NETFLIX

Comments Submitted to the Broadcasting and Telecommunications Legislative Review Panel

January 11, 2019

Executive Summary

Netflix's business model is a simple one: we give our members control over their at home video entertainment. Netflix is a leader in online distribution, but we are far from alone. Numerous online distributors offer an abundance of content, including Canadian content, on demand, anywhere and anytime to anyone with access to the open internet. This has had a positive impact on consumer choice. It has also expanded the availability of audiovisual content, generating new audiences, revenues and discoverability for the creators and producers of that content.

As a result, original production in Canada is booming: both foreign location service production and Canadian content. In fact, investments in the Canadian production sector and in CanCon have never been higher.

Netflix's growing activity in Canada led us to establish a local production presence. Following Ministerial review under the Investment Canada Act ("ICA"), Netflix committed to invest $500 million (CAD) over five years in original content made in Canada, and $25 million on initiatives to develop the next generation of diverse Canadian talent, with a focus on francophones, women, and Indigenous creators. We are on track to significantly exceed our investment commitments, which reflects the high quality and competitiveness of Canadian creators, talent, crews and facilities.

The emergence of on demand, online audiovisual services over the last decade has enriched Canada's production sector, without government intervention. We do not subscribe to the theory that a "regulated investment" is more valuable than a consumer and market-driven one.

In its review, we urge this Panel to take a holistic view of the health of Canada's audiovisual industry. The reflexive assumption that new technologies and business models create challenges, rather than opportunities, is unsupported. Indeed, the data show audiovisual market-driven growth — not contraction — as new media gain popularity and viewership. To this end, it is imperative that the Panel clearly identify what problems it is trying to solve and ensure that proposed “solutions” address them without undermining the natural investments and growth that new media are already delivering in Canada.

The rapid innovation and experimentation that characterize online content services make forecasting a challenge. They also caution against regulation that might inadvertently inhibit consumer choice, impede technological development and evolution of business models, and risk undermining market forces that are driving positive outcomes.

Over the last several years, numerous parties have proposed regulatory interventions for online services. Many of these proposals would not only undermine positive outcomes to date, they could also thwart a competitive response from Canadian broadcasters, and ultimately prove to be counterproductive to cultural and broadcasting policy objectives.

Netflix does not consider online services to be broadcasters. Nor do we support the regulation of online services as broadcasters. We urge the Panel to recognize that market forces are driving significant growth both in production in Canada, and production of Canadian content, for worldwide markets; that these outcomes represent a substantive contribution to Canada’s cultural policy goals; that policy objectives may be achieved by competition and market forces; and that regulation should be relied upon only where demonstrably required.

I. What Netflix does

Netflix's business model is a simple one: we give our members control over their at home video entertainment. Our service is consumer focused, and differs from both traditional media and many other online services: we offer a subscription video on demand (SVOD) service model of personalized recommendations to help our members find shows and movies of interest to them. Netflix is available for one low monthly price, and members can quit and rejoin any time. So we must continually provide a variety of compelling content to keep our members happy.

Members pay Netflix the same monthly price whether they watch a lot or a little. We use that revenue to license and create more movies and TV shows for our members to enjoy, and to continuously improve their user experience. We don't earn more if some shows or movies get watched more than others. In that sense, it's not like theatrical distribution or pay per view models.

There is no advertising on our service and we don't sell audiences to advertisers. We make content available, we don't "program" or "schedule" it. We don't need a million or more people to sit down and watch at 8 p.m. on Thursday to make a show successful. Our members' viewing history lets us know what they like and that information enables us to create and license content based on the tastes of our diverse membership — not on what makes advertisers happy.

We help members find content to enjoy through our recommendation system. The algorithms that generate these recommendations are complex, but what they do is simple: they help members find the right content for them. We look at viewing history, what they have liked or not liked, and what other members with similar tastes and preferences have enjoyed. Netflix does not recommend content based on gender, race, ethnicity or age. We do not collect this information from our members. "Age" only factors into recommendations when a member sets parental controls to filter based on age-oriented maturity ratings. This allows members to determine what types of content are suitable for their children and for family viewing.

Netflix is responsive to our members' needs in other ways. Privacy is important to our members, and to us: we respect and protect our members' privacy. We do not sell our members' data. We are also a leader in making content accessible to members with vision and hearing impairments with audio descriptions, subtitles and/or captions. As well, as an international service available in 190 countries, Netflix strives to make our content library available in many languages. We offer our Canadian members nearly 15,000 hours of content with French subtitles and/or captions, including Canadian content.

While Netflix is a leader in online distribution, we are far from alone. Numerous online distributors offer an abundance of content from global sources, including Canadian content, on demand, anywhere and anytime to anyone with access to the open internet. This has had a positive impact on consumer video choice. It has also expanded the availability of audiovisual content, including Canadian content, at low cost, in Canada and abroad, generating new audiences, revenues and discoverability for the creators and producers of that content.

As a result, original production in Canada is booming: both foreign location service production and Canadian content. This has been driven primarily by market forces — the unprecedented demand for online content — and Netflix has been part of this tremendous growth in a highly competitive sector.

II. Netflix in Canada

Netflix launched in Canada in September 2010, as our first market outside the U.S. We have since become a global service, offered in 190 countries. Canada is one of our top three locations for production, along with the U.S. and U.K.

Our growing activity in Canada led Netflix to establish a local production presence. This was subject to Ministerial review under the *Investment Canada Act* ("ICA"). The ICA review led Netflix to commit to invest $500 million (CAD) over five years in original content made in Canada, and $25 million on initiatives to develop the next generation of diverse Canadian talent, with a focus on francophones, women, and Indigenous creators. These commitments are legally binding. We are on track to significantly exceed our investment commitments, which reflects the high quality and competitiveness of Canadian creators, talent, crews and facilities.[1] It is clear that market forces are driving organic growth in our original production activity in Canada.

ICA approval gave us the ability to spend money directly in Canada and to hire employees in Canada. Netflix received no other benefits from the Canadian government. There was no agreement or special deal on taxation of any kind. We will comply with tax laws if and when they legally are extended to services like Netflix. For example, Netflix will begin collecting and remitting QST in Québec in January 2019.

In addition to on-location Netflix original productions, our growing activity in Canada includes certified Canadian content ("CanCon"), such as Netflix original co-productions with Canadian independent producers and broadcasters. It also includes acquired content that we know is

[1] https://media.netflix.com/en/company-blog/a-busy-first-year-for-netflix-canada

certified CanCon, such as Canadian Broadcasting Corporation ("CBC")/Radio-Canada shows. Netflix has also produced original films or shows that meet six-out-of-ten, or more, CanCon key creative criteria, but that cannot be certified as such simply because they are fully financed by Netflix[2] (one example is *ARQ*, a film written and directed by Canadian director Tony Elliott). These investments not only contribute increased financing, they also deliver worldwide exposure, contributing to the discoverability and export of both original CanCon and productions made in Canada.

In addition, the $25 million allocated to developing next-generation Canadian talent will generate even more positive outcomes in the years to come. Investments to date include multi-year commitments to:

- The Doc Accelerator Emerging Filmmaker Lab, with the Hot Docs festival, which focuses on skills training and career advancement with a goal to foster an inclusive new generation of Canadian documentary filmmakers.[3]
- The Diversity of Voices Initiative, with the Banff World Media Festival, designed to offer a professional springboard for francophone, Indigenous and women creators from across Canada.[4]
- The expansion of the Apprenticeship for Women Directors to French-language directors, with the Academy of Canadian Cinema and Television, which aims to provide female directors across the country the opportunity to further develop and advance their careers across all platforms.[5]
- The Comedy Screenwriting Program, with the École nationale de l'humour ("ÉNH"), designed to support the next generation of comedy writers.[6]
- The Film and Television Apprenticeship Program for Indigenous creators and creators from diverse backgrounds, with the Institut national de l'image et du son ("INIS"), intended to encourage the emergence and accelerate the professional development of new creators in the audiovisual sector.[7]

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[2] CanCon certification criteria include requirements for Canadian financing. So even if a production meets creative, artistic and talent criteria, being fully financed by a private foreign entity will preclude certification as Canadian content. That excludes the possibility of consideration for some awards, and recognition as "CanCon" on our service.

[3] https://www.hotdocs.ca/i/accelerator.

[4] https://dov.banffmediafestival.playbackonline.ca/.

[5] https://www.academy.ca/women-director.

[6] http://www.enh.qc.ca/actualites/lenh-offre-un-programme-de-perfectionnement-en-scenarisation-de-comedie-grace-au-soutien-de-netflix/.

[7] https://www.inis.qc.ca/programmes/programmes-reguliers/programme-dapprentissage-cinema-television.

