTC or the public any data on the number of subscribers it counts in Canada, and on how Canadian content was accessed and who was watching it, in spite of this kind of information being obligatory under its New Media Exemption Order status. Netflix cited subscriber confidentiality as the reason it could not provide the data, though in the early years Netflix revealed Canadian subscription numbers and still provides this information in the U.S.[117]

Canadian Content Requirements of Video-On-Demand Services

As set out in Broadcasting Regulatory Policy 2014-444, licensed Canadian VOD services tied to BDUs are required to contribute to Canadian programming in the following ways:

- 100% of revenues from Canadian feature films must be remitted to the Canadian rights holder, subject to an agreement to the contrary;
- not less than 5% of the English-language feature films in the inventory available to subscribers are Canadian;
- not less than 8% of the French-language feature films in the inventory available to subscribers are Canadian;
- not less than 20% of all programming other than feature films in the inventory available to subscribers are Canadian;
- the feature film inventory must include all new Canadian feature films;
- not less than 25% of the titles promoted each month on any barker channel (a channel devoted to advertising programs) are Canadian titles; and
- 5% of gross annual revenues are to be contributed to an existing Canadian program production fund administered independently of the undertaking.
- Further, licensed VOD services are prohibited from offering programming on a subscription basis that would be competitive with a genre-protected (i.e., a Category A) specialty or pay service.[119]

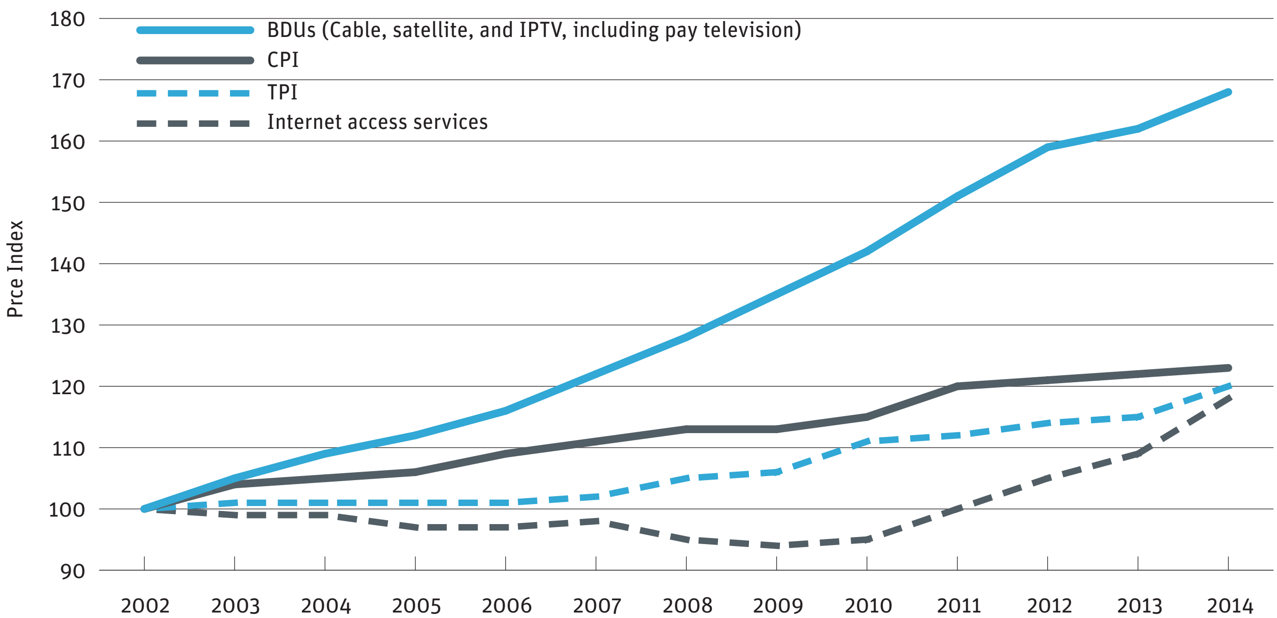
Note that these requirements do not apply to Netflix, nor anymore to CraveTV and *shomi* since these Canadian OTTs were made available to anyone with an Internet connection, independent of a Bell or Rogers television package.

Conclusions from *Let's Talk TV*

The CRTC summarized its decisions from the *Let's Talk TV* hearings in a series of announcements between November 2014 and March 2015. This study will not attempt to examine all of them, but looks only at those of particular concern to the regulation of OTTs.

