MA MAJOR RESEARCH PAPER

Going Over-the-Top:
Reassessing Canadian Cultural Policy Objectives in a Converged Media Environment

Siobhan Ozege

Professor Tuna Baskoy

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ABSTRACT: The Canadian media landscape is changing at an unanticipated pace, catching public and private broadcasters off-guard and ill equipped to meet the changing demands of the market. This is placing significant strain on the regulator's existing approach to new media regulation. Since 1999, the Canadian Radio-television and Telecommunications Commission (CRTC) has employed a policy of non-regulation—or as I will argue in this paper, a policy of non-policy regarding new media broadcasting undertakings (NMBUs). While NMBUs cast a wide net in terms of what we would classify under this term, its most widely known proponents—"over-the-top" (OTT) providers like Netflix Inc., Hulu, Apple TV, and countless others are taking the lion's share of the criticism and concern in Canada by broadcasters and social groups like ACTRA, and the Canadian Media Production Association (CMPA). This paper will provide an environmental scan of the existing approach to new media regulation in Canada by examining *The Broadcasting Act*, the New Media Exemption Order (NMEO), and the OTT Fact-Finding Mission (and results). This exploration will identify existing policy gaps, provide a history of the regulatory model, and highlight a brief case study on the Office of Communications (Ofcom) in the United Kingdom that has adopted an umbrella regulatory model that may be useful when exploring new options for new media policy in Canada. Finally, it will identify some existing roadblocks for undertaking such a policy review by looking specifically at the legislative confines of *The Broadcasting Act*.

INTRODUCTION

In CRTC 2011-344 (OTT Fact-Finding Mission), the Commission identified "Internet access to programming independent of a facility or network dedicated to its delivery (via, for example, cable or satellite) [a]s the defining feature of what have been termed 'over-the-top' (OTT) services." Most simply, these services are called 'over-the-top' because they go above and beyond the existing regulated broadcasting system. These include provides like: Netflix, Apple TV, Hulu, etc. These are the subjects of our investigation for this work.

There are two dominant methods for exploring the question of new media in Canada: an incentive-based approach or a regulatory model. An incentive based approach assumes that NMBUs will willingly contribute to the Canadian broadcasting system (either through financial contributions or through commissioning Canadian content, etc.). In the case of foreign-owned OTT providers, there is a belief that if these services are publicly traded or require venture capital, they will want to say they are willingly in compliance to the CRTC and are contributing to the Canadian system. As will be explored later, this approach is highly problematic given Canada's existing foreign ownership restrictions as they relate to broadcasting distribution undertakings (BDUs). OTT providers could be incented to do this because there is no mandated regulatory mechanism in place. If we adopt a regulatory approach, there are three models that have been proposed in the Commission's approach to new media that could be adopted if the CRTC chooses to regulate: 1) requiring companies to contribute a portion of their annual revenues to content development funding; 2) require companies and/or content aggregators to ensure shelf space and a place of prominence for Canadian new media content; or 3) require Canadian companies to provide links to Canadian web sites (CRTC 1999-84). The question that we must critically assess is: which, if any of these approaches is the most appropriate in Canada?

In this paper, I will attempt to answer this question by examining the changing media landscape, marked by the convergence of technologies and the resulting increased predominance of the consumer as opposed to the citizen in regulation. Arguing from an institutionalist perspective, this paper recommends the need for a larger national digital strategy in Canada to address shortcomings in the legislation, and the need to reimagine the CRTC as a regulator that can most appropriately serve Canadians in this increasingly converged market. OTT providers challenge the CRTC because they quite literally go over-the-top of the regulated system. We ought to reconfigure the Canadian regulatory framework to ensure flexibility in a converged environment; leaving new media unregulated and advocating for a national digital strategy that fosters innovation and competition in the broadcasting sector can achieve this.

The Canadian *Broadcasting Act* (herein referred to as 'the Act') is arguably the most important document in the field of Canadian cultural policy. As a document whose reach has continued to grow since its inception, the legislative framework of the 1991 Act has social, political and economic stipulations embedded into the language. Over the course of its life, the Act has been amended five times[1] to adapt to the constantly evolving structure of the Canadian media landscape. Since the development of radio in the mid-1920s, the role of broadcasting in Canada has been debated, explored, and legislated, with a focus on a top-down, culturally protectionist model, mounted as a defense against Americanization. New media providers stand to shake the regulatory system to its core and thusly require policy-makers' attention. This work will examine the role of the CRTC in an era of new media providers, questioning whether a system rooted in nationalism can continue to effectively regulate in a digital economy while also serving the needs of the Canadian population.

[1] Amended in: 1932, 1936, 1958, 1968 and most recently, 1991.

The need to re-examine the Act is significant, and is central in creating a national digital strategy. It is well known that since 2006, under the Conservative Government there has been almost no movement on broadcasting issues, resulting in minimal policy review and direction to the Commission. Until such time as broadcasting becomes a focal national issue, any effort to address problems in the regulatory framework will have a relatively small impact on Canadians. The combination of the extension of the NMEO in 2009, and the legislative framework of the Act make it unsurprising that until the entrance of Netflix Inc. in Canada in 2011, little attention was paid to the potential landscape altering effects of NMBUs. While there is little evidence that conventional television viewership is in decline in Canada, as the results of a Nielsen study (2012) have found, it is indisputable that online content consumption is steadily rising[2]. In order for the CRTC to continue to serve the cultural objectives it is legislated to, there must be an examination of new media policy in Canada. Without an adequate regulatory framework and larger digital strategy, we cannot hope to most effectively harness the power of these new technologies for Canadians. The question of NMBUs is really only a small piece of a larger public policy puzzle.

Examining the Act in light of new media developments is critical; the emergence of new media providers has proven a challenge to the existing regulatory framework. The Canadian tradition of subsidy-reliant independent production coupled with mandated Canadian content (Can Con) requirements has created an industry with significant barriers to entry and a mediated competitive environment. OTT providers that threaten this historically rooted, established system represent the pinnacle of frustrations over this issue in Canada. Examining OTT in the context of new media regulation is important as it highlights the growing policy gap between the NMEO

[2] According to a new report from Nielsen, the number of U.S. homes that have broadband Internet, but only free, broadcast TV, is on the rise. Although representing less than 5% of TV households, the number has grown 22.8% over the past year," (Percz, *Nielsen*).

and the broad goals of the Act. Further, the existence of unregulated OTT providers demonstrate the need for regulatory reform in Canada, as it is a clear example of asymmetrical regulation between existing public and private broadcasters, and now these new undertakings.

