The Story So Far

A review of past CRTC measures to encourage or require private English-language television broadcasters to commission the production of Canadian drama, long-form documentary and children's programming

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August 2009

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1. INTRODUCTION

(1) The Canadian Radio-television and Telecommunications Commission ("CRTC" or "Commission") has convened a policy hearing in late September, 2009 with a view to establishing a framework for the licence renewal hearings of private English-language conventional television, specialty and pay television licensees in Spring, 2010. Over the past decade, English-language private OTA broadcasters have reduced their spending on Canadian drama and other hard-to-finance Canadian programming, while significantly increasing their spending on foreign drama. This result appears to be inconsistent with paragraph 3(1)(d) of the *Broadcasting Act*, which requires the Commission to ensure that "a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity" be made available to Canadian audiences, including programming that displays "Canadian talent in entertainment programming."[1] It also appears to be inconsistent with paragraph 3(1)(f) of the Act, which states that "each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming." Even where advertising revenues are declining, achieving the objects of the Act requires that this imbalance be addressed.

(2) This study focuses on the approaches that the Commission has taken with respect to the regulation of certain categories of programming—drama, long-form documentary, and children's programming—for a good reason. These categories of programming are seen as important because they contribute so strongly to the goals of the *Broadcasting Act.* In regard to drama, the CRTC stated in 2003:

[1] S.C. 1991, c. 11.

> Canadian drama should be the cornerstone of the Canadian broadcasting system. Drama can, and should, reflect Canadians of every background and culture to each other.[2]

The importance of these programming categories to the achievement of the Act's goals has been canvassed many times before.[3]

(3) These are also categories of Canadian programming that are the hardest to finance and which experience has shown will not be produced and scheduled by private broadcasters without regulatory intervention. There are ample precedents for such intervention. However, as will be seen, the success of these precedents has been mixed.

2. PAST CRTC REGULATION OF UNDER-REPRESENTED PROGRAMMING

(a) Exhibition Requirements

(4) In the 1970s, the regulatory emphasis with respect to Canada's television broadcasters was principally on exhibition requirements, as it became clear that unless the Commission acted, there would be little or no Canadian drama on the schedules of private broadcasters. At the first comprehensive review of CTV's network licence in 1973 the Commission, noting its "continuing concern … to encourage as high a proportion of Canadian production as possible on the CTV Network", "expressed the desire that the Network develop more drama programming with Canadian themes, concerns and locales."[4] At the 1976 CTV licence renewal, the Commission "expect[ed] the network, in future schedules, to correct the deficiency

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[2] Broadcasting Public Notice CRTC 2003-54, 26 September 2003

[3] See, for instance, Colin Hoskins, Stuart McFadyen and Adam Finn, "The Environment in which Cultural Industries Operate and Some Implications" (1994) 19(3) Canadian Journal of Communication; Trina McQueen, *Dramatic Choices: A Report on Canadian English-Language Drama* (Report to CRTC and to the Department of Canadian Heritage, 2003); and Peter S. Grant, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Toronto: Douglas & McIntyre, 2004).

[4] Decision CRTC 73-44, 22 January 1973.

of no weekly Canadian drama in the 1976-1977 network schedule".[5] Only at a third renewal hearing in 1979 did the Commission look past exhibition requirements to add drama expenditure requirements as a condition of licence for CTV:

> By Decision CRTC 73-44, dated 22 January 1973, the Commission approved the corporate reorganization of the CTV Network and the conditions of affiliation between the stations and the network. The Affiliation Agreement … included the objective of operating in Canada "… a national network program service in the public interest. Such services will be varied, balanced and designed in concept to serve the national interest comprising a balanced mix of the elements of information, public service, the arts and entertainment programming, within the overall capacity of the CTV System."
>
> In the Commission's view, substantial progress was made during the 1970's by the network and its member stations in meeting this objective in relation to certain types of programming. The Commission considers that CTV has been very successful in the areas of information programs and sports, and should be commended for the high quality of the news and public affairs and sports staff which it has assembled and developed. *However, in the opinion of the Commission, CTV has not yet in the main achieved comparable results with distinctive Canadian entertainment programming, particularly in the field of drama.* Much of the discussion at the February 1979 Public Hearing dealt with this deficiency….
>
> *The Commission considers that, in entering the 1980's the CTV priority must be the strengthening of its Canadian entertainment programming, with particular emphasis on the development of Canadian dramatic programs capable of attracting viewers in the most competitive mid evening hours.* Accordingly, it will be a condition of the renewal of the CTV network licence that 26 hours of original new Canadian drama be presented during the 1980-81 broadcasting year and 39 hours of original new Canadian drama be presented during the 1981-82 season. In planning and developing the necessary pilots for these dramatic programs or series, a minimum of 50% should be entirely domestic, rather than co-productions with foreign partners. The primary orientation should be on Canadian themes and the contemplated productions should be intended for telecasting in the peak viewing periods of the evening schedules….

[5] Decision CRTC 76-395, 5 July 1976.

> It was regrettable, however, that no satisfactory commitment was made by CTV to increase expenditures on Canadian programming development and production in order to produce domestic programs capable of attracting Canadian viewers in the face of foreign competition. The above condition of licence will now require such a commitment.[6]

CTV's appeal of this requirement was rejected by the Supreme Court of Canada in 1982.[7]

(5) In 1979, the Commission reviewed Global Television's licence, including an application to amend its promise of performance:

> At the hearing the licensee indicated that its fall 1979 programming schedule would include ten continuing series by Canadian independent producers. In particular, the Commission noted the development and scheduling of a Canadian dramatic series co-production with an independent producer.

