

# Regulatory Issues Concerning New Media Alternatives to Television

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## INTRODUCTION

Throughout the past decade, the digital revolution has caused damage to traditional video content providers. Canadians are increasingly turning to the internet in order to access TV shows and movies. Companies like Netflix, Hulu, and Apple have already destroyed the video store and have the potential to wreak havoc on cable companies. Today, one of the important themes in Canadian communications is the regulatory asymmetry that is occurring. Currently, internet-based companies like Netflix are not subject to the regulatory scheme that affects their traditional competitors. The CRTC has repeatedly shown that it does not know how to handle this situation yet. However, with new major players like Amazon and Google on the horizon, it is surprising that the commission continues to remain passive.

This article will begin by discussing the significance of over-the-top (OTT) video services in Canada and briefly outline the CRTC's recent efforts and findings in relation to new media trends. It will then describe the problems with the current regulatory framework and some of the proposed solutions. While some have argued that regulating OTT services like Netflix would level the playing field, I will argue that encouraging competition and decreasing some of the onerous regulations that are currently imposed on Canadian broadcasters would be the best solution since it would benefit both consumers and Canadian corporations.

## I. THE SIGNIFICANCE OF OTT SERVICES IN CANADA

OTTs offer attractive services at a good value. For example, Netflix offers unlimited access to its catalogue of thousands of hours of TV shows and films for eight dollars a month. Cable television subscriptions are significantly more expensive. Also, because of CRTC regulations, Canadian consumers are forced to subscribe to Canadian channels they might not want in order to subscribe to the foreign channels they do want. OTTs have no such restrictions.

Use of over-the-top video services is increasing. Within two years, Netflix acquired 1.34 million subscribers in Canada.<sup>1</sup> Within its first year, Netflix's annual revenues rivaled those of The Movie Network and Movie Central. The latter two

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<sup>1</sup> Jim Sturgeon "BCE to launch rival to Netflix in English and French" *Financial Post* (10 September 2012), online: Financial Post <<http://www.financialpost.com>> [Sturgeon, "BCE"].

companies have taken thirty years to reach those amounts.<sup>2</sup> According to Alan Sawyer, “The pendulum will shift, and delivery over the Internet will become a very significant, if not the primary delivery mechanism for content.”<sup>3</sup>

Broadcasters are not only worried that their customers will cancel their subscriptions and replace them with companies like Netflix. Rather, “The competitive fear comes from the expectation that the costs of licensing foreign (i.e. Hollywood) content will increase with more competitors vying for the same rights.”<sup>4</sup> As over-the-top companies acquire more rights, Canadian broadcasters could have less access to valuable content.<sup>5</sup> Canadian broadcasters have expressed this concern to the CRTC and suggested that OTT companies’ low cost structure could enable them to outbid the Canadian companies for some of the content they rely on.<sup>6</sup>

For now, the complete destruction of traditional video content providers is being held off by bandwidth caps and copyright restrictions. Streaming video, particularly in HD, can lead to hefty monthly overage fees. However, unlimited bandwidth packages are beginning to appear in the market for reasonable prices. Also, the rights to certain TV shows and films are currently too expensive for Hulu and other OTT services to have a feasible business model in Canada. That being said, those OTT service providers might eventually be able to negotiate with copyright owners and find a way to acquire those rights in an affordable way. That would open the doors to new OTT services with more competitive catalogues of content. When both of those safeguards (bandwidth and copyright) are overcome, Canadian broadcasters will be especially vulnerable.

Since OTTs are unregulated, other global players are likely to enter the Canadian market to compete with Netflix. While Netflix is currently the major OTT giant in Canada, other companies could prove to have even more damaging effects on the Canadian broadcasting industry. The president of Bell Media has warned that “We use Netflix as an example, but [foreign companies] are not small players. Apple, Google, [and] Amazon are all looking to compete for programming rights here and internationally.”<sup>7</sup>

Amazon Prime, which does not currently operate in Canada, already offers a superior service to Netflix in the United States. In addition to offering express shipping and instant access to Kindle books, Amazon Prime provides members with unlimited access to its catalogue of movies and TV shows, which is significantly

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<sup>2</sup> Broadcasting and Telecom Notice of Consultation CRTC 2011-344, Joint Submission of ACTRA, APFTQ, CMPA, DGC, and WGC (5 July 2011), online: Actra <<http://www.actra.ca>> [Actra Submission].