Organization

In calling for increased regulatory flexibility in Canada, we must critically question whether the CRTC's jurisdiction should extend beyond legacy media like radio, television, satellite and cable distribution undertakings. Approaches to new media span three perspectives, ranging from a conservative lens that seeks a *laissez-faire* model, a radical lens that rejects capitalism in favour of democratic ideals, or a liberal (institutionist) lens that believes the state (CRTC) should intervene to ensure the market is competitive and maximizes social benefit. Both the incentive based and regulatory approach are represented through these perspectives, but the most effective approach we can adopt in Canada is one that does not seek to dismantle the regulator in the face of new media. Rather, we ought to imagine a system that is reflective of the technology, and the Canadians who use it. We must question how, if mandated they would accomplish this. For this paper, I am adopting an institutionalist perspective, as this is the most suitable in accomplishing these goals.

Thematically, this work explores a marked change from the citizen as represented in public policy regulation to that of a consumer, facilitated by these new media developments. In my approach, I am arguing that an institutionalist perspective will most suitably serve the creation of a *citizen-consumer*—a concept best explained in the work of Sonia Livingstone and Peter Lunt (2007). Given the changing media landscape, the regulator must make decisions that are favourable to this new actor: increased market choice is eroding the long-established top-

down regulatory model employed in Canada. This does not mean Canadians are uninterested in the social and cultural objectives of the Act—rather, there is a need to address these concerns in the most efficient manner without hindering consumer choice in the market. This paper will demonstrate that the CRTC has not adequately addressed the development and entrance of NMBUs like Netflix in Canada, and has presented a significant regulatory challenge to the Canadian broadcasting system by continuing to employ out-dated, long established cultural public policy objectives in lieu of a flexible regulatory approach reflective of changing consumer and technological trends.

In the subsequent sections of this paper, I intend to provide an environmental scan of existing policy in Canada to contextualize the regulatory landscape. In the first section, I will provide key concepts for the paper, a literature review of existing scholarship and policy positions relating to new media regulation in Canada, In section two, I will provide the theoretical framework for this paper, including an exploration of the institutionalist theoretical framework to be employed in this work, and the case study methodology for this paper. In section three, there is a brief overview of Canadian regulatory history. To understand the direction the regulatory framework has always taken, it is important to examine the development of early radio in Canada, as many of the cultural objectives outlined in Section 3(1) of the Act stem from this era. Specifically, I will focus on the time between 1928 and 1932 when the Aird Commission was established to explore regulatory options in Canada. Alongside the development of the Act, this is one of the most important historical documents in Canadian broadcasting history. In the fourth section of this paper is a survey of the existing approach to new media in Canada, including an exploration of the NMEO and the OTT Fact-Finding Mission. In the fifth and final section is an overview of the consolidation of Ofcom, reasons for

its use as a case study in this paper and a brief overview of the organizational structure of the CRTC and Ofcom. Finally, the paper highlights three major roadblocks for re-examining new media regulation in Canada. A conclusion of the work follows.

SECTION ONE:
KEY CONCEPTS AND LITERATURE REVIEW

"If reasons for intervention remain, there has to be a clearer understanding of what is the appropriate form. The difficulty...is the uncertainty that the various forms of technological change are bringing to the competitive process," (Hargreaves Heap, 121).

1.1 Key Concepts

Given the ambiguity of the language in the Act, contextualizing key concepts provide a clear reading of the paper's argumentation. In providing an analysis of the CRTC, an adoption of their terminology is the most appropriate, as they frame our analysis. These should not be considered finite or resolute. As will be seen through the three perspectives, interpretations of these terms are varied and require critical assessment. The common language when exploring new media revolves around the following: new media, convergence, fragmentation, citizen, consumer, broadcasting, and program, as these are central to the policy language in both Canada and the United Kingdom when we explore Ofcom.

In 1998, when the CRTC issued its Notice of Consultation on New Media (CRTC 1998-82), they developed a definition of this technology as: "encompassing, singly or in combination, and whether interactive or not, services and products that make use of video, audio, graphics and alphanumeric text; and involving, along with other, more traditional means of distribution, digital delivery over networks interconnected on a local or global scale." New media is far more complex than the oft-cited suggestion that it is simply a series of zeroes and ones, though standardization across platforms is certainly one of its most studied attributes. This aspect is useful to our analysis. At the time the NMEO was issued in 1999 the CRTC acknowledged that many of these services were based in alphanumeric text, a definition sufficiently open-ended to

allow for technological changes, a crucial point that Ofcom also noted in their own consolidation.

Convergence is perhaps the single-most defining characteristic of new media regulation, noted by the blurring of previously distinct distribution mechanisms and media. As media and distribution technologies continue to converge, they fragment the market through increased choice (content and distribution platforms). These are two of the most critical points for our analysis. Although many scholars have positioned mobile devices as the zenith of convergence, there is reason to include television as a defining technology in this field. The development of new media content providers has been ushered in by an increased centrality of the television screen. With "smart television"[3] creating a climate of individualized content selection, there are increased choices not only in programming but also in acquisition. Television is no longer a primarily top-down delivery service, as providers like Netflix and other OTTs are demonstrating. Unfortunately, this is the foundation on which the Canadian regulatory system is based.

Author Henry Jenkins (2006) describes convergence as "the flow of content across multiple media platforms, the cooperation between multiple media industries, and the migratory behaviour of media audiences who will go almost anywhere in search of the kinds of entertainment experiences they want," (2). As technologies converge, fragmentation of audience share occurs due to an influx of new entrants to the market. Kenneth J. Goldstein (2006) identifies fragmentation as a force resulting from converging technologies that causes increased pressure on unit costs, increased specialization of services, increased media consolidation, the decline of programming choice in favour of profitability, and an erosion of borders (32). He clarifies, writing that these borders are not only geographic in their conception, rather these "new

[3] Smart TVs have adapted the popular app-model most well known in mobile technology and are using them for television as well. This allows users to access services like Netflix, YouTube, etc.

communications technologies play havoc with geography…[and] with the business borders between broadcasters and advertisers and the content borders between broadcasters and consumers (33).

In establishing a framework for new media, the CRTC has always questioned whether content over the Internet is defined as 'broadcasting' under the Act, and if so, if it should be subject to the public responsibilities associated with this. Section 2 defines broadcasting as "[a]ny transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place." In CRTC 1999-84 the Commission ruled that although "some Internet services involve a high degree of **'customizable'** content [that allow] end-users to have an **individualistic** one-on-one experience through the creation of their own uniquely tailored content…this content, created by the end-user, would not be transmitted for **reception by the public** [emphasis added]," leaving NMBUs out of the reach of the Commission's jurisdiction.