The Commission further noted that Global had the

> financial resources available to significantly upgrade the standard of its production in order to meet that commitment and produce high quality Canadian programs that can compete during peak viewing hours.[8]

Two years later, however, the Commission was again called upon to review Global's licence, and found its proposed Promise of Performance unsatisfactory:

> Global has failed to provide an acceptable Promise of Performance with its application for licence renewal…. For example, the licensee proposed three hours each week of locally-produced drama in prime time. At the hearing, it indicated that this commitment was dependent on factors outside its control and, therefore, could not be fulfilled.[9]

(6) Given the foregoing, it is perhaps not surprising that, by the beginning of the 1980s, the Commission had determined that exhibition requirements were insufficient and that, without

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[6] Decision CRTC 79-453, 3 August 1979, emphasis added.
[7] *CRTC v. CTV Television Network Ltd. et al.*, [1982] 1 S.C.R. 530, 134 D.L.R. (3d) 193.
[8] Decision CRTC 79-498, 9 August 1979.
[9] Decision CRTC 81-887, 15 December 1981.

accompanying expenditure requirements, Canadian broadcasters could not be expected to devote the necessary resources to ensure the creation and exhibition of dramatic programming that would be compelling to Canadian audiences.

(b) Expenditure Requirements

(7) Although first approached in 1979 in a general sense, specific expenditure requirements, as distinguished from mere suggestions or expectations, were first codified in 1981 in the pay television sector.[10] They included three components. The first was to set a required level of Canadian content expenditures as a percentage of revenue. The second was to benchmark Canadian content expenditures as a percentage of total programming expenditures. The third was to require that 60% of all Canadian content expenditures be made on dramatic programs. Since then, the Commission has imposed Canadian programming expenditure ("CPE") requirements on virtually all must-carry pay and specialty services.

(8) Specific expenditure requirements were also raised in the conventional private English-language sector in 1982, in the context of Global Communications Limited's renewal hearing:

> In addition to its commitments for news and public affairs programming, Global has undertaken to broadcast, as a minimum, a total of 94 hours of new Canadian productions in 1982-83, including 117 half hours of children's programming, 26 half hours of drama, and 45 half hours of musical variety programs. The licensee also made a commitment to broadcast a number of "specials" during the current season.
>
> Global confirmed that new Canadian programming would continue to be scheduled in prime time hours throughout the licence term to the same extent indicated in the schedule proposed for 1982-83. It also confirmed that the quality of such programs would be maintained throughout the licence term. The licensee stated that it would at least maintain the

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[10] Decision CRTC 82-240, 18 March 1982.

> resources expended on the production or purchase of such programs at a level equal, in constant dollars, to the amount spent in 1982-83. In addition, the Commission notes the licensee's commitment to make every effort to maintain Canadian drama and variety programming throughout the term of this licence in "roughly the balance as proposed" for 1982-83.
>
> The Commission considers that the proposals made by Global at the hearing and in its application are minimum commitments and advises the licensee that any lowering of such commitments, either in terms of the hours proposed, or in the amount of the finances allocated for new Canadian programming, or any change in the balance proposed in the application between drama and variety programming during the term of this licence, will be unacceptable to the Commission.[11]

However, these expenditure requirements were not imposed as a condition of licence until 1986. In so doing, the Commission provided an interesting precursor to more recent concerns:

> *there is a growing imbalance between what the licensee spends on Canadian programming on the one hand, and on foreign product on the other*. In 1983, Global spent roughly equivalent amounts on Canadian and foreign programming. According to Global's projections for 1986/87, Canadian program expenditures, representing approximately the same level (20.3%), will be significantly less than foreign program expenditures, which would rise to 27.8% of gross revenues. Further, Global forecast that by 1991, Canadian program expenditures will have remained at a level of 20.3% while foreign program expenditures will have risen to 29.6%, creating an apparent imbalance of 9.3%.[12]

The resulting conditions of licence embraced both exhibition and expenditure requirements:

> It is a condition of licence
>
> (a) that in the eleven-month period commencing on 1 October 1987, Global broadcast a minimum of 183 (11/12 of 200) hours, and in each subsequent twelve-month period commencing on 1 September, a minimum of 200 hours of new, first run Canadian drama, music and dance, variety, children's and Category 2 documentary programs, to be scheduled, with the exception of children's programs, between 8:00 p.m. and 11:00 p.m. on Sunday through Friday and between 7:30 p.m. and 11:00 p.m. on Saturday; and

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[11] Decision CRTC 82-1066, 22 December 1982; Decision CRTC 86-1086, 14 November 1986.
[12] Decision CRTC 86-1086, 14 November 1986, emphasis added.