<sup>3</sup> Ted Kristsonis, “Media-hungry Canadians seek access to geoblocked Hulu, Spotify” *The Globe and Mail* (23 August 2012), online: The Globe and Mail <<http://www.theglobandmail.com>> [Kristsonis, “Media-hungry”].

<sup>4</sup> Michael Geist, “The CRTC’s Over-the-Top video Consult: Calls for Competition, Regulation & De-Regulation” *MichaelGeist.ca* (7 July 2011), online MichaelGeist <<http://www.michaelgeist.ca>> [Geist “The CRTC”].

<sup>5</sup> *Ibid.*

<sup>6</sup> “Results of the fact-finding exercise on the over-the-top programming services” (5 October 2011), online: CRTC <<http://www.crtc.gc.ca>> [CRTC, “Results”].

<sup>7</sup> Sturgeon, “BCE”, *supra* note 1.

larger than Netflix's *and* costs less. Hulu, a popular, unlimited television platform is also currently unavailable in Canada because of copyright and licensing issues. However, as the profits of companies like Amazon and Hulu grow in foreign markets, they may be able to overcome those issues and create a heavier burden on Canadian broadcasters. These pressures, combined with the competitive advantages OTTs have over Canadian broadcasters are significant factors that should encourage the CRTC to take some kind of regulatory action.

## II. THE CRTC'S RECENT EFFORTS AND FINDINGS

In 1999, the CRTC decided that "Regulating new media broadcasting undertakings was generally not necessary to achieve the broadcasting policy objectives set out in the Act."<sup>8</sup> As films and TV shows became increasingly available online, the CRTC reconsidered that exemption and reaffirmed its earlier findings.<sup>9</sup> During that time, a coalition representing the Canadian cultural industry argued that ISPs should contribute towards the funding of Canadian content the way traditional broadcasters do since they are "Integral to the transmission of broadcasting and should be viewed as equivalent to the role played by cable and satellite broadcasting distributions who are subject to regulation as broadcasters under the *Broadcasting Act*."<sup>10</sup> The Supreme Court decided that ISPs simply provide the means of transmission and should not be subject to regulations in the *Broadcasting Act*.<sup>11</sup>

As OTT video services gained more footing in the Canadian market, the CRTC launched a fact-finding exercise in 2011 in order to assess the significance of OTT services in Canada and consider whether or not there should be regulatory intervention. The commission confirmed that "OTT programming accessed over the Internet is increasingly available to consumers at attractive price points" and found that new changes in the communications sphere are "creating uncertainty concerning established business models and associated support for the creation and presentation of Canadian content."<sup>12</sup> However, the commission decided that the impact OTTs will have on Canadian broadcasters remains inconclusive, and that for the time being they should remain unregulated. Instead, the CRTC would like to see the market evolve and have regulated BUs take advantage of new opportunities in the new digital environment.<sup>13</sup> The CRTC said it would perform another fact-finding exercise a year later,<sup>14</sup> but surprisingly cancelled it a month before it was

<sup>8</sup> *Broadcasting Regulatory Policy CRTC 2009-329* (4 June 2009), online: CRTC <<http://www.crtc.gc.ca>>.

<sup>9</sup> *Broadcasting Order CRTC 2009-660* (22 October 2009), online: CRTC <<http://www.crtc.gc.ca>>.

<sup>10</sup> Stephen Zolf, "Supreme Court of Canada rules that ISPs are not broadcasting undertakings" *Heenan Blaikie* (21 February 2012), online: Heenan Blaikie <<http://www.heenanblaikie.com>>.