Likewise, 'program' is defined in the same section of the Act as "[s]ounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominately of alphanumeric text." As technologies continue to converge, so too does the distinction between a program and 'content'—traditionally, a program has invoked the spirit of broadcasting as designed for consumption by a wider, public audience. Content, has instead relied on a more individualized process. OTT providers particularly blur these lines as they deliver individualized content. When discussing new media, the usage of content and programming are synonymous given the streamlined delivery through ISPs. As will be explored

later in this paper, in 2012 the Supreme Court of Canada ruled the terms 'broadcasting' and 'broadcast undertaking' become extremely problematic when we explore methods for regulatory reform in light of technological changes due to this very issue of streamlining. In this way, developing a common language for these terms is a useful endeavour for policy-makers.

Arguably the most important terms for this analysis are establishing the distinction between a citizen and a consumer. In the 2003 *Communications Act* that established Ofcom, this distinction was noted as extremely important in the shift towards establishing a flexible regulatory model. By identifying key characteristics, the regulator is able to both eliminate the interchangeability of language like audience, consumer, user, and viewer, and opt instead to use language that is reflective of the digital environment. "The consumer interest should be understood in relation to economic goals while the citizen interest inheres in cultural goals, and that these in turn map onto the domain of telecommunications networks and services on one hand, and broadcast content on the other. Consumers are understood as individuals while citizens have collective status," (Livingstone and Lunt, 54). In establishing Ofcom, this distinction was made to understand the *interests* of both of these groups, identifying the following as distinguishing characteristics (54):

Consumer Interest	**Citizen Interest**
Wants	Needs
Individual	Society
Private benefits	Public benefits
Language of choice	Language of rights
Short-term focus	Long-term focus
Regulate against detriment	Regulate for public interest
Plan to roll back regulation	Continued regulation to correct market failure

In binding the language of the legislation to citizen and consumer interest, the regulator attempts to address issues of utility and public good, two themes explored in the literature review as we examine the varying lenses through which to view this issue.

1.2 Literature Review

The issue of new media regulation is extremely divisive. As with all scholarship in both economics and politics, there are three main perspectives through which we can examine this issue. For this paper, I am adopting a political economy framework for analysis. Characteristically, this approach aims to address what *ought* to be and seeks to provide solutions that can be implemented through policy. However, as Robert B. Carson, Wade L. Thomas and Jason Hecht (2002) note, because economics is a study of human behaviour, it cannot be free of value judgments as it is never free from ideology. Because of this, we must examine the question of regulating new media through a theoretical lens.

Conservative, critical and liberal perspectives of thought all provide a lens through which to view OTT, and we can see the aforementioned key concepts reflected in these. While there is no strict formula for how we define these perspectives, there are core attributes that correspond to regulatory approaches proposed by particular groups in the Canadian broadcasting system. Each of these groups supports a model for new media regulation that can be seen in these perspectives. Private broadcasters align with a *laissez-faire* model that is rooted in individualism and to a degree the free market. Publicly funded cultural institutions align with a critical perspective that rejects a for-profit model of new media and is rooted in social benefit and democracy. Finally, social interest groups like unions and professional associations often support the liberal perspective, promoting a model reliant on institutions to regulate the market for social

welfare. The liberal perspective is most aligned with an institutionalist (interventionist) perspective that I will employ for the paper's theoretical framework, outlined in the following section.

To support these three perspectives, the literature review will explore three theorist groups to help articulate positions on new media. The most diverse group are convergence theorists like Jenkins, Goldstein, Andy Banerjee (2006, 2007), Sidneyeve Matrix (2011) and Ithiel de Sola Pool (1983), whose work is the most varied and encompasses several ideas for new media regulation. These theorists believe that there are two crucial steps towards a converged media environment: primarily, the adoption of new technology by consumers, and secondly, the shift towards a single distribution system that meets all needs. These theorists support a profit-model and most heavily pursue the rhetoric of a shift from citizen to consumer. They are most closely aligned with the conservative perspective, but we see tenets in liberalism as well.

Critical political economists like Vincent Mosco (2009) focus on larger societal issues such as equity, justice, representation, access, and democracy. Unlike institutionalists, their work is more concerned with "big picture" broad public values than specific policy proposals. Mitigating the landscape between critical and liberal lenses are Canadian media policy scholars, who align most closely with the institutionalist perspective. Marc Raboy (1990), David Skinner (2008) and Robert Babe (1979) work defers to the continued existence of a regulator. As has already been mentioned, there is a significant gap in this field with very little discussion surrounding Canadian broadcasting policy in the face of new media providers like OTT. To provide better context to the work of these scholars, an historical overview of the regulated system in Canada in section three of this paper will help support the liberal/institutionalist framework. Given the lack of data on OTT services and its impacts, there has been relatively

minimal scholarship on these questions that is beyond speculative. Much of the work surrounding the question of OTT has been shifted to private consulting firms hired for CRTC processes and as a result, views expressed on the topic tend to stray towards a more business-centric discussion.

Central to the theme of the literature review is the notion of social benefit and social welfare. Each of the three perspectives addresses this in some way: whether as a rejection of this principle (conservative), acceptance (liberal) or focal point (critical). When we relate this to the debate of citizen versus consumer, these are directly related. In my own argument, this is a founding concern that I believe may be obtained by addressing flexibility and fostering innovation. As Livingstone and Lunt demonstrate, citizens and consumers uniquely have a corresponding set of needs and wants that help us determine what the most appropriate avenue for addressing new media is. As demonstrated through a brief analysis of Section 5 of the Act, it is clear that the regulator must act in the interest of Canadians, and an institutionalist framework is therefore the most appropriate to support this claim. The Act states:

> The Canadian broadcasting system should be regulated and supervised in a **flexible manner** that: a) Is **readily adaptable** to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate; b) Takes into account regional needs and concerns; c) Is **readily adaptable to scientific and technological change**; d) **Facilitates** the provision of broadcasting to Canadians; e) **Facilitates** the provision of Canadian programming to Canadians; f) **Does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians;** and g) Is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings [emphasis added].

Flexibility, adaptability, and providing regulation in the best interest to Canadian citizens appear repeatedly throughout the legislation: this requires us to turn our attention to the confines of the

Act. Through this literature review, I will situate my work in the existing field in order to contextualize the pressing need to re-examine Canada's regulatory framework as it relates to new media regulation.