- The Netflix-CFC Global Project, with the Canadian Film Centre, to foster and accelerate a broad scope of diverse Canadian creators and their film and TV projects, and advance Canadian talent and opportunities in the international marketplace through three accelerators programs.[8]
- The Pacific Screenwriting Program, with Creative BC, the Canadian Media Producers Association ("CMPA") and the Writers Guild of Canada, established with the goal of building a vibrant screenwriter community in British Columbia.[9]
- The Talent Lab, with Québec Cinéma, to mentor and coach emerging artists and professionals by outstanding world-renowned experts, and designed to both challenge and help the next generation of Québec filmmakers in their career path.[10]

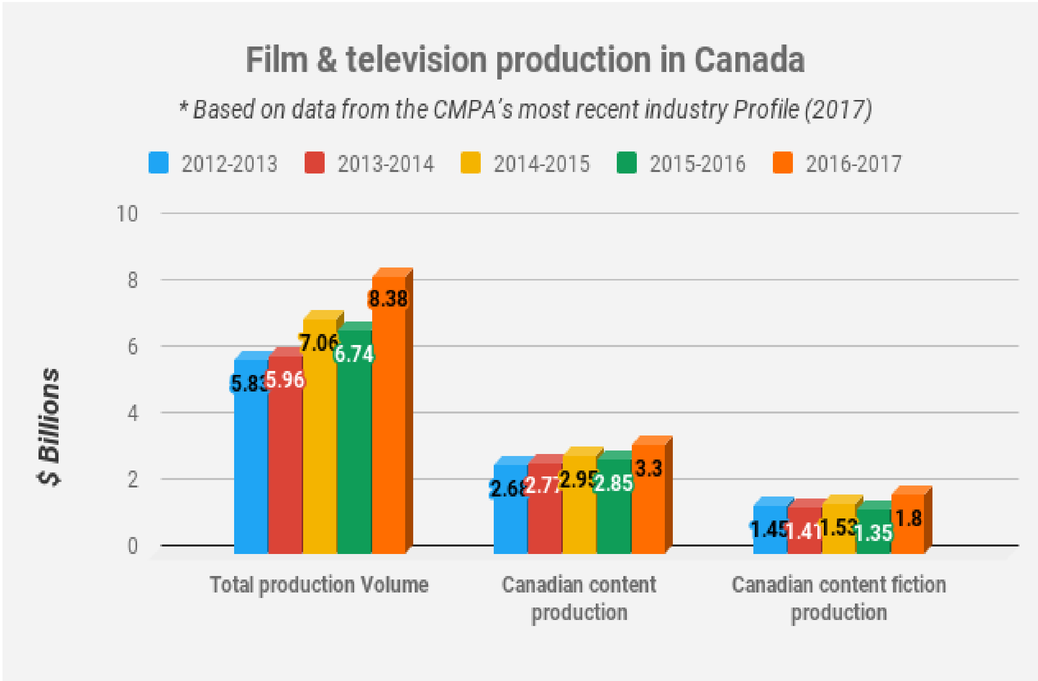
III. Investment in production in Canada and Canadian content is at an all-time high.

This Panel is conducting its review during the so-called "golden age of content." This golden age is spurred by increasing competition and consumer demand for high quality content across all platforms in Canada and abroad. Canada is a direct and significant beneficiary of this phenomenon. While there has been a fair amount of anecdotal concern about the future of the Canadian audiovisual sector, the fact is that investments in the Canadian production sector and in CanCon have never been higher.

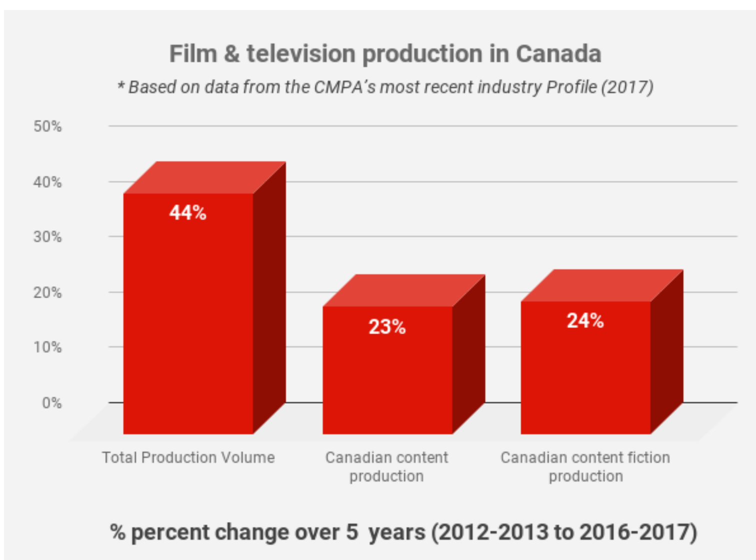
According to the CMPA's most recent industry Profile (2017),[11] original audiovisual production in Canada is booming:

- **In 2016-17 alone,** total production volume was up 24% (over 2015-16) to an all-time high of $8.38 billion.
    - Foreign on-location "service production" was up 41%.
    - Canadian content production was up 16% to an all-time high of $3.30 billion (English-language was up 16.6% and French-language was up 15.9%)
    - Canadian content fiction production was up 33% to $1.8 billion.

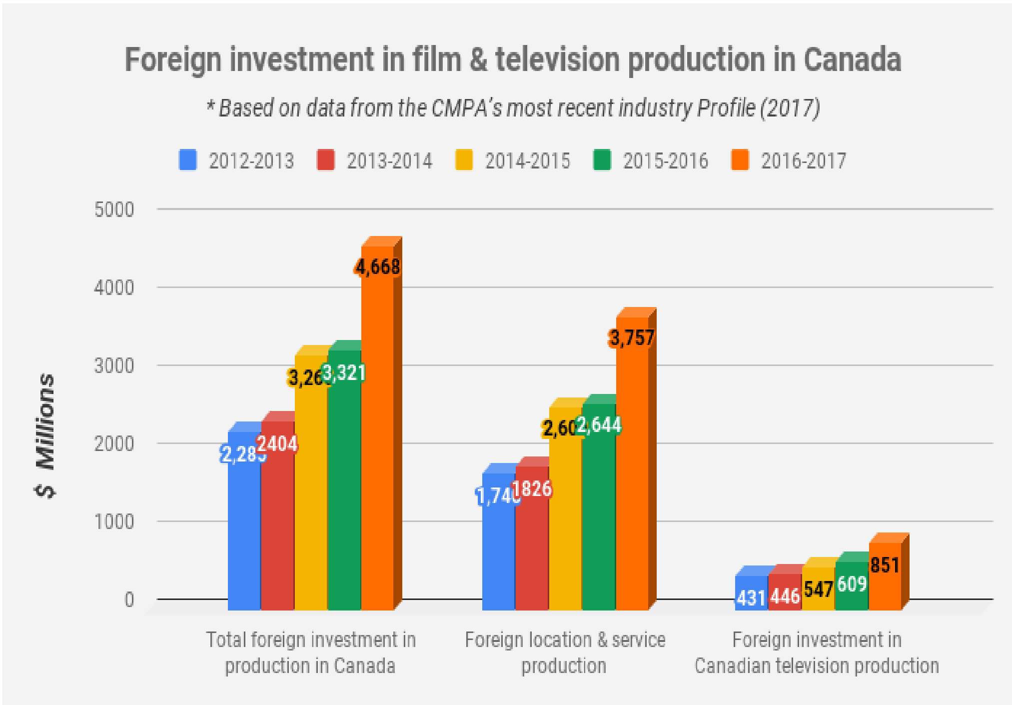
[8] http://www.cfccreates.com/news/pressroom/318-new-cfc-netflix-partnership-to-inspire-and-empower-distinctive-canadian-voices.
[9] https://pacificscreenwriting.com/about/.
[10] https://www.lapresse.ca/cinema/nouvelles/201812/13/01-5207862-netflix-et-Québec-cinema-creent-un-programme-de-mentors.php.
[11] http://cmpawebsite.wpengine.com/wp-content/uploads/2018/04/Profile-2017.pdf



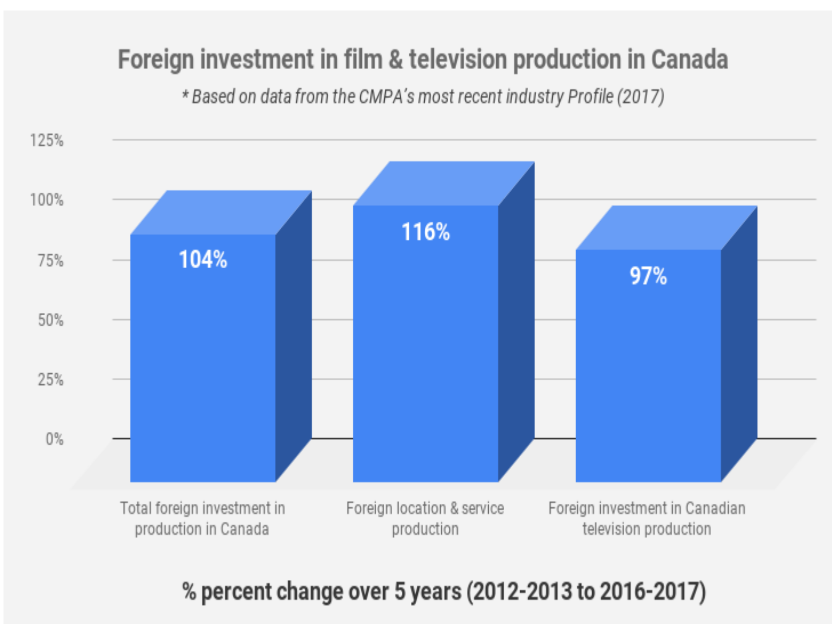
- **Over the last five years** (2012-13 to 2016-17), total film & TV production volume in Canada increased 44%; Canadian content production was up 23%.