<sup>11</sup> *Reference re Federal Courts Act (Canada)*, 2012 SCC 4, 2012 CarswellNat 214, 2012 CarswellNat 215, (sub nom. *Reference re Broadcasting Act*) [2012] 1 S.C.R. 142 (S.C.C.).

<sup>12</sup> CRTC, "Results", *supra* note 6.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

scheduled to begin.<sup>15</sup> It did note, however, that it would continue monitoring OTT services and their impact on Canadian broadcasters.<sup>16</sup> In sum, the CRTC is not yet regulating over-the-top video services, but acknowledges that media trends are shifting and may require regulatory intervention down the road.

### III. WHAT'S WRONG WITH THE CURRENT REGULATORY FRAMEWORK?

*The only obvious conclusion from hundreds of submissions and hours of the debate is that Canada's broadcast law framework is broken.*<sup>17</sup>

— Michael Geist

The main problem with the current regulatory framework surrounding OTT services is that they have more advantages and fewer onerous obligations than Canadian broadcasters. Astral Media is one of the companies seeking a level playing field and has noted that new internet-based broadcasters entering the country “have access to Canadian consumers but are not contributing to our economy [or] our system, because they have no obligation [to].”<sup>18</sup>

A report commissioned by the CRTC found that OTTs like Netflix and iTunes are in the same market as Pay TV, VOD, and PPV and are a reasonable substitute for consumers.<sup>19</sup> It also noted, “Entry barriers are sufficiently low that in these markets, foreign OTT services have assembled larger program libraries than their Canadian counterparts, have made competitive in-roads in acquiring distribution rights for premium content, [and] are available without buy-through requirements and without regulatory obligations.”<sup>20</sup> Additionally, the fact that OTTs are purchasing an increasing amount of programming rights means that Canadian broadcasters’ advantage of incumbency in the program rights markets is shrinking.<sup>21</sup>

In addition to those competitive advantages, OTTs are not subject to the regulatory requirements and costs to which Canadian companies are. Canadian broadcasting distributors are required to contribute 5% to support the production of Canadian content through the Canada Media Fund.<sup>22</sup> Those contributions, based on broadcaster’s gross revenues are significant (i.e. over three hundred and fifty mil-

<sup>15</sup> John Traversy, “Commission Letter” (16 April 2012), online: CRTC <<http://www.crtc.gc.ca>>.

<sup>16</sup> *Ibid.*

<sup>17</sup> Michael Geist, “Why Competition Holds the Key to a Broken Broadcast System” *The Toronto Star* (5 July 2011), online: TheStar.com <<http://www.thestar.com>> [Geist, “Why Competition”].

<sup>18</sup> Jamie Sturgeon, “CRTC decides against Netflix Regulation — for now” *Financial Post* (5 October 2011), online: Financial Post <<http://www.financialpost.com>>.

<sup>19</sup> “Market Impact and Indicators of Over the Top Television in Canada: 2012” (30 March 2012), online: CRTC <<http://www.crtc.gc.ca>>.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Broadcasting Distribution Regulations*, SOR/97-555, s. 34 [*Broadcasting Distribution*].

lion dollars in 2010).<sup>23</sup> In addition to that required funding, those companies are also unable to secure large foreign investments due to foreign ownership regulations.<sup>24</sup> Canadian broadcasters are also required to carry certain mandatory channels,<sup>25</sup> which may not be profitable.

In sum, Canadian broadcasters are at a significant disadvantage compared to foreign OTT service providers. The CRTC is enforcing regulations with the goals of preserving and developing Canadian culture. However, those regulations are impeding Canadian broadcaster's ability to fairly compete with foreign companies. As such, the CRTC should amend the regulatory scheme in order to protect the Canadian broadcast industry.