> (b) that during the twelve-month period commencing on 1 September 1991, Global broadcast an additional 50 hours of these types of programs at the licensee's discretion at any time during the broadcast day.
>
> It is a condition of licence
>
> (a) that Global spend, in respect of first run amortized play costs for new, first run, Canadian drama, music and dance, variety, children's and Category 2 documentary programs, in the eleven-month period commencing on 1 October 1987, a minimum of $4.58 million (11/12 of $5 million), and in respect of the direct and indirect costs of news programs, excluding overhead allocations, a minimum of $11.67 million (11/12 of $12.736 million); and
>
> (b) that Global spend, in respect of first run amortized play costs for new, first run Canadian drama, music and dance, variety, children's and Category 2 documentary programs, in each subsequent twelve-month period commencing on 1 September, a minimum of $5 million plus an amount to reflect the percentage increase in the All Items Consumer Price Index for Canada published by Statistics Canada for the twelve-month period ending on the last preceding 30 April; and in respect of the direct and indirect costs of news programs, excluding overhead allocations, a minimum of $12.736 million plus an amount to reflect the percentage increase in the All Items Consumer Price Index for Canada published by Statistics Canada for the twelve-month ceding 30 April.
>
> The Commission notes that between the 1982/83 and 1985/86 program years inclusive, approximately 55% of the total hours of new, first run Canadian drama, children's, musical/ variety and specials were devoted to drama and children's programs. The Commission expects the licensee, as a minimum, to maintain this percentage of new drama and children's programs, relative to the amount of music and dance, variety and documentaries it broadcasts, in each year of its new licence term.
>
> With respect to the second condition, the Commission reminds the licensee that the requirement is for a minimum annual expenditure as opposed to the average annual expenditure proposed by Global.[13]

(9) The following year, in 1987, the CTV Network was also made subject to specific expenditure conditions well as exhibition requirements. It will be recalled that CTV was required to present 26 hours of original new Canadian drama in the 1980/81 broadcasting year and 39 such hours in

[13] *Ibid.*

the 1981/82 season. While this was achieved, the Commission was disappointed that its expectation regarding the airing of Canadian drama in peak viewing periods had not been fulfilled, and therefore imposed the following conditions of licence:

> In consequence, the Commission requires as a condition of licence, that CTV undertake, at a minimum, the following expenditures in respect of Canadian programs in Network Sales Time in each year of the licence term:
>
> 1987-88 $68.4 million
> 1988-89 $74.5 million
> 1989-90 $80.2 million
> 1990-91 $86.5 million
> 1991-92 $93.3 million
>
> The foregoing minimum dollar expenditures do not include the costs of the additional hours of Canadian drama programs that CTV is required to broadcast, by condition of licence, in section 5 of this decision. The Commission therefore requires as a condition of licence that, in each of the years 1990-91 and 1991-92, CTV surpass the foregoing levels of annual expenditures by the amount of the costs of the additional hours of Canadian drama programs required by this decision over and above those indicated in the revised Promise of Performance…
>
> Accordingly, the Commission requires, as a condition of licence, that CTV broadcast during Network Sales Time the following average number of hours per week of regularly-scheduled Canadian drama in each year of the licence term:
>
> 1987/88 2.5 hours per week
> 1988/89 3.0 hours per week
> 1989/90 3.0 hours per week
> 1990/91 4.0 hours per week
> 1991/92 4.5 hours per week
>
> The Commission also requires, as a condition of licence, that in each year of the licence term no more than one hour per week of the above-mentioned hours of regularly-scheduled Canadian drama be broadcast before 8:00 p.m.
>
> The Commission expects these programs to reflect high production standards in order to be attractive to a wide Canadian audience.

> Finally, the Commission expects that the proportion of original hours to repeats of regularly-scheduled Canadian drama programming will remain above the 70% level attained during the 1981/86 period...
>
> In keeping with the network's proposal, the Commission expects that CTV will broadcast a minimum of 34 hours of Canadian dramatic features, mini-series and limited series, in addition to its regularly-scheduled programming, in each year of the new licence term. The Commission requires, as a condition of licence, that at least 24 hours of Canadian dramatic features, mini-series and limited series be broadcast in the Network Sales Time portion of the CTV schedule in each year of the new licence term.[14]

(10) Shortly thereafter, the same combined exhibition and expenditure approach was applied to all other major television licensees. As set out in the Public Notice introducing the renewals of virtually all of Canada's major English-language private television broadcasters in Spring 1989:

> In recent years, the Commission has placed increased emphasis on licensees' expenditures on Canadian programs. While a program's costs are not always proportional to its quality, there is generally a relationship between the two. As a result, an evaluation of program expenditures provides the Commission with an indication of a broadcaster's priorities…
>
> The Commission considers that the level of spending on Canadian programming is a vital element in ensuring the quality of Canadian programs. At the same time, the Commission acknowledges the suggestions made by various licensees and is aware of the importance of flexibility, simplicity and fairness in the application of any condition of licence based on a formula. For this reason, the Commission has decided to impose on the largest television stations under consideration a condition of licence relating each licensee's Canadian program expenditures to the station's financial performance as measured by its total advertising revenues in previous years…
>
> The Commission notes the flexibility and fairness built into this condition through the linkage of Canadian program spending to revenues. As licensees' revenues increase, so will their Canadian program

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[14] Decision CRTC 87-200, 24 March 1987.

> expenditures; should advertising revenues decline, so will the required level of spending.[15]

To establish the level of spending required for most large television stations, the Commission took the dollar amount to which they had committed in their Promises of Performance for the year ended August 31, 1990, then adjusted that figure upwards or downwards for each subsequent year according to fluctuations in the licensee's revenues, based on a rolling three-year average.