The first perspective to examine is the conservative viewpoint, as supported by private broadcasters. In their supplementary paper titled *"Over the Top...And Around the Corner: Challenges to the 'walled garden' of media regulation in Canada"* to the Commission in CRTC 2011-344, Shaw Media submitted that there are four potential impacts from OTT providers that include: increased competition for audience, increased competition for subscribers, competition for advanced advertising, and significant ripple effects in the programming rights market (Communic@tions Management Inc., 4). They, along with many other private broadcasters believe that for too long, Canada has promulgated a regulatory system that seeks to protect and financially inflate otherwise unprofitable sectors of Canadian media. Since the 1970s, the CRTC has employed a series of policy tools in addition to foreign ownership restrictions and spending requirements that include: rules on access, carriage and linkage for services delivered by BDUs; rules on simultaneous substitution; provisions in the *Income Tax Act* that disallow deductions on ad expenditures on non-Canadian stations when the advertising is aimed at Canadians; the Canadian Media Fund (CMF); tax credits for independent Canadian productions; the Local Programming Improvement Fund (LPIF)[4] and parliamentary allocations to the Canadian Broadcasting Corporation (CBC) that have created a complex system that can be viewed through one of two lenses. Either "an attempt to play 'catch-up' with technological changes, [or] to help create a 'walled garden' within which Canadian broadcasters are expected to be able to offer

[4] The Local Programming Improvement Fund (LPIF) as defined by the Canadian Association of Broadcasters (CAB) is "a fund established to help finance the costs of local television programming by private and CBC/SRC-owned and operated television stations. Local programming is defined as programming produced by local stations with local personnel or programming produced by locally-based independent producers that reflects the particular needs and interests of the market's residents."

public interest programming that would otherwise not be economically viable," (Communic@tions Management Inc., 6). This viewpoint supports a model reliant on competition policy, where economic requirements like subsidy payments are minimized, foreign ownership restrictions are relaxed, and broadcasters are able to concentrate on profitability rather than public policy objectives. The conservative perspective draws heavily from Adam Smith's conceptualization of a *laissez-faire* economy that promotes individualism. If private broadcasters wish to pursue their self-interest, they should be able to do this freely. When we discuss OTT, this relates to asymmetry: if new media providers like Netflix will not be subjected to the same regulatory framework as public and private broadcasters, then no one should. In adopting this model, players would be able to do what they excel at, in terms of pricing, content provision and distribution. The individual strengths of each player would contribute to a balanced and competitive environment. Competition would also drive the quality of content in the market. The modern conservative lens is characterized by two ideas that are useful for this literature review: "1) the market system and the spirit of competition [as] central to proper social organization, and 2) that individual rights and freedoms must be unlimited and uninfringed," (Carson, Thomas and Hecht, 12). Given the current structure of the Canadian regulatory system, this proposal is unattainable without a complete dismantling of the CRTC and the social and cultural objectives of the Act.

Bridging the theoretical gap between conservative and critical lenses on the subject of OTT are convergence theorists who recognize the importance of the technology for its innovation and ability to change viewership and consumption habits. However, they still believe the existing regulatory structure is in the best position to mitigate changing technology, should we choose to employ a regulatory approach. One of the pioneers of the study of media

convergence was political scientist Ithiel de Sola Pool who was the first to outline the concept in his anthology *Technologies of Freedom*. Pool noted:

> A process called the 'convergence of modes' is blurring the lines between media, even between point-to-point communications, such as the post, telephone and telegraph, and mass communications, such as the press, radio, and television. A single physical means – be it wires, cables or airwaves - may carry services that in the past were provided in separate ways. Conversely, a service that was provided in the past by any one medium – be it broadcasting, the press, or telephony – can now be provided in several different physical ways. So the one-to-one relationship that used to exist between a medium and its use is eroding (Pool, 14).

Jenkins elaborates on Pool's work; examining the culture that arises from a converged media environment and the implications this has on how we consume media. For him, "new media technologies enabled the same content to flow through many different forms at the point of reception" (Jenkins, 11), changing how we understand the very notion of broadcasting. He notes that media industries worldwide are actively embracing these new technologies. This is not the case for the regulated broadcasting system in Canada. New media technology is being embraced because "convergence-based strategies exploit the advantages of media conglomeration; because convergence creates multiple ways of selling content to consumers; because convergence cements consumer loyalty at a time when the fragmentation of the marketplace and the rise of file sharing threaten old ways of doing business," (243). For Jenkins, it seems that adopting a new media model is the most logical choice to remain globally competitive. He identifies the significance of a younger audience, one who challenge the existing broadcasting model because they have come to expect a certain amount of control over what they watch and how they watch it. These 'media-actives'[5] are pushing the market towards a more personalized media experience,

[5] Jenkins cites Betsy Frank, executive VP Research & Planning at MTV, who refers to this demographic as "the group of people born since the mid-70s who've never known a world without cable television, the VCR, or the Internet, who have never had to settle for forced choice or least objectionable program, who grew up with a what I

causing businesses to re-think their models. In the Canadian case, OTT providers are presented with an opportunity to skirt the regulated system and address these gaps.

This massive shift in consumption patterns has a great impact for meeting the needs of consumers in terms of their viewing habits and desired niches. Jenkins cites *Wired's* Chris Anderson, who writes of the phenomenon of "the long tail" in which he argues that "as distribution costs lower, as companies can keep more and more backlist titles in circulation, and as niche communities can use the web to mobilize around titles that satisfy their particular interests, then the greatest profit will be made by those companies that generate the most diverse content and keep it available at the most reasonable prices," (Jenkins, 252). Because of low barriers to entry in the system, as providers like Netflix continue to grow, they will be able to provide more and better content at a lower cost, challenging the CRTC and the private broadcasting model. The convergence approach aligns with the conservative lens because it most heavily emphasizes the shift from citizen to consumer. Media is no longer a cultural product: it is a consumer good and should be monetized as such.

In her work, Matrix presents a contemporary overview of convergence in Canada that furthers the rhetoric of an increased focus on consumers rather than citizens. She identifies ten issues arising in Canada from convergence that address consumer representation in a new media environment. These include: increasing transparency, educating consumers, harmonized approaches to consumer redress, consumer protection, regulation and licensing for new transmission models and transmission rights. Matrix argues that a control crisis has arisen within the Canadian regulatory system as "these convergent digital devices and the services bundled with them provide new choices for consumers. They also usher in new business models and

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want when I want it view attitude towards media, and as a result, take a much more active role in their media choices," (244).

content distribution and transmission models," (Matrix, 10). She cites Michael Latzer, who writes that "digitalization in general and the Internet in particular are changing the cost structures in the communication sector, enabling and demanding new business models and thereby profoundly changing the competitive conditions in convergent mediamatics markets," (8).