#### IV. PROPOSED SOLUTIONS

##### (a) Regulating OTTs

Creator groups believe that OTTs should be subject to the same CRTC regulations as Canadian broadcasters.<sup>26</sup> Since OTTs are profiting from the Canadian market, proponents of this solution would like them to direct a portion of their profits towards Canadian content funding, like traditional TV broadcasters. ACTRA submitted that "Absent any contributions from OTT services, producers will have to make do with less funding, causing a trickle-down effect that may negatively impact every aspect of the creative industries."<sup>27</sup>

However, regulation could lead to unintended consequences. Google and the NFB argued that regulating would inhibit innovation, while Shaw noted that it would make it harder for Canadian companies to compete globally.<sup>28</sup> The CRTC should focus more on the *Broadcasting Act's* policy objective of ensuring that the broadcasting system is regulated and supervised flexibly in a way that "does not inhibit the development of information technologies and their application or the delivery to Canadians."<sup>29</sup>

Google's submission to the CRTC said that "As it is, Canadians can only be enviously aware of the full range of choices in platforms, content and technology available to US consumers. Imposing broadcasting regulation online would make this situation even worse."<sup>30</sup> While Netflix's American catalogue, Hulu, and other OTT services are unavailable in Canada, some Canadians use virtual private networks to circumvent geoblocking in order to access that content.<sup>31</sup> Between in-

<sup>23</sup> "CRTC releases 2010 financial results for Canadian broadcasting distributors" (14 July 2011), online: CRTC <<http://www.crtc.gc.ca>>.

<sup>24</sup> *Broadcasting Act*, SC 1991, c. 11 s. 3(1)(a) [*Broadcasting Act*].

<sup>25</sup> *Broadcasting Distribution*, *supra* note 22 at s. 18.

<sup>26</sup> Geist "The CRTC", *supra* note 4.

<sup>27</sup> Actra Submission, *supra* note 2 at s. 13.

<sup>28</sup> CRTC, "Results", *supra* note 6.

<sup>29</sup> *Broadcasting Act*, *supra* note 24 at s. 5(2)(f).

<sup>30</sup> Susan Krashinsky, "Excerpts from submissions to the CRTC" *The Globe and Mail* (5 October 2011), online: The Globe and Mail <<http://www.theglobeandmail.com>> [Krashinsky, "Excerpts"].

<sup>31</sup> Kristsonis, "Media-hungry", *supra* note 3.

ternet piracy and the use of VPNs, it seems like Canadian consumers are looking for more programming options. Regulating OTTs would not provide those consumers with more legal options or benefit them in any way. Instead, it would create challenges for the companies that are providing services that Canadians are looking for.

### (b) Competition/De-Regulation

Instead of regulating OTTs, the CRTC should help Canadian broadcasters compete by reconsidering some of their current obligations. Competition often leads to innovation, which means better products and value for consumers. For example, the CRTC has pointed out that in its early days “access to Internet services was competitive, and both creativity and innovation grew in an environment without regulation”.<sup>32</sup> However, encouraging competition is not part of the *Broadcasting Act*’s policy. Geist argues that “The absence of competition may have made sense when there was little of it, but in today’s world of abundance . . . fostering competition among broadcasters and broadcast distributors such as cable and satellite companies might hold the key to reforming the system.”<sup>33</sup> The presence of OTTs might seem threatening to Canadian broadcasters, but it could also create incentive for those broadcasters to innovate and provide superior services and better value.

Gesit believes that “The best way to beat Netflix is in the marketplace.”<sup>34</sup> The CRTC has noted that “Stakeholders generally consider that a more permissive regulatory environment would allow Canadians the flexibility to create and have access to a greater choice of innovative communications services”.<sup>35</sup> Rather than regulating OTTs, removing some of the regulatory burdens on Canadian broadcasters would not only foster fair competition, but it would also benefit consumers.