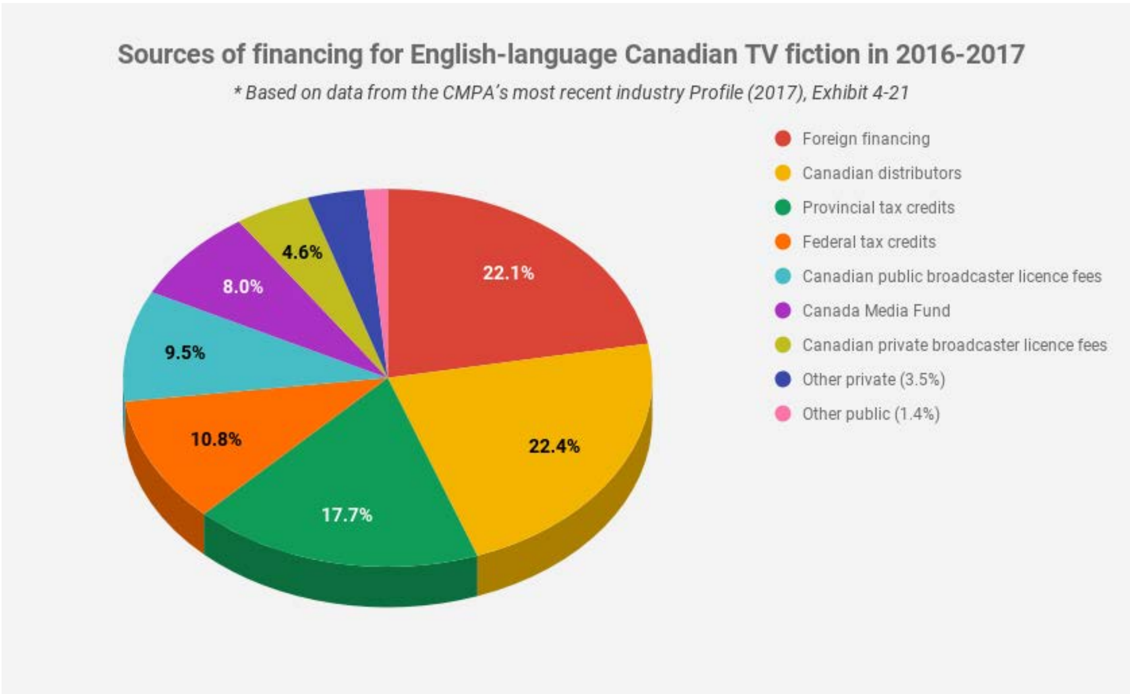
- **In 2016-17 alone**, foreign investment in Canadian television production grew 39.8% (over 2015-16) to reach an all-time high of $851 million.



- **Over the last five years** (2012-13 to 2016-17), foreign investment in film & TV production increased 104% and was up 97% in Canadian TV production.



- Foreign sources were tied with Canadian distributors as the top sources of financing for English-language TV fiction — each providing 22% of financing — more than provincial tax credits at 18%, federal tax credits at 11% and public and private broadcasters at 14% *combined*.



- Overall, at 17%, foreign sources are now the third most important source of financing for English-language Canadian TV production (excluding news and sports), after Canadian distributors and provincial tax credits.
- For French-language content, Canadian private and public broadcasters remain the largest sources of financing.

These figures indicate a clear trend of increasing investments in Canadian production starting at the top of this past decade. Online audiovisual services are a significant part of that growth: according to the CMPA's 2016 industry Profile,[12] from 2011 to 2015, production industry revenues from Netflix and Canadian SVOD services increased by 472%. Our commitment to Canada is the result of creative and business decisions grounded in meeting the interests of our members. And our investments demonstrate that global demand for high quality content is delivering results for Canada's creators and production sector.

[12] https://telefilm.ca/en/studies/profile-2016-economic-report-screen-based-media-production-industry-canada

Netflix CanCon co-productions have helped create shows such as: *Alias Grace* and *Anne with an E* with CBC, *Between* with Rogers, *Degrassi: Next Class* with DHX Media, *Frontier* with Bell Media and *Travelers* with Corus. And Netflix is committed to *Northern Rescue*, a new co-production with CBC, to be launched in 2019. When we partner with Canadian producers and broadcasters on CanCon for our service worldwide, we gain access to compelling stories and talent and bring our particular focus on audiences and exports. Canadian broadcasters get better-financed content for their domestic audiences, and Canadian independent producers, creators and talent gain substantial exposure, with Netflix Original branding, in 190 countries. Those benefits are all market-driven.

Some shows, like *Travelers* (and *Trailer Park Boys* before it), started out as co-productions with Canadian broadcasters. Netflix co-produced *Travelers* with Corus for two seasons, then produced Season 3 on our own (Corus decided not to continue for third season).[13] Given that Netflix is now the sole financier of the show, Travelers S3 (like *Trailer Park Boys)* no longer qualifies as “certified” CanCon.

Other Netflix originals made in Canada may not qualify as CanCon, but feature Canadian creative and other talent, such as: *Altered Carbon, A Series of Unfortunate Events*, *Chilling Adventures of Sabrina, Lost in Space*, *Murder Mystery*, *Riverdale, Umbrella Academy, To All The Boys I’ve Loved Before and Van Helsing*; and Netflix originals for kids and family such as *Beat Bugs, Cupcake & Dino, Kid Cosmic, Ponysitters Club, Reboot: The Guardian Code, Super Monsters* and *The Willoughbys*.

Netflix’s substantive, and growing, production activity in Canada provides revenues, jobs and global exposure for Canadian producers, creators, talent, crews, as well as studio, animation, post-production and visual effects facilities, helping sustain a globally competitive production sector in Canada.

Moreover, Netflix production investments are not limited geographically, but literally range from coast to coast. For example: St.John’s, NL & Louisbourg, NS & ON (*Frontier*), PEI & Millbrook, ON (*Anne with an E*), Montreal, QC (*Murder Mystery*), Ottawa, ON (*I Am The Pretty Thing That Lives in the House*), Mount Albert, ON (*Ponysitters Club*), Toronto, ON (*Umbrella Academy*), Cambridge, ON (*The October Faction*), Stratford, ON (*In the Tall Grass*), Parry Sound, ON (*Northern Rescue*), Sudbury, ON (*V Wars*), Winnipeg and Brandon, MB (*How it Ends*), Selkirk, MB (Fracture), Calgary, AB (*Black Summer*), Drumheller, Kananaskis & Lethbridge, AB (*Hold the*

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[13] https://www.forbes.com/sites/merrillbarr/2018/12/03/travelers-season-3-review-eric-mccormack-wil-and-grace-mackenzie-porter-nesta-cooper-jared-abrahamson-reilly-dolman-patrick-gilmore-brad-wright-netflix-time-travel/#671e1f307ac2
https://decider.com/2018/12/14/travelers-season-3-netflix/

Dark), Cochrane, AB (*Black Summer*), Fort Langley, BC (*To All the Boys I've Loved Before*), Surrey, BC (*Altered Carbon*) and Vancouver, BC (*Travelers*, *Riverdale, A Series of Unfortunate Events*) - to name only a few. This activity generates significant impact on local economies. A recent CMPA report[14] on the impact of *Frontier* (a Netflix and Bell Media co-production) estimates that the three seasons of the series contributed 82.1M$ to Canada's GDP and generated 888 jobs (FTE's).