First, in spite of the CRTC's confrontation with Netflix and Google, it stuck to its guns on the exemption order. In fact, the only major change was to create a new hybrid video-on-demand (VOD) service type that exempted Canadian VODs such as *shomi* and CraveTV from all regulation regarding Canadian content, including the requirement to contribute 5% of revenues to Canadian media development, as long as the VODs were made available over the Internet — not just to Rogers and Bell television subscribers as was the case previously. "This will enable Canadian services to compete on a more equal footing with online video services," said the CRTC.[118]

FIGURE 4 The Cost of Connection



Note Figure 2.0.2 Price Indices for Telephone Services, Broadcasting Distribution Services (Cable, DTH Satellite, IPTV and Pay Television) and Internet Services, Compared to the CPI from Communications Monitoring Report 2015: Canada's Communications System: An Overview for Citizens, Consumers, and Creators

A second recommendation actually reduced the amount of Canadian content that must be broadcast by television stations and many specialty channels. Cancon quotas for daytime television were dropped from 55% to zero; the 50% quota for broadcasts between 6 and 11 p.m. was maintained. The CRTC announced it is also, "harmonizing the requirements for specialty channels, which range from 15% to 85% depending on the service. Going forward, specialty channels will have to ensure that 35% of all programs broadcast overall are made by Canadians. There will no longer be a specific requirement for the evening hours."[120]

Probably the decision most Canadians heard about from these CRTC hearings was the requirement for cable and satellite companies to offer inexpensive "skinnier" packages given that monthly television bills have climbed much faster than Internet or telephone, and faster than the cost of living.

"By March 2016, Canadians will be able to subscribe to an entry-level television service that costs no more than $25 per month…. Canadians will now have alternatives," said the CRTC. There was also to be an additional "pick-and-pay" option: "Canadians, who choose to do so, will be able to supplement the entry-level television service by buying individual channels

The Role of the CBC

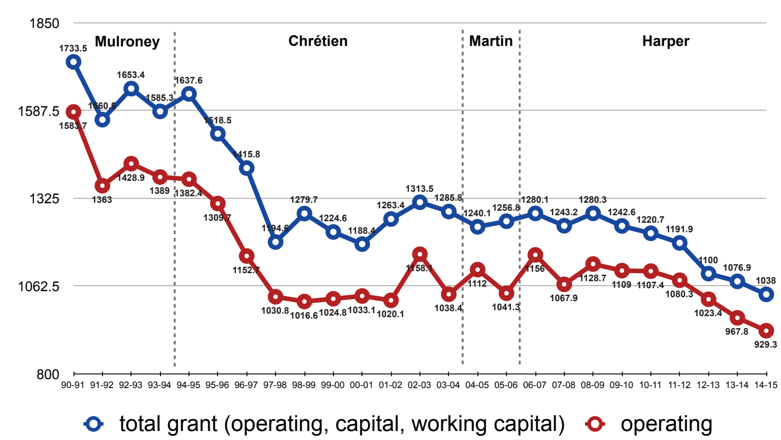
It is important to underline that we cannot fundamentally fix the problems associated with an unregulated OTT sector without also reviving and improving CBC/Radio-Canada, which is still the major broadcaster of Canadian culture despite a significant drop in viewership over the past 50 years—from 35% of English and 40% of French households in 1969 to less than 7% in English and 13.4% in French in 2013–14.[125] The reasons for the audience decline are multiple, and include the emergence of diverse new sources of Canadian programming (e.g., specialty channels) as well as the availability of OTT services that can be accessed without a traditional television subscription. But the effect of this migration on Canadian programming is worsened by the unwillingness of Canadian governments to adequately fund our public broadcaster.

CBC/Radio-Canada funding declined from over $1.7 billion per year in 1990–91 (in 2014 dollars) to $1.038 billion in 2014. The $150-million top-up in the 2016 federal budget is welcome, but clearly will not bring the CBC back to where it should be.[126] It is also a drop in the bucket compared to international standards: a study using 2011 figures showed Canada spent roughly one-third what the U.K. government puts toward the BBC, and half of what France and Belgium spend on public broadcasting on a per capita funding basis.[127]

While the cuts have been steep, CBC/Radio-Canada still produces high percentages (30% in 2014) of what the CRTC calls Programming of National Interest (PNI), or high-quality Cancon.[128] This is more than double the PNI that conventional private sector networks produce (14%); Netflix produces none at all.[129]

For all these reasons and others, Unifor raised Canada's neglect for its public broadcaster during the *Let's Talk TV* hearings as being inseparable from the discussion of OTT regulation and sufficient revenues for Canadian programming. The CBC generates more than $500 million in revenues through television broadcasts and contributes one-quarter of total Canadian program expenditures, noted the union. "Since 2008, the CBC has shed more than 2,000 jobs. We cannot help but view this as the slow and steady dismantling of our national broadcaster, with an eye to greater private sector involvement in the delivery of services."