(11) As the 1990s started, all of Canada's major private English-language television broadcasters, including Global and CTV, were thus subject to expenditure requirements and, in a number of cases, to additional quantitative exhibition requirements for Canadian entertainment programming drawn from the genres of drama, music and variety.[16]

(12) Global Communications Limited's 1992 licence renewal continued both its expenditure and its exhibition requirements as ongoing conditions of licence, consistent with the Commission's "view that spending remains the most significant quantifiable indicator available to evaluate a licensee's efforts in Canadian programming."[17] In particular, Global was to spend and to air the following amounts, as conditions of licence:

> 2. Subject to conditions 3 and 4, the licensee shall spend on Canadian programming, at a minimum:
>
> (a) for the year ending 31 August 1993, the amount of $30,008,000;
>
> (b) for the year ending 31 August 1994, the amount set out in paragraph (a) above, increased (or decreased) by the year-over-year percentage

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[15] Public Notice CRTC 1989-27, 6 April 1989.
[16] Programming Categories 7, 8 and 9: *Television Broadcasting Regulations, 1987*, SOR/87-49, Appendix 1.
[17] Decision CRTC 92-220, 8 April 1992.

change for the year ending 31 August 1993, in the total of the station's time sales revenues as reported in the relevant Annual Return;

(c) for the year ending 31 August 1995, the minimum required expenditure calculated in accordance with paragraph (b) above, increased (or decreased) by the average of the year-over-year percentage changes for the years ending 31 August 1993 and 31 August 1994, in the total of the station's time sales revenues as reported in the relevant Annual Returns; and

(d) for the year ending 31 August 1996, the minimum required expenditure calculated in accordance with paragraph (c) above, increased (or decreased) by the average of the year-over-year percentage changes for the years ending 31 August 1994 and 31 August 1995, in the total of the station's time sales revenues as reported in the relevant Annual Returns, and then (further) increased by the amount of $ 2,125,000, representing the licensee's benefit expenditures on news programming set out in Decision CRTC 90-1073 for the year ending 31 August 1995, referred to at pages 5 and 11 of this decision.

3. In any year of the licence term, excluding the final year, the licensee may spend an amount on Canadian programming that is up to five percent (5%) less than the minimum required expenditure for that year set out in or calculated in accordance with condition 2; in such case, the licensee shall spend in the following year of the licence term, in addition to the minimum required expenditure for that year, the full amount of the previous year's underspending.

4. In any year of the licence term, including the final year, the licensee may spend an amount on Canadian programming that is greater than the minimum required expenditure for that year set out in or calculated in accordance with condition 2; in such case, the licensee may deduct

(a) from the minimum required expenditure for the following year of the licence term, an amount not exceeding the amount of the previous year's overspending; and

(b) from the minimum required expenditure for any subsequent year of the licence term, an amount not exceeding the difference between the overspending and any amount deducted under paragraph (a) above.iii5. Notwithstanding conditions 3 and 4 above, during the licence term, the licensee shall spend on Canadian programming, at a minimum, the total of the minimum required expenditures set out in or calculated in accordance with condition 2.

> 6. It is a condition of licence that Global broadcast between 8 p.m. and 11 p.m. the following average number of hours per week of Canadian drama:
>
> 1992: 933 clock hours
> 1993: 943 clock hours
> 1994: 953.5 clock hours
> 1995: 963.5 clock hours.[18]

(13) In CTV's 1994 licence renewal proceeding, notwithstanding CTV's attempts to persuade the Commission to remove the expenditure condition, the CRTC adopted a targeted approach which set out both expenditure and exhibition requirements for Canadian drama:

> The Commission's concern, however, is that the removal of all spending requirements for Canadian programming would lead to a reduction in the quality of entertainment programming aired by the licensee, particularly drama programming. The Commission considers that this concern is amply justified by CTV's actual and projected decrease in expenditures on entertainment programming. At the hearing, CTV acknowledged that its largest losses on Canadian programming are related to its costly regularly-scheduled drama. In the Commission's view, it is in this area that CTV would be most tempted to reduce spending in order to maximize profits. Accordingly, the Commission has taken a more focused approach in setting requirements for expenditures by the licensee on Canadian programming in the new licence term, an approach that addresses only CTV's spending on Canadian entertainment programming (categories 7, 8 and 9).[19]

In granting only a short-term renewal as a result of CTV's failure to comply with the drama condition of licence in the last year of its licence term, the Commission imposed conditions of licence that included four conditions requiring expenditures and four conditions requiring exhibition. The expenditure conditions were as follows:

> 1. The licensee shall expend on Canadian entertainment programming (Categories 7, 8 and 9), at a minimum,

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[18] *Ibid.*
[19] Decision CRTC 94-33, 9 February 1994.

i) in the year ending 31 August 1995, the amount of $18,000,000; and

ii) in each subsequent year of the licence term, an amount calculated in accordance with the following formula: the amount of the previous year's minimum required expenditures increased (or decreased) by the year-over-year percentage changes in the total of the network's time sales revenues, as reported in the relevant Annual Return for the years ending 31 August, averaged over the four previous years.

2. In any year of the licence term, excluding the final year, the licensee may expend an amount on Canadian programming that is up to five percent (5%) less than the minimum required expenditure for that year as set out or calculated in accordance with condition 1; in such case, the licensee shall expend in the next year of the licence term, in addition to the minimum required expenditure for that year, the full amount of the previous year's underexpenditure.