Impacts on individual production companies can also be largely beneficial, as recently highlighted in a piece on *Playback*'s 2018 Prodco of the Year, Calgary-based Nomadic Pictures[15]:

> "*… After more than two decades in business, 2018 has seen Calgary's Nomadic Pictures vault forward into a new era. The year was headlined by a fast-growing relationship with Netflix that resulted in a trio of commissions for I-Land, The Order and Wu Assassins. The greenlights helped drive Nomadic, led by co-chairs Chad Oakes and Mike Frislev… to around $135 million in indie production spend over the past 12 months, with the company also moving into season three of Van Helsing…*
>
> *...[said Chad Oakes in response to a question from Playback] there's a growing desire for SVOD companies to own their own stuff. But we have different types of structures — stuff that we own, stuff that they own. It's a harmonious way to work together and grow our company along with Netflix's growth*."

Similarly, our acquisitions generate export revenues and worldwide visibility and 'discoverability' for Canadian content, particularly when they are launched as Netflix Originals. Robin Aubert's *Les Affamés* was launched as a Netflix Original in early 2018, following a theatrical run in Canada. This Québecois film has garnered significant critical acclaim and Netflix is proud to bring this compelling story to audiences around the world.[16] Other acquired CanCon titles available on Netflix in some or all markets (due to rights availability) in November 2018 included[17]: *21 Thunder*, *Bad Blood*, *Les beaux malaises*, *Bon Cop Bad Cop, Le clan*, *Heartland*, *Hyena Road*, *Incendies*, *Intelligence, Kim's Convenience, Monsieur Lazhar*, *Murdoch Mysteries*, *Nouvelle adresse, Race*,*The Red Violin*, *Schitt's Creek*, *Seducing Dr. Lewis*, *Série Noire*, *La théorie du K.O.*, *Toi et Moi, Vertige*, *When Calls the Heart*, and *X Company*.

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[14] https://cmpa.ca/wp-content/uploads/2018/12/CMPA-2018-Economic-Impacts-of-Frontier-Factsheet.pdf

[15] http://playbackonline.ca/2018/12/07/playbacks-2018-prodco-of-the-year-nomadic-pictures/

[16] Netflix acquires French-Canadian horror 'Les Affamés', Screen Daily (Feb 1, 2018) https://www.screendaily.com/news/netflix-acquires-french-canadian-horror-les-affames-exclusive/5126152.article.

[17] Sample taken Nov. 18, 2018 and represents titles readily-identified as certified CanCon. As discussed later in this submission, Netflix has no way to reliably identify CanCon in a systematic way.

Netflix is a global service and offering French-language content is an important component of making our members happy. To that end, we are excited by the depth and breadth of talent in Québec and the prospect of more partnerships there. The investments we are making in Québécois organizations, including ÉNH, INIS and Québec Cinéma, toward the development of next-generation creators will help us engage more deeply with the Québec creative community. In May 2018, Netflix executives gathered in Montréal to meet, and deepen our relationships, with Québec creators and producers.[18] These relationships will result in growing content partnerships over time.

As a result of these initiatives, we are pleased to have announced three new French-language originals from Québec. These include two stand-up specials: *Humoristes du Monde* [19] launching on our service on January 1, 2019 and Martin Matte's *Eh La La* [20], also launching in 2019; as well as a new Netflix original film. We are delighted to be working with up-and-coming Québec talent on a thriller by director Patrice Laliberté. To quote the director: « *Le film est fondamentalement québécois... On raconte une histoire québécoise, avec une langue qui est la nôtre, des allusions à notre culture et notre cinéma.* » ["*The film is fundamentally Québécois… It tells a Québécois story, in a language that's our own, with references to our culture and our cinema*."] [21] [22]

We will continue to work with our industry partners in Québec and French Canada broadly to explore further collaborations. As we have shown in English Canada, we are open to different models, including co-productions and originals. Since Netflix is focused on its global membership, our co-productions with Canadian producers and broadcasters generally result in higher budgets than a production created primarily with the domestic market in mind. We know that the lower level of production budgets in Québec (compared to English Canada) has repeatedly been cited as an ongoing concern by local industry stakeholders.[23]

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[18] https://ici.radio-canada.ca/nouvelle/1104105/netflix-rencontres-production-Québec-films-montreal

[19] https://www.lapresse.ca/arts/medias/201812/04/01-5206659-humoristes-du-monde-sur-netflix-le-1er-janvier.php

[20] https://www.lapresse.ca/arts/spectacles-et-theatre/humour-et-varietes/201811/08/01-5203430-martin-matte-bientot-sur-netflix.php

[21]http://plus.lapresse.ca/screens/ba16855a-5545-4309-82de-fd65a8b173b2__7C___0.html?utm_medium=Facebook&utm_campaign=Internal+Share&utm_content=Screen&fbclid=IwAR0ZZOqmSeci1tfgcdHKP_8liXnqgvqC8iSggG9cBDV_x3IH7aKjeC9U5W8

[22] Netflix financing will almost certainly preclude certification of this new Québecois film as Canadian content.

[23] http://plus.lapresse.ca/screens/d0e34e83-98ae-4f52-bf8a-687390123a04__7C___0.html?utm_medium=Email&utm_campaign=Internal+Share&utm_content=Screen

Finally, Netflix is committed to making its Canadian service interface available and enjoyable in both French and English, in addition to offering content in both official languages, as well as subtitles and dubbing in multiple languages. This is not the product of regulation, but of our goal to provide an inclusive service for all our Canadian members. Even regulated private-sector Canadian broadcasters are not required to operate and provide content in both of Canada's official languages.

Taken altogether, Netflix's contributions to Canadian content production, distribution and exports are meaningful and significant.

IV. Policy Challenges: Regulation risks undermining Canadian content's online success

As detailed above, the emergence of on demand, online audiovisual services over the last decade has enriched Canada's production sector, without government intervention. We do not subscribe to the theory that a "regulated investment" is more valuable than a consumer and market-driven one.

In its review, we urge this Panel to take a holistic view of the health of Canada's audiovisual industry. While some business models and technologies may ebb consistent with maturity, new technologies and models will flow. The reflexive assumption that those new models create challenges, rather than opportunities, is unsupported. Indeed, the data show audiovisual market-driven growth — not contraction — as new media gain popularity and viewership. To this end, it is imperative that the Panel clearly identify what problems it is trying to solve and ensure that proposed "solutions" address them without undermining the natural investments and growth that new media are already delivering in Canada.

A. Online services are evolving rapidly and broadcasters are responding

The rapid innovation and experimentation that characterize online content services make forecasting a challenge. They also caution against regulation that might inadvertently inhibit consumer choice, impede technological development and evolution of business models, and risk undermining market forces that are driving positive outcomes.

Available data show that Canada's production sector, its creators, producers, talent, crews and facilities are all benefiting from global online demand for content. Canadians consistently rank among the world's most avid users of online content.

With respect to entertainment content, and in particular English-language fiction or "scripted drama", CMPA data show that any perceived lack of Canadian content cannot be attributed to deficient foreign investment. Rather, in this culturally important content genre — the focus of the CRTC's Programs of National Interest ("PNI") category [24] — foreign sources are significantly outspending Canadian broadcasters.[25] Despite policy measures designed to support and incentivize only Canadian broadcasters and distributors, and CanCon regulatory obligations on Canadian broadcasters, foreign investment has been growing fast. CMPA data show that foreign investment in Canadian television grew 23% in 2014/15, 11% in 2015/16 and 40% in 2016/17. In English-language television, financing from foreign sources has grown from 10% of total in 2013/14 to 19% in 2015/16 and 17% in 2016/17.[26] Netflix's ICA commitments and significant investments in Canadian content are part of that global demand.

Similarly, according to CMPA data, the rapid growth of financing from Canadian distributors (often affiliated with Canadian independent producers) for English-language fiction and kids' TV content, is also being driven by international demand for Canadian content.

Canadian broadcasters' total content spending of over $3.8 billion — including more than $2.7 billion on Canadian content — demonstrates very clear priorities. CRTC data for 2017[27] show that:

- The CBC's conventional TV spent:
  - $ 214 million on Canadian news, information & sports
  - $ 295 million on Canadian music & entertainment
    - of which $177M on drama; and
  - $ 19.7 million on foreign programming.
- By contrast, Canada's private sector conventional TV broadcasters and specialty[28] broadcasters spent:
  - $ 1.7 billion on Canadian news, information & sports
  - $ 507 million on Canadian music & entertainment content
    - of which $240M on human interest & reality TV shows, and $142M on drama; and
  - $1.1 billion on foreign programming

[24] PNI includes primarily "prime-time" drama, comedy and documentaries.
[25] http://cmpawebsite.wpengine.com/wp-content/uploads/2018/04/Profile-2017.pdf Exhibits 4-18, 4-19, 4-21
[26] CMPA Profile 2017, Exhibits 2-5 and 4-19
[27] https://crtc.gc.ca/eng/publications/reports/branalysis/fin2017.htm https://open.canada.ca/data/en/dataset/5032ef1f-bc28-4e8d-8a96-9eed77f29d99
[28] Specialty broadcasters are almost all private sector but also include CBC Newsworld and Radio-Canada's RDI.