Matrix points to a call for regulatory change in light of this. She writes,

> The rapid pace of technological, economic and social change in the digital telecommunications and media industries makes it difficult to develop effective public policies with staying power. The solution it seems is to pursue adaptive regulation and policymaking...robust across a range of plausible futures, and flexible enough to respond to changes over time and make explicit provision for learning (Matrix, 12).

In this way, her proposed approach is aligned with the Ofcom model. She argues that there is no single-way to approach regulation in a converged environment, and although a number of countries have adopted a converged legislative framework, there is no guarantee that this will be the most beneficial elsewhere due to the variable factors that influence new media and public policy. As will be explored in section four, although the Ofcom model is a useful case study for Canada, it is not necessarily an ideal model for us to adopt given our history and unique market.

Similarly to Matrix, Banerjee's work examines how to re-evaluate regulatory systems in a converged environment. In his paper co-authored with Christian Dippon (2006), they wrote that "convergence is not merely a technological or market-related phenomenon; it also has substantial policy and regulatory ramifications. As convergence continues to blur, and even erase the boundaries between several technologically distinct sectors, sector-specific regulations...may become, at best, anachronistic and, at worst, irrelevant," (4). Banerjee and Dippon propose that to meet the rapid pace of change from convergence, we must question existing regulatory structures and their efficacy. Although their work has been largely centred on voice-over-Internet-protocol communications, they assert that looking towards telecommunications is a useful tool for examining the question of OTT. In

many ways, this aspect of the industry has been experiencing the effects of convergence for a number of years, and only now is the broadcasting sector feeling comparable strain. In their approach they identify five questions[6] that the regulator should employ when examining new media. For them, the need for regulatory review and convergence are synonymous, and align closely with the theme of social benefit outlined in the liberal perspective.

These scholars who work with Banerjee are excellent examples of more liberal-leaning convergence theorists, in that they support the free market so long as the state (regulator) is able to intervene when and if necessary. In a co-authored paper with Gary Madden and Joachim Tan (2007) Banerjee proposes employing a dynamic efficiency model that suggests regulation should be relegated to a strictly economic role "to emulate the workings of competition when competition does not occur efficiently or fairly in the market," (Banerjee, Madden and Tan, 12). This is particularly important as we transition into a digital environment, since convergence is distinctly marked by a move away from earlier conceptualizations of broadcasting as a natural monopoly. They and other liberals position this model as a form of government intervention for securing the public good. They write, "this appeal is based on the principle that the public interest is best served when markets work efficiently, generally in a competitive market setting. Any market failure that causes a loss of efficiency, therefore, requires regulation to restore or protect the public interest," (12). Perhaps most importantly, Banerjee, Madden and Tan explicitly state that regulation cannot be a permanent state as this artificially uses permanent non-market mechanisms to direct and inflate the market. This is symptomatic of nationalized regulatory

[6] 1. Is regulation still necessary, redundant or harmful? 2. At what (service, operator, content, etc.) should regulation be directed, if at all? 3. What form should regulation take? 4. Who needs to be protected from whom? 5. How can communications policy be used to improve social welfare? (Banerjee and Dippon, 2).

models[7], as we have in Canada. Further, they argue that long-term regulation leads to administrative and regulatory burden: two things the CRTC have endeavoured to avoid, but as highlighted by Babe, have been unsuccessful.

According to Banerjee and Dippon, there are three decisive actions that may be employed in a post-convergence environment. There may be a need for greater regulatory restraint, specifically with the collapse of the natural monopoly model in this environment: "the pre-convergence policy pre-occupation with *preventing* the emergence or exercise of market power will no longer be a pressing priority," (Banerjee and Dippon, 16-7). Secondly "policy must become more directed at encouraging the emergence and growth of new technologies and platforms, new market institutions and new forms of packaging of services and content." Thirdly and most importantly, they stress the primacy of the user. Rather than passively receiving services under set terms, users have the opportunity and means to make "active, real-time choices of services and content as well as who should provide or transport them," (Banerjee and Dippon, 17).

Goldstein has written similarly about the importance of reassessing the role of regulation in a post-convergence era. He contextualizes two distinct regulatory regimes, which he distinguishes as a means of understanding convergence and the call for significant regulatory change. The 'old' system encompasses:

I. A radio frequency spectrum with interference characteristics;
II. An assumption that the spectrum and/or the market would allow only a very limited number of players, or even just a monopoly; and
III. A concern about the size of the Canadian market in relation to the adjacent U.S. market, and the fear that Canada would be overrun with U.S. content.

On the other hand, he characterizes the 'new' system as:

[7] These models have grown out of a natural monopoly model, with much of the existing regulation reflecting a pre-convergence era.

I. A broadcasting marketplace that is fragmented and competitive;
II. Borders that are eroding;
III. A Canadian market that is still relatively small compared to the adjacent U.S. market, and when compared to a number of other markets from which content may be accessed using new technologies, (Goldstein, 34-5).

He argues that given these significant changes in the market, it is increasingly inevitable that regulation will become less and less effective due to border erosion. This increasing pressure from unregulated competitors who do not have the same obligations or spending requirements can only further strangle existing competitors in the industry, which has negative ramifications for the consumer. He prescribes that "one of the tasks of the regulator...should be to regulate in such a way that Canadian licensees will have the best chance of making the transition to that more competitive environment," (40). Again, there is a push for increased flexibility.

Goldstein explicitly raises concerns over asymmetrical regulation, which more closely aligns with the conservative perspective. Although he notes that this is a by-product of market fragmentation resulting from convergence, it ought to be "one of the tasks of the regulator...to regulate in such a way that Canadian licensees will have the best chance of making the transition to that more competitive environment," (40). He questions the very existence of a regulatory system in the face of such asymmetry: "how effective can any of those rules be, if porous borders create an uneven playing field between those who are captured by the rules and non-Canadian signals that are not?" (Goldstein, 35).

The critical perspective, like the conservative, calls for an end to regulation, but for markedly different reasons. Although concerned primarily with social welfare, critical theorists "espouse a social and economic order in which institutions are expected to respond to people's needs and people are to be empowered politically and economically so as to ensure democratic outcomes," (Carson, Thomas and Hecht, 23). In this way, critical theorists might argue that OTT

providers may facilitate democracy and create social benefit by making content more widely accessible, and free to support democratic ideologies. Publicly funded institutions like the National Film Board (NFB) and CBC most clearly align with this viewpoint, although critical theorists explicitly reject undertones of capitalist production.