3. In any year of the licence term, including the final year, the licensee may expend an amount on Canadian programming that is greater than the minimum required expenditure for that year as set out or calculated in accordance with condition 1; in such case, the licensee may deduct

i) from the minimum required expenditure for the next year of the licence term an amount not exceeding the amount of the previous year's overexpenditure; and

ii) from the minimum required expenditure for any subsequent year of the licence term, an amount not exceeding the difference between the overexpenditure and any amount deducted under paragraph i) above

4. Notwithstanding conditions 2 and 3 above, during the licence term, the licensee shall expend on Canadian programming at a minimum, the total of the minimum required expenditures as set out in or calculated in accordance with condition 1.

(For the purposes of the above conditions, "expend on Canadian programming" shall have the same meaning as that set out in Public Notices CRTC 1993-93 and 1993-174 dated 22 June and 10 December 1993, respectively).[20]

The corresponding exhibition requirements were:

[20] *Ibid.*

> 5. The licensee shall broadcast in network sales time between 8:00 p.m. and 11:00 p.m. Monday through Friday, and between 7:00 p.m. and 11:00 p.m. Saturday and Sunday, the following average number of hours per week of regularly-scheduled Canadian drama programming in each year of the licence term: 3 hours per week in each of the first three years, and 3 hours 30 minutes per week in each of the last two years.
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> 6. The licensee shall broadcast in network sales time between 8:00 p.m. and 11:00 p.m. Monday through Friday, and between 7:00 p.m. and 11:00 p.m. Saturday and Sunday, a minimum of 48 hours per year of Canadian dramatic features, mini-series and limited series, to be averaged over the licence term.
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> 7. The licensee shall broadcast in network sales time, in each year of the licence term, a minimum of 1 hour per week of regularly-scheduled programming directed to children.
>
> 8. The licensee shall broadcast in network sales time a minimum of 18 hours per year of Canadian specials, including music, variety, documentary and children's or family specials in each of the first three years of its licence term, and 26 hours per year of such programming in each of the last two years of its licence term.[21]

(14) To the expenditure condition imposed in the 1989 renewals of major television licensees other than CTV and Global, the Commission added, between 1989 and 1994, four additional public notices. Two of these addressed provisions for greater flexibility with respect to the formula.[22] The other two clarified for licensees the nature of expenditures that would be considered as eligible Canadian programming expenditures under this formula,[23] militating against accounting distortions and double counting.[24]

(c) Choice Between Exhibition and Expenditure Requirements

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[21] *Ibid.*
[22] Public Notice CRTC 1992-28, 8 April 1992; Public Notice CRTC 1992-89, 23 December 1992.
[23] Public Notice CRTC 1993-93, 22 June 1993; Public Notice CRTC 1993-174, 10 December 1993.
[24] See, in particular, Public Notice CRTC 1993-93, 22 June 1993.

(15) In the 1995 round of licence renewals for most major television stations other than CTV Network or Global Television Network affiliates, the Commission decided to give licensees earning more than $10 million in annual advertising revenues the option of determining for themselves how they would discharge their Canadian content responsibilities under the *Broadcasting Act*. Licensees were granted a choice between continuing the existing condition of licence approach governing expenditures on Canadian programming, or adhering to another condition of licence stipulating minimum quantitative requirements for the exhibition of Canadian entertainment programming in the evening broadcast period. These two choices were set out by the Commission as “Option A” and “Option B”:[25]

> **Option A: Condition of Licence on Canadian Programming Expenditures.**
>
> Licensees choosing this option will be required to adhere to a condition of licence on Canadian programming expenditures which is essentially the same as the existing condition. Specifically, the Commission will allow most licensees to continue on with their existing conditions of licence; and all policies that pertain to this formula as set out in Public Notices CRTC 1989-27, 1992-28, 1992-89, 1993-93 and 1993-174 will continue to apply in the new licence term, with one important clarification.
>
> Licensees will not be permitted to credit any overexpenditures made in the previous licence term towards Canadian programming expenditures in any year or years of the upcoming licence term.
>
> Otherwise, and in most cases, the formula will continue to apply in a seamless fashion, so that the required amount of first-year expenditures will be calculated using, as the base amount, the minimum required level of expenditures during the final year of the current licence term under the formula (before consideration of any over- or under-expenditures from prior years), increased or decreased by the average percentage change in station advertising revenues and network payments in the last one, two,

[25] Public Notice CRTC 1995-48, 24 March 1995.

or three years of the current term, depending upon the election of the licensee.

Because of the high costs associated with the production of entertainment programming, the Commission has determined that it would be appropriate to extend the option of choosing between the two conditions of licence approaches only to those licensees earning annual advertising revenues and network payments in excess of $10 million. Accordingly, licensees earning $10 million or less in annual advertising revenues and network payments, will not be given a choice between the two options; the above formula approach for Canadian programming expenditures shall continue to apply as an expectation during the new licence term.

Option B: Condition of Licence on the Exhibition of Canadian Entertainment Programming in the Evening Broadcast Period.