- of which $840 million on music & entertainment content (68% more than on Canadian)
- which included $ 521M on drama (more than three times as much as on Canadian).

These figures demonstrate that Canada's private sector broadcasters see news, information and sports as key content differentiators (in fact, CRTC data show that these are long-time spending priorities). Local news, information and sports all contribute to a sense of common identity. Live local sports create a sense of national and local solidarity, and are likely to remain popular and well-suited to the local, linear and scheduled nature of traditional broadcast media. Indeed, both BCE and Rogers own sports networks and have holdings in sports teams. There is also significant value in domestic broadcasters investing in professional journalism that contributes to an informed electorate and citizenry. None of this takes away from the importance of telling local stories as dramas and comedies. Rather, the public policy value of all categories of local content should be acknowledged.

With respect to entertainment content, despite decades of regulation — both content quotas and spending obligations — Canada's English-language private sector broadcasters continue to spend much more on acquired foreign content than on Canadian content. It is a long-established business model whereby ad revenues generated from popular (mostly U.S.) content (acquired at a fraction of the cost of producing originals) are used to cross-subsidize regulatory obligations for Canadian content. French-language broadcasters, for their part, spend proportionately more on original French-language content that attracts large domestic audiences.

As more and more content goes online, business models are evolving. Growing online demand is increasing competition and prices for the most popular content; and more providers are offering their content directly to consumers. Those trends were driving forces in our own shift to original content. In addition to Netflix, other providers such as CBS, NBC's hayu, FXNow and Amazon already have Canadian services. Disney[29], Hulu[30] and Apple[31] have all announced plans to launch services outside the U.S. We expect more will follow. Ottawa-based You.i TV is currently developing cross-platform video applications and advertising interfaces for

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[29] https://www.theverge.com/2018/2/8/16992732/disney-streaming-service-plans-original-film-tv-star-wars-marvel-high-school-musical

[30] https://techcrunch.com/2018/11/09/disney-to-invest-in-more-original-content-for-hulu-expand-service-internationally/

[31] https://9to5mac.com/2018/10/23/apple-international-release-streaming-after-us-launch/

customers including National Geographic, Fox and AT&T. According to a recent article, "*Deals struck with the NBA, NFL and Canadian Football League in the past few years have guided You.i TV towards opportunities in sports television, where the leagues themselves are increasingly looking to take their content direct-to-consumer.*"[32]

Canadian players are also providing new offerings. A recent article stated that "...*In early November 2018, [BCE]'s Crave online app started offering new content from AT&T unit HBO, along with movies, and programming from CBS unit Showtime, Lionsgate unit Starz, and Hulu, for $19.98 per month... That represents content from four of the top U.S. premium providers... BCE offers a version of Crave with less-current content is available for $9.99 per month... [And] subscribers to BCE competitors can also add Crave to their current traditional TV subscriptions.*"[33] CTV recently announced the launch of two new ad-supported online services: CTV Movies and CTV Throwback[34], which will allow Canadians to stream thousands of hours of uncut movie titles and full TV series free of charge, available exclusively on CTV digital platforms.

CBC for its part announced Gem, "*a new streaming service featuring live and on-demand programming [including films, drama series, documentaries and sports] for free as well as an option to upgrade to a premium membership for a monthly fee… CBC Gem has more than 4,000 hours of content and will offer original programming….*"[35]

Broadcasters are experimenting in other ways too. In addition to news, information and sports, CRTC data show Canadian private sector broadcasters are spending more on human interest and reality-TV. Bell Media recently acquired a majority stake in Pinewood Toronto Studios, one of Canada's largest production facilities, and recently struck a long-term content partnership with Vice Media.

With respect to English-language scripted drama, Canada's major public and private broadcasters have partnered with Netflix and other global players. The outcome has been certified original CanCon with higher budgets and global distribution, offering worldwide exposure for Canadian producers, directors, talent, facilities, and locations. For certified CanCon, the Canadian broadcaster obtains "first-window" rights in Canada while Netflix, or another online service, gets international rights outside Canada and possibly second-window rights in Canada.

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[32] http://www.obj.ca/article/ottawa-based-youi-tv-raises-us23m-series-c-round

[33] https://seekingalpha.com/article/4224035-bce-looks-ready-compete-netflix-canada.

[34] https://www.bellmedia.ca/pr/press/the-ctv-digital-universe-expands-with-two-new-free-vod-channels-ctv-movies-and-ctv-throwback/

[35] https://www.cbc.ca/news/entertainment/gem-launch-1.4940880

In sum, CMPA data on foreign investment, and Netflix's CanCon originals, show that any perceived challenges facing Canadian content production and distribution do not result from any financing or market failure where online services are concerned. Nor is there a lack of funds to invest from Canadian broadcasters, who spent over $3.8 billion on programming in 2017, including more than $2.7 billion on Canadian content.

In this rapidly evolving market, it's not clear what purpose would be served by regulating foreign, global online services as "broadcasters" in Canada. Regulating them is not likely to alter the behaviour of Canadian broadcasters with respect to Canadian scripted drama and kids' content. Foreign sources are already outspending Canadian broadcasters on English-language Canadian fiction. Rather, global demand for CanCon from online sources is more likely to stimulate a market-based response and is already helping to create better financed CanCon co-productions for Canadian and global audiences.

B. Proposed policy "solutions" are likely to have a negative impact on consumers, on Canadian broadcasters, on online services, and on CanCon production and distribution

Over the last several years, numerous parties have proposed regulatory interventions for online services. Many of these proposals would not only undermine positive outcomes to date, they could also thwart a competitive response from Canadian broadcasters, and ultimately prove to be counterproductive to cultural and broadcasting policy objectives.

Proposals have focused on four types of regulatory obligations for online services: (1) Canadian content quotas; (2) requirements to give prominence to Canadian content in online menus and algorithms; (3) mandatory contributions to funds that provide financing for CanCon; and (4) a mandatory spending requirement - usually that a minimum percentage of revenues earned in Canada be spent on CanCon. We will discuss each proposal in turn, but first wish to address the erroneous "level playing field" argument underpinning them all.

1. The purported "level playing field" problem

Various proposals have been made to regulate foreign online services, and Netflix in particular, as "broadcasters". Proponents of regulation generally invoke the "level playing field" talking point to suggest that Canadian media companies are all subject to broadcast regulations while foreign services are not. That is wrong.

In Canada, no online media service or application — foreign or domestic — is subject to traditional broadcast media regulations. Per the CRTC's decision in 1999, over-the-top services such as Netflix, Crave, and Club Illico are all are exempt, regardless of their country of origin.

Comparisons to regulated broadcasters and broadcast distributors ("BDUs") also ignore or understate all the advantages they enjoy as part of the regulated system, which unregulated media do not. For example:

- Access to public resources like radio spectrum, streets and other rights of way.
- Dedicated channels of distribution — whether over-the-air or on BDU networks — as opposed to distribution on the open internet.
- Unlimited distribution without caps or usage charges (unlike online services).
- Simultaneous substitution rules that allow Canadian broadcasters to replace foreign signals with their own (worth hundreds of millions of dollars according to the industry).
- Must-carry, preponderance and marketing/packaging rules that apply to regulated BDUs, providing certain services with either guaranteed or preferential access to, and revenues from, millions of subscribers.
- The ability for Canadian broadcasters to operate Canadian "clone" specialty services that combine content from counterpart U.S. services with a quota of CanCon.

Any "level playing field" calculation needs to account for these and other regulatory benefits. Online services like Netflix don't receive the market protections that broadcasters get — and we're not asking for them. We compete on the open internet against the whole range of new and well-established competitors, and our success depends entirely on providing content and a service that our members enjoy.

2. Content Quotas

Some intervenors have proposed CanCon quotas comparable to those that apply to Canadian broadcasters. In a closed environment like traditional scheduled broadcasting, quotas may serve to influence user choice and direct consumers to content they might not otherwise watch. But in an on-demand environment, consumers choose what they want to watch and simply bypass content that doesn't interest them, "mandated" or not. As a result, quotas would merely encourage spending on quantity over quality to meet an arbitrary number. That would not produce a beneficial outcome for either consumers (who won't watch the content, but must pay for it anyway) or creators (who may be subject to a push for more — but cheaper and lower quality — productions).