In the NFB's submission to the fact-finding exercise, they wrote that OTT providers have "the potential to transform the broadcasting system by creating new business opportunities for existing stakeholders and facilitating many new entrants. OTT services are a key enabler of the personalisation of audio and video services tailored to consumers," (National Film Board of Canada, 3). They ask whether the complexities of our existing regulatory system have "channelled our innovation in certain directions and not others so that today the first response to the perceived threat of OTT is regulatory rather than competitive," (National Film Board of Canada, 8). They note four challenges[8] that may have initially led to this line of thinking, but ultimately believe that the Commission is serving an ulterior agenda by not seeking to foster competition and creative content through this new technology. The most useful group of theorists here are critical political economists, who are distrustful of institutions and primarily interested in addressing larger questions of the public good, though they do not support any specific public policy action, and instead advocate for the promotion and protection of broader public values.

In situating the need for regulatory reform as both a political and economic issue, Mosco is particularly valuable in theorizing the role of institutions in critical political economy. He writes that although institutions are the natural result of human interactions, they must be:

> Watched with a sceptical eye because of their tendency to restrict freedom of individual choice and social intercourse, including the free flow of ideas,

[8] These are: a lack of Internet-connected televisions; bandwidth limitations; lack of business models; and a challenging environment for consumers given the volume of content available.

> commerce, and labor....The institution of government bore special watchfulness because of the tradition of sovereignty, which gave it the power to defend the realm, could easily be used to create special privileges, including combinations that would restrain industry and trade (40).

Because critical theorists equate power as intricately connected to private property, "whoever owns or controls the use of a society's things invariably possesses political and economic power commensurate with such ownership or control," (Carson, Thomas and Hecht, 23-4). These institutions that employ a top-down, autocratic approach to media shift the concentration of power away from the citizenry and limit individual freedom. When these types of institutions exist, we cannot have a system that seeks social benefit, regardless of the cultural or social objectives that may be outlined in the legislation. Ultimately, only the public knows what will serve the public best: it cannot be left up to institutions or politicians.

Although Section 3 (1) of the Act stipulates cultural and social objectives for the Canadian system, these do not best serve the Canadian public. In a true critique of the Keynesian model, some people working along these lines believe we cannot trust policy makers to act in the public interest instead of their own, as it assumes these politicians have a desire to better the nation and larger public. Mosco describes public choice theory as supporting the notion that these institutions might be self-serving. He cites the view that these "collectivities are reducible to the sum total of individual choices which...reflect private self-interest. There is...no sum greater than the parts,"(253). This assumes "structures are nothing more than convenient fictions for individuals pursuing similar interests...the approach privileges private over public interests because it starts from the view that people are, above all else, pursuers of private self-interest," (Mosco, 253). Simply, a top-down regulatory approach built on cultural policy objectives no longer makes sense in a converged environment. Rather, we should seek to explore new models

that have social benefits, and we ought to structure an innovative, public-controlled system of media.

In direct opposition to this are Canadian media policy scholars, whose work centres on the primacy of the regulator. Raboy identifies the role of the state in how we have developed our regulatory system. He writes that the state has always been associated with the defense of public interest, and has come to embody that. "The historic importance of the state as a patron, organizer, and enabler of both the cultural and the technological aspects of communications systems in Canada is self-evident. State intervention has been a means to guarantee Canada's national sovereignty, a secure capital base for its entrepreneurs and financiers, and free expression and access to communications," (336). Simply, Canada has a longstanding history of utilizing the state to implement larger public policy goals. Because the state has become synonymous with national identity, unity and the protection of the market, the decision to pursue state regulated broadcasting was natural; "a strong, central communications and broadcasting system was perceived as fundamental to all of these tasks, and federal policy flowed from that perception," (Raboy, 335).

However, a state-centric model of regulation in Canada is by no coincidence. As nearly all Canadian media scholars will agree, the tenets of Canadian broadcasting policy are rooted in defensive fears of American domination which have impacted the cultural protectionism and national identity rhetoric embedded into the Act. Geography has always been a challenge for Canada, not only due to its expansive landmass but its proximity to the American border. With a majority of the population within 200 miles of the border, Canada is next to its largest trading partner and the world's largest exporter of cultural goods. In this context, Canadian ownership and control of media properties has been viewed as key to cultural sovereignty. Skinner

compares the regulatory system to the railway, which sought to physically join the country: "broadcasting...has been seen as a vehicle for developing and distributing a common culture across the country," (3). For nearly a century, the issue of reconciling the public's desire to consume foreign products and the need to create strong public policy has contextualized Canada's regulatory framework. "Historically, the public sector has been mandated to pursue a broad set of social and cultural goals whereas, driven by the profit motive, the private sector has been harnessed to a set of public responsibilities in exchange for the privilege of holding broadcasting licenses," (Skinner, 4). Despite good will by policy-makers and the regulator, the system is complicated by the constant influx of US programming on Canadian channels. Because these types of programs have already recovered the costs of production, they are exported at a fragment of the cost. "In the face of these constraints, a complex weave of regulation in the broadcasting, cable, and telecommunications industries has developed to try to create an economics of Canadian production and prevent Canadian media companies and markets from becoming mere extensions of their American cousins," (Skinner, 4).

Raboy argues that this approach is short sighted, flawed and masks many other important public policy issues. "The emphasis on national considerations has only been maintained at the cost of subsuming the other major tensions in Canadian broadcasting: between public and private ownership, between different jurisdictional models, between different structural approaches," (339-40). He argues that by persistently camouflaging these issues, "the cultural sovereignty argument has prevented the extension of the public dimension of broadcasting in Canada...if one were inclined to see things this way, one could argue that the thwarting of the democratic potential of media in Canada in the name of a national interest actually serves American interests in the long run," (Raboy, 340). Further, we have developed a completely asymmetrical

broadcasting system, making new media that much harder to regulate. Given the low barriers to entry, NMBUs are able to capitalize on gaps in the Canadian system by tailoring their programming to suit niche interests, and due to the lack of regulation, provide almost exclusively foreign content without Canadian quotas.

If nothing else, there is a need for a regulatory approach that addresses this, as it has wider implications on the larger system through Canadian content production and subsidy funds. Under the liberal perspective, this is a clear example that would warrant regulatory intervention. It is most appropriate for us to employ an interventionist institutionalist approach that seeks to maximize social benefit. As Babe explained, the CRTC was "given sweeping new powers to license and regulate all Canadian broadcasting, public and private. Its mandate was simple in concept—to carry out the intent of Parliament that the national broadcasting system should serve the national purpose—but frighteningly complex in interpretation and execution," (Babe, 29). This model directly reflects Canadian values, though as Babe pointed out, it has been used to near inefficacy, citing the countless examples where Canadians have chosen socialization over individualism at every critical stage of the nation's development (115). At this juncture, a regulatory review would be the most appropriate, as it would present an opportunity to adopt a model that is balanced, fosters innovation and promotes regulatory flexibility while maintaining the history of social benefit.