Licensees earning more than $10 million in annual advertising revenues and network payments who choose this condition of licence must exhibit a specific number of hours of Canadian drama, music and variety programming during the evening broadcast period in each year of the new licence term. Such programming may be either produced by the licensee or acquired from other sources. The condition will state the following:

It is a condition of licence, that the licensee broadcast in the evening broadcast period (between 6:00 p.m. and midnight) the following minimum average number of hours per week of Canadian drama, music or variety programming in each broadcast year of the licence term beginning 1 September 1995:

1995-1996 5:30 hours
1996-1997 6:00 hours
1997-1998 6:00 hours
1998-1999 6:00 hours
1999-2000 6:30 hours
2000-2001 6:30 hours
2001-2002 7:00 hours

(16) In 1996, the year after the Option A/Option B mechanism had been introduced for private licensees, other than CTV and Global, earning more than $10 million in annual advertising revenues, Global's licence came due for renewal. Global applied to be brought under the same Option A/Option B mechanism, indicating that it would select the exhibition requirements set

out as Option B were the Commission to agree. However, the Commission did not agree.[26] Instead, it decided that, given Global's unique regional mandate, Global should not be governed by the same provisions as stations with local obligations, and would therefore continue to be held to both exhibition and expenditure requirements with respect to Canadian programming:

> The Commission has decided to impose on Global a condition of licence which requires that the licensee expend a minimum of $9,339,000 on Canadian entertainment programming (categories 7, 8 and 9) in the year ending August 1997, and to adjust this amount in each subsequent year in accordance with the prescribed formula linking program expenditures with station advertising revenues. The policies pertaining to the formula, as set out in Public Notices CRTC 1989-27, 1992-28, 1992-89, 1993-93 and 1993-174 will apply, with the clarification that the licensee will not be permitted to credit any overexpenditure made in the previous licence term towards Canadian programming expenditures in any year or years of the upcoming licence term….
>
> The Commission considers that Global's proposal made at the hearing to broadcast an average of 4 hours of Canadian drama programming each week during peak viewing hours would be an appropriate contribution. In its 25 September submission, Global requested that the peak viewing hours be defined as the period between 7:00 p.m. and 11:00 p.m. during the weekdays as well as on Saturday and Sunday. The Commission agrees that it is reasonable for Global to schedule Canadian drama between 7:00 p.m. and 11:00 p.m. on Saturdays and Sundays (as approved in Decision CRTC 96-46 dated 9 February 1996), but considers that the licensee should schedule its Canadian drama after 8:00 p.m. and before 11:00 p.m. on all other evenings, when the largest audiences are available. Accordingly, by a further condition of licence, set out in the appendix to this decision, the Commission requires Global to broadcast, at a minimum, an average of 4 hours each week of Canadian drama programming between 8:00 p.m. and 11 p.m. Monday through Friday, and between 7:00 p.m. and 11:00 p.m. on Saturday and Sunday. The Commission notes Global's commitment to maintain a percentage of at least 50% of original, first-run hours of Canadian drama….
>
> The Commission requires Global, by condition of licence, to broadcast, between 8:00 p.m. and 11:00 p.m. Monday to Friday and between 7:00 p.m. and 11:00 p.m. on Saturday and Sunday (peak viewing hours), a

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[26] Decision CRTC 96-72, 29 February 1996.

> minimum of 6 hours each year of original, first-run Canadian documentary programs during the first three years of the licence term, and a minimum of 9 hours each year of original, first-run Canadian documentary programs in peak viewing hours during the last four years of the licence term.[27]

(17) Notwithstanding its 1996 decision regarding Global, the Commission abruptly ended its regulation of television broadcasters' Canadian programming expenditures in 1999, setting out its reasoning in two paragraphs:

> The Canadian broadcasting system has become increasingly competitive. In such an environment, licensees need flexibility and diversity to attract the largest possible audiences and advertising revenues. The Commission believes that, in a competitive environment, licensees require high quality programming to win audience loyalty.
>
> The Commission is concerned that the existing expenditure requirements are complex and may not provide licensees with the flexibility they require to adapt their programming strategies to a highly competitive marketplace. In addition, concerns regarding the equitable application of expenditure requirements have begun to outweigh the benefits.[28]

Accordingly, "[t]he regulatory requirement for expenditures on Canadian programming [was] eliminated effective 1 September 2000."[29] This assumption—that investment in higher-quality programming is the most rational response of private English-language conventional television broadcasters to flexibility in the direction of their Canadian programming requirements—would soon be tested.[30]

(d) Return to Exhibition-Only Requirements

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[27] *Ibid.*
[28] Public Notice CRTC 1999-97, 11 June 1999, paragraphs 78-79.
[29] *Ibid.*, paragraph 75.
[30] Broadcasting Public Notice CRTC 2007-53, 17 May 2007, discussed *infra*, note 43 and accompanying text.

(18) Although the Commission ceased regulating private over-the-air broadcasters' Canadian programming expenditures in 1999, it continued to regulate Canadian programming exhibition. To provide greater flexibility to broadcasters in meeting this exhibition requirement, however, the Commission worked to simplify it, in part by introducing the concept of "priority programming". This consisted of:

(a) Canadian drama programs;
(b) Canadian music and dance, and variety programs
(c) Canadian long-form documentary programs;
(d) Canadian regionally produced programs in all categories other than News and Information and Sports; and
(e) Canadian entertainment magazine programs.