Concerns about efficacy of content quotas are not new. Dating back nearly four decades, Canadian researchers have found that quotas are unlikely to have salutary, and may even have detrimental, impacts on the quality of Canadian content available because they index "quantity" over "quality".[36] More recently, a 2014 report prepared for Netflix by Lemay-Yates Associates,[37] and a 2016 report by Richard Stursberg likewise concluded that quotas and other regulatory devices were not consistent in generating quality, popular, or commercially successful Canadian programming.[38]
The CD Howe Institute has observed that whatever value quotas may have had in promoting Canadian Content via linear services, they would effectively be "unworkable" in a on-demand environment.[39]

These findings, observations and analyses reinforce concerns about quotas, and how they would only be exacerbated in an on-demand, online environment.

Attention has been recently drawn to the European Union's Audiovisual Media Services Directive ("AVMSD"), and its provision on content quotas. The EU quota has been invoked by some stakeholders as evidence that Canada should implement its own Canadian quota. But these proposals (which we consider are misguided for the policy reasons discussed above) misunderstand a critical aspect of the AVMSD: it covers a continental quota, encompassing more than 28 countries, not a country-level quota. From a Canadian perspective, a more apt comparison would be a North American content quota.

3. Prominence

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[36] See, e.g., Colin Hoskins and Stuart McFadyen, Faculty of Business, University of Alberta Canadian Journal of Communication, 1986 "The Economic Factors Relating to Canadian Television Broadcasting Policy: A Non-Technical Synthesis of the Research Literature" [PDF] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=2ahUKEwii_dyspY7eAhXtm-AKHWcWBeEQFjAEegQIBBAC&url=https%3A%2F%2Fcjc-online.ca%2Findex.php%2Fjournal%2Farticle%2Fdownload%2F368%2F274&usg=AOvVaw0-oIBPb5O8BSjCMUGjHklu. This literature survey of prior research found that prescriptive conduct regulations, such as content quotas undermined quality prompting broadcasters to invest in cheaper content to fulfill their requirements. Id. at 24/25.

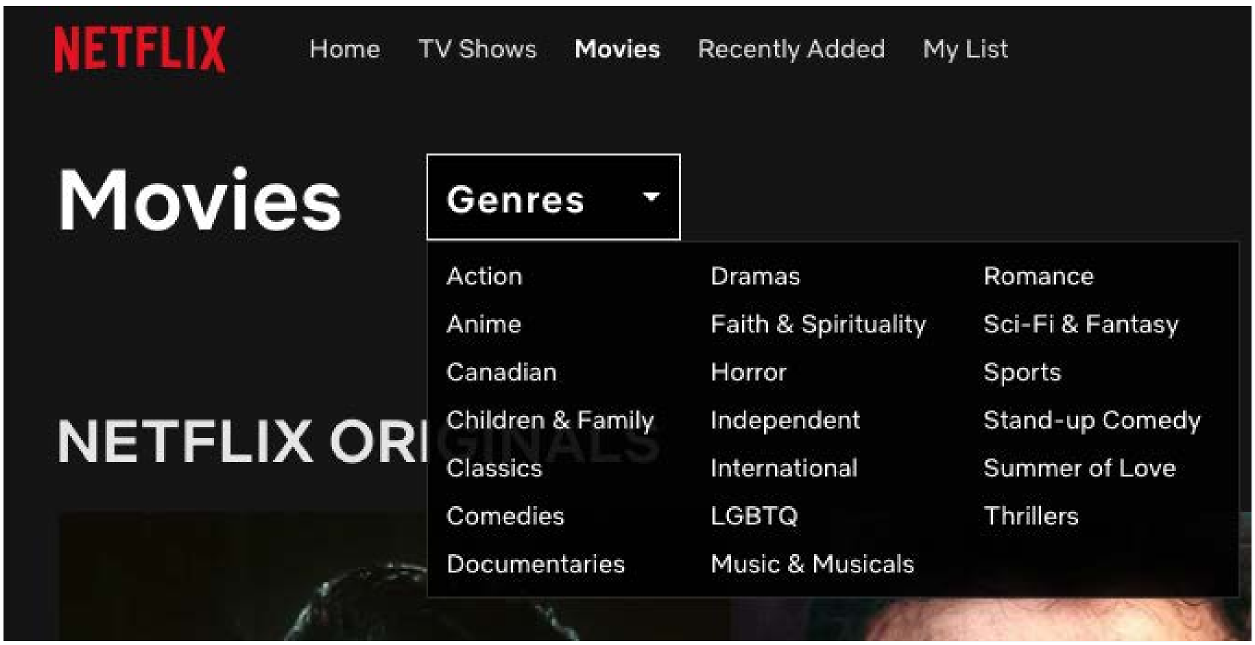
[37] http://peternowak.ca/wp-content/uploads/2014/09/lemay-report.pdf

[38] Richard Stursberg "Cultural Policy for the Digital Age" 2016 https://techlaw.uottawa.ca/sites/techlaw.uottawa.ca/files/culturalpolicyforthedigitalage.pdf

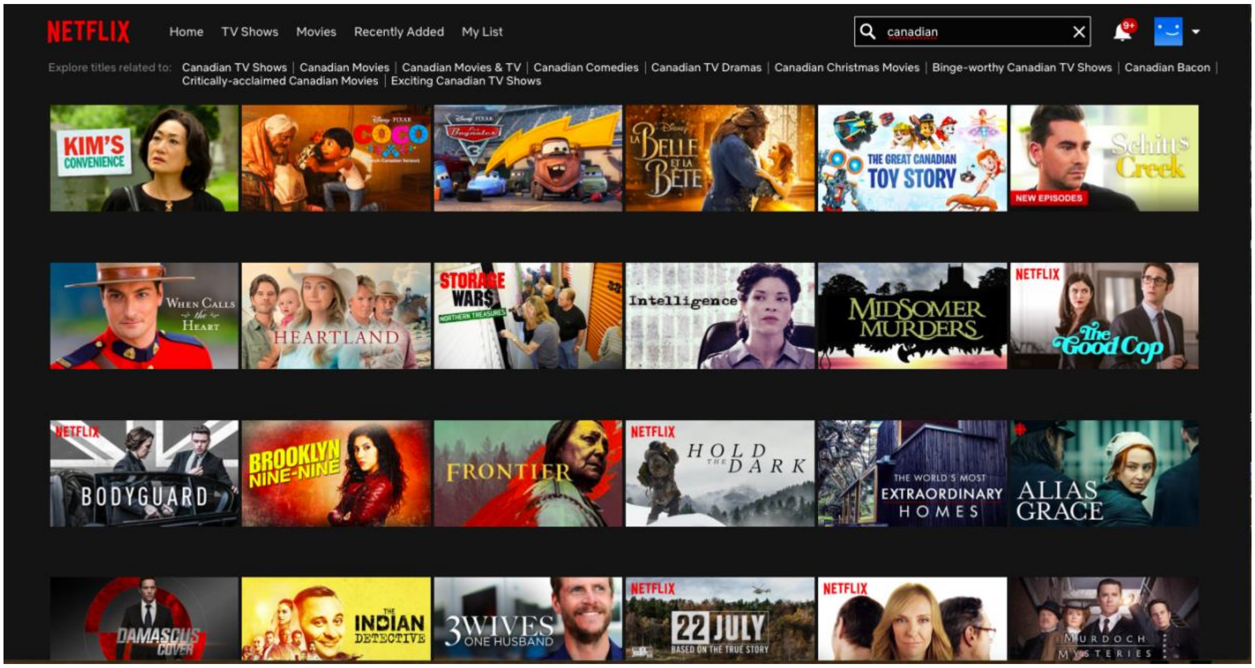
[39] Lawson A.W. Hunter, Q.C., Edward Iacobucci, Michael J. Trebilcock, "Scrambled Signals: Canadian Content Policies in a World of Technological Abundance," C.D. Howe Institute, January 2010 https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/commentary_301.pdf

Netflix takes several measures to feature and help our members in Canada find Canadian productions and stories. First, we organize content into thousands of genres and micro-genres to offer recommendations best suited to a particular member. These include "Canadian" categories that range from traditional, such as "Canadian Documentaries" and "Canadian Comedies," to more specific ones, such as "Canadian 20th Century Period Pieces," and "Canadian Independent Movies Based on Books".

Second, our Canadian members can discover Canadian themed and produced movies and TV shows in our application drop down menus where "Canadian" is featured prominently as a genre.



Netflix tags content as "Canadian" based on a number of factors. We include content that we know to be certified CanCon, such as our original co-productions with Canadian broadcasters, and our acquisitions from sources such as CBC/Radio-Canada. We also tag as "Canadian" content that features Canadian creators or talent, has won Canadian awards, and other such indicators. Of course, we also tag Netflix-financed originals such as *ARQ* that are not certified CanCon but that our Canadian partners tell us meet CanCon key creative criteria. These tags generate searchable "Canadian" categories on our service in Canada and worldwide. But, as shown below, these categories are "imperfect": they do not necessarily represent certified CanCon; they inevitably include some content that is only shot on location in Canada; and they almost certainly exclude CanCon on our service that we are unable to identify.