The liberal view of OTT in Canada is one that relies quite heavily on the existing regulatory model, but is marked by the problem of being too complex in its application. Influenced by a true neoclassical economic model, there is minimal state regulation and these mechanisms are only employed when necessary (example: deficit measures). Interest groups and Canadian media policy scholars who work within the CRTC's framework have most heavily

propagated this interventionist model. In a joint submission[9] to the CRTC, these groups sought to expand the Commission's definition of OTT to include "ANY [their emphasis] form of online broadcasting that is currently subject to the New Media Exemption Order including...those services that are linked to a BDU service subscription...or broadcaster-affiliated offerings such as video streamed on their websites or through a mobile app," (ACTRA et al, 2). This group believes that private broadcasters are seeking to skirt Canadian content requirements under Section 3(1) under the Act, and are most concerned with protecting these public policy objectives. They believe that new entrants should be subject to the same requirements to continue furthering long-standing cultural policy objectives.

In the following section, I will provide the basis for utilizing an institutionalist perspective by more deeply exploring the theoretical framework of the paper. I will connect some of the key aspects of the literature review into the larger body of work by drawing conclusions from the liberal perspective as supported by Canadian media policy scholars. Additionally, this section will outline the methodology for the case study of Ofcom, clarifying why it is the most appropriate research method for this endeavour, and why it is a suitable case when discussing the CRTC.

[9] ACTRA, Association des producteurs de films et de télévision du Québec, Canadian Media Production Association, Directors Guild of Canada and the Writers Guild of Canada.

SECTION TWO:
THEORY AND METHOD

"The public service, state-regulated model...has in effect always been seen, not as a positive good but as an unfortunate necessity imposed by the technical limitations of frequency scarcity," (Garnham in Golding, Murdock and Schlesinger, 39).

2.1 Theoretical Framework

Having just identified three lenses through which to examine the question of OTT regulation in Canada in the previous section, I will employ a framework that encompasses aspects of each and ultimately leans closely to liberalism by way of institutionalism. In exploring the question of OTT, this paper will utilize an institutionalist lens, arguing that the CRTC is in the best position to make significant regulatory amendments that are more flexible so as to foster competition in the sector, and ultimately meet the needs of Canadian citizens-consumers. Perhaps more importantly, this situates the question of regulating new media providers within a call for larger public policy action as this relates to the creation of a national digital strategy.

Unless we seek to dismantle the CRTC via a reconfiguration of the Act, we ought to adopt a policy approach that continues to meet the policy objectives of the Act (citizens) but is also flexible in its application (consumers). Re-examining the CRTC is the most logical step that we might take in seeking a flexible regulatory model for OTT and new media, until such time as a review of the Act and the legislative powers of the CRTC may be examined in Parliament. As we continue through a transitional period marked by technological and consumption changes by Canadians, we ought to seek a model that best ensures that all of the concerns outlined in the literature review are addressed. We may achieve this through an institutionalist perspective.

As Jan-Erik Lane and Svante Ersson (2002) discuss, the role of the state in securing the market can only work efficiently when the state and its institutional framework are properly

supported. They identify the dichotomy that exists in political economy: is the market or the state best equipped to regulate? Should this institution be public or private? Are we concerned with efficiency, or equity in the market? I am arguing that we are concerned with the equity of the regulatory system in Canada due to our history of public policy objectives and concerns over larger societal issues. If we skew towards political interests, we are ultimately concerned with issues of justice. While this concept is inevitably difficult to explain, "justice tends to define as the outcome of a decision process where all concerned have been given a voice," (125). We can seek to equalize the market through competitive pricing and a more open acceptance of OTT, as these players push for better programming options for Canadian consumers. "Competitive prices in markets have several advantages over administrative prices in a planned economy. They are conducive to efficiency in resource allocation. They enhance flexibility and rapid adjustment," (Lane and Ersson, 126) and they can importantly be the most reflective of Canadian consumption habits. By employing a model that is reflective of the history of Canadian regulation by maintaining the structure of the CRTC, we can mitigate the concerns of many of the parties involved in the OTT debate by seeking to benefit the public good.

Nicholas Garnham (1986) emphasized this notion of the public good and the contradiction between how we define the individual in the political versus the economic sphere through an institutionalist lens. He argues that politically, the citizen is viewed as exercising public rights of debate, voting, etc. within a communally agreed upon structure of rules and towards communally defined ends. It presupposes a value system that is social, and is legitimated by social action towards the public good, (as cited in Golding, Murdock and Schlesinger, 45). Whereas, in the economic sphere, the individual is regarded as a producer and consumer, exercising private rights through purchasing power in the market in the pursuit of private

interests. The invisible hand of the market thus coordinates the actions of the individual (as cited in Golding, Murdock and Schlesinger, 45). These correspond directly to the concept of the citizen and the consumer. Neither of these spheres exists exclusively of one another any longer due to converging technologies. To most effectively address new media then, we must marry these two concepts and seek to serve a citizen-consumer.

In order to reimagine the broadcasting landscape in Canada, we must address this longstanding contradiction between the political and the economic, as it affects how we tailor our policy objectives. The Canadian system is at an impasse: if we continue to lean towards a model reliant on national identity and public policy, conceptualizing the individual politically must take precedence. Using Ofcom as a case study provides an interesting dynamic to the paper, as it encompasses an economic approach to regulation. In Ofcom's regulatory approach, intervention from the government is only employed when necessary, and only insofar as it seeks to improve the workings of the economy through this limited intervention. It is a marked move away from cultural policy objectives and focuses instead on efficiency rather than equity (except in the case of access). As Steven Pressman (2002) points out, although many economists see state intervention as an infringement on individual rights, there are two clear examples for when it is necessary: in reducing monopoly, and in cases where externalities spill over. These are exemplified in Ofcom's model.

In a longer work, this paper may have sought to explore a second case study that is representative of a political model. However, the existing Canadian model is already closely aligned with these values, and since this paper is utilizing an institutionalist lens that builds on the existing framework, a conscious decision was made to only explore one case study.