From September 1, 2000, the Commission required that each station in the major television broadcasting groups broadcast on average at least 8 hours per week of priority Canadian programs during the 7 p.m.-11 p.m. viewing period during each broadcast year.[31] Accordingly, Global's[32] and CTV's[33] licences were amended to replace their conditions of licence relating to expenditures and exhibition of Canadian programming with the new conditions relating to exhibition flowing from the 1999 decision.

(19) Since that time, two of the concerns which underpinned the Commission's imposition of expenditure requirements during the 1980s and 1990s have come to pass. Private English-language over-the-air television broadcasters have reduced spending on Canadian dramatic productions, and they have increased spending on non-Canadian programming. Between 1999, when the spending requirement was removed, and 2008, spending on Canadian programming by English-language conventional broadcasters increased from $366.8 million to $449.3

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[31] Public Notice CRTC 1999-97, paragraphs 29 and 37.
[32] Decision CRTC 2000-230, 6 July 2000, replacing conditions set out in Decision CRTC 96-72, 29 February 1996.
[33] Decision CRTC 2000-235, 6 July 2000, replacing conditions set out in Decision CRTC 94-33, 9 February 1994.

million. Expenditures on non-Canadian programming, which had started the period almost at parity with Canadian programming expenditures, rose to $739.7 million in 2008. Adjusting for inflation and exchange rate changes in order to measure in constant 1999 dollars, the disparity is starker still: Canadian programming expenditures stayed relatively constant between 1999 and 2008, crawling from $366.8 million to $371.8 million; non-Canadian programming expenditures increased by more than $650 million to $1042.5 million, a 2.8 to 1 constant-dollar ratio between non-Canadian and Canadian programming expenditures.[34]

(20) The situation was even more acute for Canadian drama. Between 1999 and 2003, private conventional television broadcasters' Canadian drama expenditures hovered around 3.7% of their advertising revenues, while their non-Canadian drama expenditures moved from 20.7% to 22.7% of ad revenues. In constant-1999-dollar terms, this translated into a change in Canadian drama expenditures from $51.5 million to $53.9 million and, in, non-Canadian drama, from $304.5 million to $376.2 million. In 2004, the Commission therefore introduced a proposed incentive program to encourage the financing and viewing of more and better Canadian dramatic productions:[35]

> As noted in Public Notice 2003-54, drama is the most popular programming on television. English-language drama programs receive more than twice the number of viewing hours received by any other type of programming. According to Fall 2002 data collected by the Bureau of Broadcast Measurement (BBM), prime time viewing of drama on private, conventional, English-language television stations represented 70% of all

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[34] For comparative purposes, the data presented in paragraphs (19) and (20) estimate English-Canadian conventional television expenditures and revenues as 105% of reported results for Canada excluding Quebec, and are based only on expenditures on telecast programs. These data therefore exclude both licence fee top-up and the following eligible broadcaster expenditures: inventory write-downs on Canadian programs, non-telecast Canadian script & concept, and loss on equity in Canadian programs. CRTC, *Conventional Television Financial Summaries* (online: <http://crtc.gc.ca/eng/stats5.htm>).

[35] Broadcasting Public Notice CRTC 2004-32, 6 May 2004.

> viewing. This disproportionate amount of viewing to drama relative to programming in other categories has been recorded consistently since measurement of this type was introduced.
>
> The production of high quality drama programs requires more creative, technical and financial resources than any other genre of television programming. Drama production trains, develops and employs Canadian writers, actors, directors, editors, technicians and other key creative individuals. In 2003, the total value of Canadian drama production exceeded one billion dollars.
>
> As has been frequently noted, however, viewing to Canadian drama, as a percentage of all drama viewing on English-language services, has been very low. It stands at only 5% of all viewing to drama on Canadian English-language private conventional television stations, according to Fall 2002 BBM data.
>
> None of the comments received by the Commission in this proceeding argued that an emphasis on Canadian drama was misplaced. Although a few expressed the view that regulatory action was unnecessary or that too great a focus on drama could be to the detriment of programming in categories such as documentary, there was a clear consensus that Canadian drama was important and needed support. [36]

(21) These observations led the Commission to the "preliminary view that effective measures to increase the availability of, and viewing to, Canadian drama programs are needed at this time and that such measures would further the objectives of the *Broadcasting Act* (the Act)."[37] The Commission also agreed that "the lack of funding is a key contributor to the difficulties facing Canadian drama", and proposed its drama incentive plan.[38]

(22) The drama incentive plan sought to use a carrot rather than a stick approach by "incentivizing" private over-the-air broadcasters to fund and exhibit more Canadian dramatic productions. The incentive was permission to air more minutes of advertising than the 12 minutes per hour at which advertising was otherwise capped:

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[36] *Ibid.*, paragraphs 14-17.
[37] *Ibid.*, paragraph 18.
[38] *Ibid.*, paragraph 24.