FIGURE 5 Change in Parliamentary Appropriations CBC/Radio-Canada in $ millions 2014



Sources Friends of Canadian Broadcasting https://www.friends.ca/blog-post/238 that will be available either on a pick-and-pay basis or through small, reasonably priced packages."[121]

The new regulation helped fulfil the idea of "consumer choice" that had been the objective of the Harper government when it handed its Order in Council to the CRTC. But when the BDUs rolled out the new offers, many consumers were not happy with "skinny basic." The regulator was "flooded" with complaints about how little content there was in these inexpensive plans, and the extra charges for equipment rental, which had previously been provided free of charge with a TV subscription.[122]

While it failed to satisfy consumer needs, there was an important economic downside to new CRTC policy. In January 2016, some of the major media unions and Friends of Canadian Broadcasting published a study, *Canadian Television 2020: Technological and Regulatory Impacts*, which predicted the CRTC decisions could lead to the loss of more than 15,000 Canadian jobs, take $1.4 billion annually from the Canadian economy, and cause spending on Canadian programs to drop by $400 million a year by 2020. The study recognized that,

> Technology is, undeniably, making achieving the objective of support for Canadian programming more difficult in two key respects: The move to "on demand" from "linear" or "scheduled" TV renders shelf space requirements like Canadian content exhibition obligations less effective; and opportunities for by-pass of Canadian television providers (through the Internet) increase, thus inevitably putting pressure on Canadian content expenditure stipulations.[123]

Of the $4.1 billion spent on Canadian programming in 2012–13, almost two-thirds (65.6%, or $2.7 billion) came from the expenditures of Canadian television programming services on Canadian programs. Only 34.4% came from direct subsidies in the form of government funding, federal and provincial tax credits, the Canada Media Fund (CMF), tangible benefits, the contributions of BDUs to community programming, and various independent production funds.

The union study underlined that "without broadcast regulation and Canadian ownership requirements, spending on Canadian programming could be less than a third of what it is today." It cautioned: "The notion of Canadian television in the more distant future becoming predominantly Internet-based, on demand and 'over-the-top' is not particularly far-fetched — although linear television will likely continue to have a significant presence for some time to come. The bigger question is how to keep the 'Canadian' in Canadian Television, however it is delivered."[124]

The Trans-Pacific Partnership and OTTs

THE PREVIOUS CONSERVATIVE government frequently publicized its distaste for the idea of regulating and taxing the OTTs. Former prime minister Stephen Harper tweeted in August 2015, during the long election campaign, "I love movies and TV shows. I'm 100% against a #Netflix tax. Always have been, always will be #NoNetflixTax #elxn41."[130] Some are now questioning whether he may have used an international trade agreement — the Trans-Pacific Partnership (TPP) — to hamstring future governments that believe otherwise and choose to change the regulatory environment affecting online delivery of media services.

Negotiations on the 12-country trade and investment agreement wrapped up just before the October 2015 election and the final deal was made public at a signing ceremony in February 2016. While the Liberal government of Justin Trudeau signed the TPP, by June it was still consulting Canadians on the costs and benefits of eventually ratifying the agreement. The TPP has become controversial in Canada for how it would lock in very pro-U.S. intellectual property rights, expand the excessive investment protections and investor-state dispute settlement process found in NAFTA, and undermine the regulatory freedom of governments in a number of areas barely related to trade. Culture is potentially one of those areas, despite the government's claims to have protected Canada's cultural policy flexibility in the TPP as in past free trade deals.

Indeed, the language in Canada's Annex II reservation (carve-out) for cultural industries in the TPP's services and investment chapter starts out well: "Canada reserves the right to adopt or maintain any measure that affects cultural industries and that has the objective of supporting, directly or indirectly, the creation, development or accessibility of Canadian artistic expression or content."[131] Moreover, as in past Canadian trade deals, the list of covered cultural industries appears to be comprehensive and includes the following:

a. the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;

b. the production, distribution, sale or exhibition of film or video recordings;

c. the production, distribution, sale or exhibition of audio or video music recordings;

d. the publication, distribution or sale of music in print or machine readable form; or

e. radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.

However, as Michael Geist noted in a January 2016 blog post — part of a series on the TPP from one of Canada's loudest critics of regulating Internet services — this exception to trade and investment liberalization for culture industries has its own exception built in for OTTs, as it does not apply to:

a. discriminatory requirements on services suppliers or investors to make financial contributions for Canadian content development; and

b. measures restricting the access to on-line foreign audiovisual content.[132]

The first exception (a) could be problematic for Canada if the TPP is ever ratified, as it would be up to a trade tribunal — not the federal government — to decide what constitutes a "discriminatory" requirement to fund Canadian content. The second exception (b) could even make it difficult to apply a "Netflix tax" (i.e., to move to collect income taxes or require the remittance of value-added taxes) in the future. As Geist framed it:

> Expanding Cancon payments may be a bad idea today (the Ontario and Quebec governments along with the CBC have suggested it is a good idea), but as the market evolves it is certainly possible that some form of regulation will be contemplated tomorrow. The TPP provision appears to be a permanent ban on a "Netflix tax" or virtually any expansion of Cancon contributions to currently exempt services.[133]

Communications and cultural policy lawyer Peter Grant sees Geist's comments as "overblown" and maintains that the TPP will not stop regulation. He claimed in a February 2016 blog post that, "If Canada wanted to impose Cancon expenditure requirements on Netflix, it is completely free to do so, as long as it also imposes similar requirements on Crave TV and *shomi*, the Canadian over-the-top subscription streaming services that compete with Netflix in Canada."[134]

Unfortunately for Canada, we will not be able to test who is right until after the TPP is ratified by enough parties for the agreement to come into effect and the federal government subsequently attempts to regulate the OTT environment. One thing we can say with certainty is that the "exception to the exception" for OTT services, as Geist put it, was inserted into Canada's cultural reservations at the request of U.S.-based Internet services firms. They will use whatever legal tools they have available to them to avoid having to fund Canadian content and pay Canadian taxes.

Conclusions and Recommendations

THIS STUDY HAS attempted to show that in failing to properly tax and regulate new media players, in particular over-the-top services such as Netflix and Google, Canada is in danger of losing control of its broadcasting system and of causing severe damage to the production and delivery of Canadian cultural programming. Without taking appropriate action in these two areas, Canada risks a situation akin to the unregulated radio era of the 1930s and 1940s, when Canadian airwaves were dominated by American programming and we were merely a branch plant location for U.S. culture. The new OTT services do not simply challenge the delivery technologies of existing Canadian media players; without better regulation they also threaten thousands of jobs in the cultural sector.[135]

Through its complicated e-commerce rules, Canada is missing out on millions of dollars in uncollected income and value-added taxes from OTTs — money that might go toward producing Canadian content and supporting the cultural industry through this technological transition. In this respect, we have fallen behind countries such as Australia, New Zealand, and the European Union where governments have woken up to the need to rein in the tax-avoidance tactics of major foreign-based OTTs. Canada's tax rules create an unreasonable competitive disadvantage for Canadian-based BDUs and OTTs when they must collect sales taxes on identical products that are not taxed if purchased via a foreign-based OTT firm with no physical presence in Canada.

At the same time, the CRTC's unwillingness to regulate the broadcasting activities of OTTs is undermining Canadian cultural policy and starving the national cultural industry of Cancon funds. It is astonishing that despite hearing compelling arguments on how to bring OTTs in line with existing Cancon rules, the regulator chose to "compromise" in the other direction — by allowing Canadian-based OTT companies *shomi* and CraveTV avoid having to contribute a share of revenue toward Canadian content. The CRTC chose to "level the playing field" by deregulating local firms rather than asking the internationals to play by the rules. The biggest losers in this compromise are, of course, Canadian actors, musicians and other culture workers.

This study proposes that the government must step in to help develop a true level playing field on OTT issues. Toward that end, it makes the following recommendations for the CRTC and the federal government.

1. Regulate

The CRTC should remove the new media exemption orders for all OTT services and ensure that OTTs begin to comply with Canadian broadcasting regulations. It must assure there are no more exceptions given to either foreign or Canadian online media services.

2. Collect Value-Added Taxes

All electronic commerce services (above a determined sales threshold) that sell to Canadians should collect and remit GST/HST and PST amounts to federal and provincial governments. E-commerce platforms can easily incorporate collecting value-added taxes into their online platforms. This e-commerce regulation should apply to all broadcast distribution companies or Internet and digital services (with over 2,000 subscribers) that consolidate programming and channels and distribute them in Canada. All digital and online media services that earn subscription revenue from Canadians, sell or rent individual shows or programs, or collect advertising revenue from Canadian companies, governments or individuals, should collect HST, PST, and GST where applicable.

3. Pay Income Tax

These same e-commerce companies should pay income tax on monies they earn from products or services they sell or rent in Canada. This should apply to other e-commerce companies in other sectors, such as Amazon, Uber, and Airbnb, as well as to the cultural and broadcast sector.

4. Contribute to Creation of Canadian Content

OTT companies that act as broadcasting distribution undertakings with more than 2,000 subscribers should contribute 5% of their gross revenues from broadcasting-related activities to the creation of Canadian programming through publicly or independently administered funds.

5. Carry an Inventory of Canadian Programming

The regulations on Canadian programming inventory should be applied to all foreign or domestic video-on-demand (VOD) services.

6. Increase Funding for the CBC

One of the major ways to assure the development of Canadian culture is through adequate funding for CBC/Radio-Canada. The national broadcaster today receives roughly $1 billion a year in public funding for its English and French networks. The federal government should double this contribution and at the same time limit advertising revenues.[136]

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