Some stakeholders have recommended that the government mandate that algorithms artificially weight local content to give prominence to Canadian content as a means to address concerns about "discoverability", or the ability of consumers to quickly identify, and select, Canadian films and shows amid the abundance of content online. That approach would be fundamentally anti-consumer and would have counterproductive outcomes harmful to the interests of Canadian creators.

Netflix generates recommendations based on our members' stated preferences, on their viewing patterns, and on content enjoyed by other Netflix members whose viewing patterns are closely aligned. If the algorithms were weighted to artificially recommend Canadian titles that the member won't watch — or rates negatively — that viewer feedback would adversely impact those Canadian titles. That outcome would diminish the likelihood that those Canadian titles would be recommended to members in Canada, or anywhere in the world, who otherwise would enjoy them. For example, if you are a Québec member and only like romantic comedies, surfacing *Les Affamés* (a zombie film) simply because it was produced in Québec is likely to generate a negative reaction and a disappointing viewing experience for you. "Tweaking" recommendations in ways that undermine viewer choice and preferences would lead to unhappy viewers and a potential negative cost to the content itself.

It could also constrain diversity. Netflix's international membership is larger than its U.S. membership, and is growing fast. So, too, is our international content. Since our service makes recommendations based on both personal viewing history, and content liked by members with similar preferences worldwide, it promotes diversity organically. So members from anywhere in the world may be recommended content from Australia (*Tidelands*), France (*Plan Coeur*), Germany (*Dark*), India (*Sacred Games*), Italy (*Baby*), Mexico (*Ingobernable*), Poland (*1983*), Spain (*Elite*), Turkey (*The Protector*), the United Kingdom (*The Bodyguard*), or Canada (*Les affamés*, *Alias Grace*).

A practical issue with any prominence proposals focused on certified CanCon is that there is no reliable or comprehensive way for Netflix to assess whether a movie or TV show is certified CanCon. This is especially true for acquired content. Some specific challenges are:

- There is no readily accessible database of certified CanCon that allows online services to electronically, and reliably, cross-reference content libraries.[40]
- Metadata embedded in acquired content do not generally include a CanCon indicator.[41]
- The complexity of CanCon certification criteria, which include not only creators, talent and producers, but also sources of financing, and variables such as treaty co-productions, make it virtually impossible to readily identify CanCon. Certified CanCon may include: content that does not tell a recognizably Canadian story; that does not appear to have been shot in Canada; and animated kids' content intended for global audiences. For example, it is reasonable to assume that few Canadians would recognize as "Canadian" treaty co-production films such as *Brooklyn* and *Cairo Time* or TV shows such as *The Tudors* and *Vikings*. But they "count".

For all these reasons, Netflix does not have the necessary information to determine whether or not titles in our library are certified CanCon. Two ways to improve identification and discoverability of Canadian content are:

- for the Canadian industry or government to generate a reliable, readily accessible online database of certified CanCon that online services can cross-reference electronically to tag content in their libraries; and
- for Canadian producers to make better use of metadata to identify productions as certified CanCon.

These measures would enable Netflix and other online services to more reliably tag certified Canadian content into searchable CanCon categories. The outcomes would be far more organic and effective solutions to CanCon discoverability than subverting the core functions of how Netflix or other online services serve content recommendations.

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[40] The Canadian Audio-Visual Certification Office (CAVCO) recently published lists of certified productions but these lists would be insufficient for these purposes. https://open.canada.ca/data/en/dataset/90cabeaa-1f73-4e7b-b926-cce6f103aa19

[41] The importance of metadata for discoverability was addressed in a recent article, *Why metadata means discoverability*. https://cartt.ca/article/ctam-canada-why-metadata-means-discoverability

4. "Contributions" to a CanCon fund

Another proposal advanced by some stakeholders is to require Netflix and other online services to contribute to the Canada Media Fund (CMF). The CMF is funded by contributions from licensed BDUs and licensed VOD services, from the federal government, and from earned revenues. In a nutshell: only Canadian producers may apply for funding, but they must have a licence agreement from a Canadian broadcaster, or CRTC-licenced VOD service, for the 'first window' in Canada. Accordingly, the CMF establishes 'envelopes' allocated to Canada's major broadcaster groups. The level of vertical integration in Canada is such that contributions to the CMF from several BDUs directly benefit their affiliated TV broadcasters or VOD services.[42] Currently, foreign online SVOD services like Netflix do not qualify as a Canadian 'first window' for CMF-funded productions.

Requiring foreign online services to contribute to the CMF could generate problematic and discriminatory outcomes. One outcome is that foreign online SVOD services would contribute to the CMF but they could not trigger productions' access to CMF funding as a first window in Canada. That would be discriminatory. It would also effectively force foreign online services to subsidize Canadian broadcasters, and reinforce the market power of vertically-integrated incumbents.

The alternative is that foreign streaming services would contribute and have the same access as Canadian broadcasters or CRTC-licenced VOD services. The result is that they would be drawn into competing with Canadian broadcasters or VOD services for the Canadian first window rights for publicly funded original Canadian content.

While Netflix welcomes and thrives in competitive markets, we understand that promoting foreign competition for Canadian broadcasters and other distributors is not a feature of the current contribution system. The CMF, and most other federal and provincial funding programs, currently require that first-window rights for Canada be held by a Canadian-owned company *because* those programs are intended to support *both* Canadian content and the Canadian production, broadcast and distribution sectors. The Panel should consider carefully the merits and implications, from a public policy perspective, of drawing foreign, global, online services into what was designed to be a domestic closed-circle of support.

5. Spending requirements

[42] There are exceptions: some BDUs do not own broadcast assets, and some broadcasters (mostly public and educational) receive envelopes although they are not tied to BDUs.

Spending requirements are sometimes proposed as an alternative to a contribution to the CMF. They, too, raise complex considerations.

Some have suggested that online services, including global, foreign services, be subject to the same CanCon spending requirements as Canada's private broadcasters — 30% of gross revenues in Canada. As outlined in section B.1. above, comparisons to broadcasters' regulatory obligations are fundamentally inappropriate as they ignore or understate the significant advantages they enjoy as part of the regulated system. Even CRTC-licensed VOD services aren't subject to that level of spending requirements. So it would be discriminatory to impose such obligations on foreign online services.

Comparisons are problematic in other ways too. CRTC data show that Canada's private broadcasters collectively allocate just over two-thirds of their overall CanCon spend to news, information and sports. Data for 2016 show that about 10% of their gross revenues was spent on all forms of Canadian entertainment content including PNI, and only 7% went to PNI, the CRTC content sub-category most comparable to Netflix content.[43]

Netflix is already a significant investor, through coproductions with Canadian private and public broadcasters, in some of Canada's most high-profile, award-winning, CanCon TV dramas including *Anne with an E*, *Alias Grace*, *Frontier*, *Travelers*, and *Northern Rescue*. Those partnerships reflect CanCon policy and certification criteria that require Canadian financing and distribution as one of several indicators of overall Canadian creative and artistic 'control'. A production fully-financed by Netflix, without a Canadian intermediary (like *ARQ, Eh La La* and *Humoristes du Monde*), could not be certified as "CanCon", irrespective of how many CanCon creative and artistic criteria the production met. Similarly, the Panel will want to consider carefully the implications of spending requirements that could drive some foreign online services to spend heavily on Canadian news, information and sports: content categories where Canadian broadcasters allocate most of their Canadian content spending.

In any event, the data show that there is no problem (or cause for regulation) with respect to foreign financing of CanCon: in the absence of any regulatory obligation, foreign sources, and Netflix in particular, already invest significantly in Canadian content, most notably in English-language Canadian TV fiction.[44]

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[43] https://crtc.gc.ca/eng/publications/reports/policymonitoring/2017/cmr4.htm#s41v
Revenues: Table 4.2.1; PNI spend: Table 4.2.21
As of 2018, actual regulatory obligations for PNI range from 5% to 8.5% for English-language TV broadcasters and are 18% for French-language broadcasters.

[44] See Section IV. Part A.

C. Further problems with proposals to regulate online services

1. They overlook the positive effects of market forces

Proposals to regulate online services are often put forward in the context of an argument that Netflix “benefits from the system without giving back”. That’s just not accurate.