> This incentive had as its objective an increase in the spending on Canadian drama by the English-language conventional television industry, as a percent of total revenues, from 4% to 6% over a five-year period.[39]

In exchange for a total increase of 0.4 percentage points in annual expenditures on Canadian drama across all conventional television stations within a private broadcast group, that group would receive the "reward" of 25% more advertising minutes.[40]

(23) The drama incentive plan was unsuccessful. Rather than increasing, spending on Canadian dramatic productions by the television broadcasters continued its downward trajectory, both in absolute terms and in relation to revenues and to overall programming expenditures. In 2007 the Commission, in its framework decision, abandoned the failed drama incentive plan altogether by eliminating the 12 minute per hour advertising cap. Instead the Commission expected that

> the additional revenues resulting from this measure will enable conventional television licensees to increase their contributions to the production and exhibition of Canadian programming.[41]

As it had before introducing the first, rudimentary expenditure requirements for CTV in the 1970s, the Commission set out only expectations, not conditions of licence, as to these expenditures:

> Although English-language OTA licensees have maintained Canadian programming expenditures as a percentage of revenues, *the continuing reduction in the proportion of total programming expenditures allocated to Canadian programming is cause for concern.*

[39] Broadcasting Public Notice CRTC 2004-93, 29 November 2004, paragraph 8.
[40] *Ibid.*
[41] Broadcasting Public Notice CRTC 2007-53, 17 May 2007, paragraph 48.

> The Commission remains of the view that, in an increasingly competitive environment, licensees require high quality programming to win audience loyalty and will, therefore, make the necessary expenditures to acquire such programming. Furthermore, the Commission does not consider that increasing regulatory obligations is appropriate at a time when the OTA television sector must respond to the ever-increasing challenge of competing with new and largely unregulated sources of audio-visual programming.
>
> However, the Commission notes that section 3(1)(f) of the Act states that each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming. Therefore, the Commission intends to discuss this aspect of programming expenditures with English-language OTA broadcasters at the time of their licence renewals to ensure that an appropriate proportion of their financial resources will be allocated to the production and acquisition of Canadian programming.
>
> The Commission notes that the focus of this review was primarily on the financial aspects of the OTA television sector, and therefore considers the appropriate context for examining exhibition issues to be during the licence renewal process for the major OTA broadcast groups, which is scheduled for Spring 2008.[42]

(24) As is now known, the assumption (reprised from Public Notice CRTC 1999-27[43]) that "licensees require high quality programming to win audience loyalty" is belied by Canadian conventional television's shift of Canadian programming expenditures from drama to less-expensive news and sports programming,[44] while the promised review of Canadian programming expenditures and exhibition performance did not occur as scheduled. Instead, it will be discussed at the policy framework hearing to be held beginning September 29, 2009.

(25) But, in 2007, the Commission also noted a growing imbalance in programming expenditures:

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[42] *Ibid.*, emphasis added.
[43] Discussed *supra*, notes 28-30 and accompanying text.
[44] Broadcasting Notice of Public Hearing CRTC 2006-5, 12 June, 2006, paragraph 13.

> Commission records indicate that, between 1999 and 2006, *Canadian programming expenditures by English-language OTA broadcasters decreased from 50% to 40% of total programming expenditures…*.
>
> Although English-language OTA licensees have maintained Canadian programming expenditures as a percentage of revenues, the continuing *reduction in the proportion of total programming expenditures allocated to Canadian programming is cause for concern*….
>
> [T]he Commission notes that section 3(1)(f) of the Act states that each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming. *Therefore, the Commission intends to discuss this aspect of programming expenditures with English-language OTA broadcasters at the time of their licence renewals to ensure that an appropriate proportion of their financial resources will be allocated to the production and acquisition of Canadian programming.*[45]

(26) In 2006, and again in 2007, private over-the-air broadcasters proposed a fee-for-carriage arrangement as a response to changing industry conditions (such as broadcasting in new media and the transition to digital transmitters) and challenging economic conditions. The Commission declined on both occasions to grant this change to the over-the-air broadcasters' regulatory bargain, stating in 2007 that

> [c]onsidering the 2006 decline in both revenues and PBIT in the context of the industry's financial performance over the entire 2002-2006 period, the Commission is not convinced that this one year's financial performance constitutes a permanent decline in the profitability of OTA television. In this regard, the Commission notes the cyclical nature of the broadcasting business, which is dependent on the audience appeal of each programming line-up at a given point in time[46]

and, in 2008, that

> [w]hile OTA broadcasters have shown a recent decline in profitability, they, as other enterprises, might first look to their own business plans before making a request for increased revenue from the Commission. In

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[45] Broadcasting Public Notice CRTC 2007-53, 17 May 2007, emphasis added.
[46] Broadcasting Public Notice CRTC 2007-53, 17 May 2007, paragraph 28.

> the Proceeding, no business plans suggesting new sources of revenue were provided to the Commission. Neither the rationale for strategic initiatives by OTA broadcasters, such as recent major acquisitions, nor the basis for financing those initiatives or the impact of those initiatives on profitability were explained to the Commission at the public hearing.[47]

(27) This position is consistent with the Commission's view of the OTA television sector's "key role … both in terms of audience reach and support for Canadian broadcasting". The Commission has more recently stated that it intends to move to a "group licensing approach[48]" and is prepared to consider both group-based exhibition and group-based expenditure conditions. While this group approach is beyond the scope of this review, the provisions of the *Broadcasting Act* which have propelled the Commission to impose requirements in the past have not changed. Some of the techniques or lessons of the past outlined in this report may therefore be relevant in this new environment.

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[47] Broadcasting Public Notice CRTC 2008-100, 30 October 2008, paragraph 32.
[48] Broadcasting Decision CRTC 2009-279, 15 May 2009 and Broadcasting Notice of Consultation CRTC 2009-411, 6 July 2009.