The CRTC might reconsider, at least for the time being, the required contributions to the Canada Media Fund. Interestingly, some major players believe that OTTs are good for the Canadian film and TV industries. It is not surprising that companies like Netflix, Google, and Apple have made submissions to the CRTC stating that they view OTT services as beneficial to Canadian content producers. However, CBC and the NFB also argued that those services mean wider distribution for Canadian content.<sup>36</sup> The CRTC should also consider that if OTTs outbid Canadian broadcasters for programming rights to popular content, Canadian broadcasters might become less profitable and consequently unable to provide as much funding to the Canadian Media Fund.<sup>37</sup>

<sup>32</sup> “Frequently Asked Questions — Why doesn’t the CRTC regulate Internet services?” (9 July 2012), online: CRTC <<http://www.crtc.gc.ca>>.

<sup>33</sup> Geist, “Why Competition”, *supra* note 17.

<sup>34</sup> Geist “The CRTC”, *supra* note 4.

<sup>35</sup> “Navigating convergence II: Charting Canadian Communications Change and Regulatory Implications” (18 August 2011), online: CRTC <<http://www.crtc.gc.ca>>.

<sup>36</sup> CRTC, “Results”, *supra* note 6.

<sup>37</sup> Sturgeon, “BCE”, *supra* note 1.

The NFB has expressed interest in directly competing with Netflix. “There is room,” it says, “to create an alternative Canadian OTT service that would not compete with the existing commercial sector, but provide unique opportunities for the Canadian private production industry and for Canadians. Such a service can be enormously advantageous in promoting the value of Canadian programming at home and abroad.”<sup>38</sup> In fact, Videotron has already released its own OTT service, illico Club Unlimited, which taps into Eastern Canada’s French market that Netflix has mostly neglected. However, Videotron is subject to some of the CRTC’s regulations, while Netflix is not. As companies like Videotron release new, competitive services, the CRTC should encourage them by releasing them from some of their current obligations.

In focusing on encouraging competition, the CRTC could allow Canadian broadcasters to benefit from foreign investments so that they could have enough capital to reasonably compete with their heavily-funded foreign competitors.<sup>39</sup> Companies like Netflix, Amazon, and Google have access to international investors. With deep pockets, they are better equipped to purchase program rights and expand in the Canadian market. The commission could also alter the mandatory carriage requirements that make cable broadcasting subscriptions less appealing.<sup>40</sup>

While Bell’s proposed merger with Astral has many factors that must be considered, it should be noted that Bell’s CEO, George Cope, has said that combining Bell and Astral’s content buying capabilities was a major reason for the merger, since it would allow them to better compete with OTT services.<sup>41</sup> Astral has stated that “Nobody today doubts that, over the next five years, Internet broadcasting will grow at a phenomenal rate, well above that of traditional television . . . Astral will pay more for less, which could ultimately affect the power of our pay television services to attract an audience.”<sup>42</sup> Together, Astral and Bell have distribution rights to popular shows and films through channels like HBO Canada and The Movie Network. Allowing the merger could potentially allow Bell and Astral to create a Canadian over-the-top service that is superior to Netflix.

Finally, given the current instability of the Canadian broadcasting business, the CRTC should consider focusing less on the production of Canadian content, and more on protecting its regulated companies. Being a public organization, the CRTC should represent Canadian interests. Given the drastic technological changes that have occurred since the creation of the *Broadcasting Act*, it might be time for the commission to figure out whether Canadians are more concerned with the production of Canadian content or superior broadcasting services at a better value.

## V. CONCLUSION

In conclusion, public organizations like the CRTC are supposed to reflect Canada’s societal values, which change over time. It remains unclear whether Ca-

<sup>38</sup> Geist “The CRTC”, *supra* note 4.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Sturgeon, “BCE”, *supra* note 1.

<sup>42</sup> Krashninsky, “Excerpts”, *supra* note 30.

nadian consumers are concerned with the production of content. In any case, while Canadian broadcasters are expressing valid apprehensions about the increasing market share OTTs are procuring, the CRTC appears to be playing a passive role. With new, major foreign competitors seeking to enter the Canadian market, it might be time for the CRTC to intervene with a new regulatory structure. The CRTC should focus on encouraging fair competition, not through the regulation of OTTs, which could negatively impact consumers, but by removing some of the onerous obligations that currently affect Canadian broadcasters.