Revenues earned from our Canadian members contribute directly to our content spending, and Canada is one of our top three locations worldwide for original content production. The notion that these revenues “leave Canada” and benefit only foreign shareholders does not account for Netflix’s significant and ongoing payments to Canadian producers, creators, talent, crews and facilities — literally from coast to coast. Whether for CanCon or otherwise, those investments contribute directly to sustaining a world-class, globally competitive production industry in Canada. We do not agree that is “taking without giving back”.

Further, these proposals entail fundamental problems: they ignore or overlook the positive impacts of market forces; and they seek to draw global online services into policy and regulatory constructs designed for a) pre-internet distribution models and b) domestic closed-loop support systems. To reiterate, such regulatory measures carry the risks of:

- increasing costs and reducing choice for Canadians;
- directing investment and resources toward quota-driven rather than audience-driven content (quantity over quality); and
- undermining diversity

We urge the Panel to consider, instead, how Canadian content, producers, creators, talent and the production industry, are all currently benefiting from access to global audiences directly through the internet and through online services. These outcomes are driven by market forces. In some respects, they appear to be achieving results where decades of regulation have not.

2. They risk creating arbitrary distinctions among content services

In recent months, much of the public policy discussion has focused on providers of online entertainment content — Netflix in particular — and concerns about competition with regulated Canadian broadcasters. But if that competition is a primary rationale for regulating online services, it would be arbitrary to solely target online SVOD services like Netflix that provide only entertainment content.

Foreign broadcasters and newspapers have an increasing amount of prominent video content online, and have Canadian viewers and subscribers. And Canadian newspapers like *The Globe & Mail*, *National Post* and *La Presse* are increasingly featuring prominent online video content. So too do native online news services like *Canoe.ca/toile.ca* and *huffpost.ca*. These foreign and domestic services all compete directly with Canadian broadcasters for audiences and even ad revenues, in the content segment where Canadian broadcasters have the greatest investment: news and sports.

Furthermore, for decades, many foreign broadcasters (now numbering over 200 including many U.S. services)[45] have been distributed by Canadian BDUs, with CRTC approval, like ABC, NBC, CBS, CNN, PBS, BBC and Black Entertainment. Those foreign broadcasters benefit from dedicated channels and joint marketing with Canadian services, without any regulatory obligations for Canadian content (whether quotas, contributions to funds or spending requirements). Would they, too, become subject to regulation? What about when they migrate to online distribution and reach Canadians directly?

V. Legislative reform should take its cue from the internet that is driving competition, innovation and economic growth

A. The *Broadcasting Act*: online services are not “broadcasters”

Online audiovisual services have more in common with the open markets that characterize most media of cultural expression — books, newspapers, magazines, visual arts, movies, sound recording, music, dance, and theatre — than with regulated broadcasting. As regulated media, radio and television broadcasting are the exception, not the norm, among media of cultural expression. Most media operate in open, competitive markets and citizens have access to whatever they want, from wherever, and whenever they choose, subject only to local market availability and generally applicable laws. Online distribution via the open internet brings those characteristics to all forms of audio and audiovisual content.

Radio and television broadcasting are media grounded in early-to-mid-20th century technologies with particular characteristics that justified government regulation:

- radio spectrum for over-the-air radio and TV is a finite public resource with a limited number of broadcast channels available in any geographic market;
- cable-TV and satellite systems increased distribution capacity, but the number of channels was still finite and access was controlled by the system owners;

[45] https://crtc.gc.ca/eng/publications/satlist.htm”

- content was generally advertising-supported, which could influence content;
- the underlying transmission technologies required access to public rights of way for towers, wires and transmitters; and
- whether over-the-air, cable or satellite, broadcasters transmitted 'one-way' over dedicated channels to the public in a system where broadcasters controlled access and, therefore, content.

Radio and TV broadcasting are uniquely regulated because of the unique characteristics of the media — not because of any inherent need to regulate either the speech of audio and audiovisual creators and distributors, or citizens' access to that content. These characteristics gave a fixed number of broadcasters in a given market full control over content availability and distribution, with corresponding privileges, and market and societal power. While there was some inevitable cross-border spillover, radio, TV, cable and even satellite distribution served primarily domestic markets. Broadcasters were licensed and governments used that authority to impose requirements, often including local content obligations.

The internet and online media share none of those characteristics. The internet rides over public telecommunications networks owned and operated by carriers, including Internet Service Providers ("ISPs"). The internet is interactive and access is open to anyone to send, distribute, access or receive services and content. Communications between end-users and online video services are two-way, interactive, point-to-point, private and personal; and it is the end-user — not the service provider — that initiates and controls the streaming or downloading of content. The service provider makes content available. But if a million users around the world are watching the same episode of *Anne with an E* on Netflix, there are a million separate and discrete streams, each initiated and controlled by the end-user who may pause, rewind, terminate and restart, entirely at their discretion. And there is no limit to the number of possible services. Online services compete for attention based on the variety, quality, and pricing of their offerings and are subject to the realities of 'best efforts' internet delivery and usage caps imposed by ISPs.

The basis of the federal government's authority to regulate both broadcasting and telecommunications rests on court cases involving use of physical facilities and infrastructure, dating back to the beginning of the 20th century. All of the jurisprudence conferring federal jurisdiction relates to 'undertakings' that make use of radio spectrum and/or wires that cross provincial and/or international boundaries. Those decisions do not address entities that do not themselves own or operate radio or other transmission facilities, but are merely delivered to end-users by undertakings that do. Nor do they contemplate on-demand services where users initiate and control access to content.

Online audio and video distribution over the internet is not the ‘evolution’ of traditional broadcasting. It is something entirely different. The internet and the world wide web are an electronic means of distribution, and a marketplace — and all media are migrating online. Like more traditional media, online media are subject to generally applicable laws governing content such as those related to hate speech, slander, pornography, etc. Successful online media policy will be grounded in the characteristics of the internet, and the manner in which Canadians interact with, and consume, online content.

As with books, newspaper and magazine publishing, the visual arts, movies, sound recording, music, dance, and theatre, regulating online media like broadcasters is unnecessary. Some would argue that it would be repugnant to freedom of expression and creative discretion.

In the open-market internet environment, licensing online media serves no purpose: it confers no right of market entry, protection, access to public resources, advantage or privilege. Content quotas, contributions to funds and spending obligations are unlikely to achieve their intended purpose in on-demand media, and may generate counterproductive outcomes. Regulation could also be fraught with arbitrary distinctions and discriminatory outcomes. For all of these reasons, online media should not be regulated as broadcasters.

In the absence of any corresponding right or benefit, regulation that serves merely to extract a monetary contribution would be more fairly characterized as a tax. From a public policy perspective, we urge the Panel to consider very carefully whether measures put forward as ‘regulation’ would more accurately be characterized as a form of taxation, or more appropriately be addressed by generally applicable laws. That will assist in determining their relative merits, private versus public interests and, ultimately, the transparency of those measures for Canadians.

B. The legislative framework needs to adapt

Netflix understands the rationale for examining the Telecommunications, Radiocommunication and Broadcasting Acts at the same time. However, we encourage the Panel to take into account the very different underlying purposes of these laws:

- Telecommunications law and regulation are focused on economic issues: common carriage, protecting consumers, fostering competition, and they are highly technical in nature.[46]

[46] This is in addition to the existing competition law mandate of the Commissioner of Competition under the federal *Competition Act*.

- Radiocommunication law and regulation deal with management of a public resource, the radio spectrum, and they too are highly technical.
- Broadcasting law and regulation are focused on licensing Canadian broadcasters, and managing access to broadcast content, with a view to supporting and cross-subsidizing the production and exhibition of Canadian content.

A future-oriented legislative framework ought to be grounded in the reality that the internet has become the global platform for communications and commerce. This has enabled unprecedented economic growth, innovation, competition, choice, open access and freedom of expression for Canadians as citizens, consumers, creators and entrepreneurs.

An open internet has enabled Canadians to directly access content they enjoy through a variety of choices for video streaming services, including Netflix. An open internet has allowed Canadian creators to reach domestic and global audiences either directly, without intermediaries, or via global platforms such as Netflix.

Netflix is of the view that:

- Given their very different purposes, it would serve no useful goal to try to combine the *Telecommunications Act* and *the Broadcasting Act* into one piece of legislation.
- Generally, a new *Broadcasting Act* should explicitly recognize that policy objectives may be achieved by competition and market forces; and that regulation should be relied upon only where required, be targeted to demonstrable problems, and interfere with market forces to the minimum extent necessary to meet policy objectives.
- Given the very different characteristics of online media and broadcasting, a new *Broadcasting Act* should be crafted to unambiguously exclude online services.

Rather than seek to “harness” online services, we believe policy should, as a first principle, seek means that do not rely on regulation to unleash creativity, investment and exports, and encourage the Canadian industry to seize the opportunities, both local and global, that online distribution offers, to ensure the continued success of Canadian content online.