2.2 Methodology

This paper will provide an in-depth examination of the Act to explore the possibility of implementing an umbrella regulatory approach in Canada. The language used in the Act, as well as the jurisdictional abilities of the CRTC help provide a framework on how we can situate the question of new media regulation in Canada by addressing the mechanisms in place that exert control over these policies. Using the consolidation of Ofcom as a case study, we can look to other legislative bodies to find similarities and differences regarding answering the question on whether or not and how to regulate new media. Although the CRTC and Ofcom have adopted two distinct approaches to new media, a case study may assist us in identifying these distinguishing factors.

In examining the Act, this work will ultimately argue the need for a larger, national digital strategy to encompass the full spectrum of regulatory issues that arise from increased broadband Internet penetration in Canada. In addition to the Act, I will examine Canada's existing regulatory framework for new media. This includes the NMEO (1999 and 2009), the OTT fact-finding mission and its findings from 2011. I am exploring the policy of non-policy that has developed from these consultations and will be juxtaposing their findings against Section 2, 3, and 5 of the Act. Respectively, these sections outline the definition of broadcasting, the culturally-protectionist national identity goals for the broadcasting system and finally, the mechanisms for it the system's regulation. We ought to reconfigure the Canadian regulatory framework to ensure flexibility in a converged environment. In leaving new media unregulated, and pushing for a national digital strategy we may achieve this.

Looking to Ofcom is the most useful in supporting my argument that Canada should adopt a more flexible regulatory model that moves away from top-down regulation, as was

outlined in the theoretical framework section. As Matrix and other authors have pointed out, there is no single route towards a universal regulatory model for new media. In Canada, it is clear that whatever steps are taken towards greater regulatory flexibility, they will continue to embrace a model of public interest regulation.[10] Given Canada's historic disposition for this model and larger public policy objectives, it is unlikely these will be abandoned any time soon. We must work within these parameters to develop the most implementable solution for new media. Even if we were to adopt an umbrella regulatory approach as Ofcom has, it would likely straddle the economic and political sphere more holistically. An exploration into other legislative models would be helpful to our larger policy goals, but for the purpose of this paper I will exclusively look to Ofcom.

Matrix writes that we should be cautious before immediately pushing for a fully converged regulatory policy, noting: "there is only partial integration of media and communications regulations, because the content/carriage distinction remains largely intact...Even in [these] frameworks that adopt an industry-agnostic approach to carriage regulation, at this point in the evolution of converged regulatory models, when it comes to content, sector-specific regulatory measures still generally apply," (Matrix, 11). For this reason, we must consider throughout our analysis the primacy of flexibility and a move away from technology and media-specific regulation as Canada moves forward. This would facilitate a model that would not require constant legislative review, thus promoting regulatory efficiency.

A case study is the most appropriate methodology for this undertaking, as it will help broaden our existing range of knowledge on Canada's regulatory approach to new media. Robert

[10] In his article, "Convergence and Competition: Technological Change, Industry Concentration and Competition Policy in the Telecommunications Sector" author Arlan Gates defines this as a model that firstly prioritizes social values above economic goals; secondly, promotes universal service; and finally, strives to impose domestic content requirements.

K. Yin (1992) wrote that case studies are suitable for this kind of work specifically because they can "assume a single objective reality that can be investigated by following the traditional rules of scientific inquiry; used for theory building; favours theory testing; and considers context as an essential part of the phenomenon being evaluated," (Yin, 128). Further, because this work includes a literature review, and is an exploratory inquiry (in that, it is seeking to develop a new hypothesis on Canada's approach to new media regulation). Thus, a case study is both appropriate and well suited. Perhaps most importantly, the work "investigates a contemporary phenomenon within its real-life context; when the boundaries between phenomenon and context are not clearly evident; and in which multiple sources are used," (Yin, 123).

In a longer work with greater depth, this paper would do well to employ a broad range of case studies to inform and highlight the innumerable variables between each nation. For the purpose of this paper, I am limiting the utilization of the case study exclusively to an examination of Ofcom, and only in terms of its broad approach to an economic-centered model for regulation. There are a number of other aspects that may have been explored, such as structure, history, and jurisdiction. In this work, these are secondary to the main issue of regulatory approach.

In this section I have established the theoretical framework and methodology for the remainder of this work, explaining the decision to employ an institutionalist framework and case study of Ofcom through the literature review and key concepts for the paper. Importantly, I have solidified the importance of re-examining the existing regulatory framework in Canada by highlighting the change from citizen to consumer, and have proposed the need to adopt a model that focuses on a hybrid citizen-consumer by continuing to utilize the existing institutional structure with a focus on regulatory flexibility in this converged environment. In the following

section, I will explore the history of Canadian regulatory history and highlight the longstanding tradition of public policy objectives by examining the era from the mid 1920s until 1932 with the writing of the *Canadian Radio Broadcasting Act*, and the Aird Commission report, two of the most important documents in our country's history of media regulation.

SECTION THREE:
MEDIA REGULATION IN CANADA

"Radio broadcasting is no more a business than the public school system, the religious organizations, or the varied literary, musical, and scientific endeavours of the Canadian people. It is a public service," (Peers, 90).

In this section, I will explore the history of Canadian regulation beginning in the mid 1920s with the early development of radio. I will provide a very brief survey of the British and American models so as to contextualize the climate for Canada's early regulatory framework that has come to shape so much of our current policy. Importantly, I will focus on the Aird Commission (1929) and the *Canadian Radio Broadcasting Act* (1932), two documents that laid the groundwork for our current system. Additionally, I will provide a brief survey of the changes in the regulatory structure that led to the creation of the CRTC, as well as its current organizational structure.

The development of radio in the post-WWI era was the first time legislators and the public began to consider the social, economic and political impact of media on the population. Unlike the development of print that brought the mass dissemination of newspapers, radio was the first time media transcended levels of literacy and income; given the initial cost of the technology, listeners had to 'listen-in' in groups. It became a truly public medium, raising regulatory questions for governments worldwide. The most significant point worth exploring in this section is the relationship between technological constraints and content regulation. The context in which much of the Canadian regulatory debate stemmed revolved around issues of spectrum scarcity, fuelling the rhetoric that because the airwaves were limited, only the highest quality content should be broadcast. This logic was applied to greater nation-building goals in an attempt for Canada to assert itself culturally against the United States. Ultimately, this influenced a move towards a regulatory model that encompasses both content and technology. The nation-

building goals embedded in the regulatory structure were born out of over a decade of discussion surrounding how to use this new medium, and what it could mean for national unity in the face of Americanization. NMBUs are nearly antithetical in their conceptualization, as they are arguably[11] uninhibited by technology.

3.1 Early Radio

To contextualize the events that unfolded in Canada in this formative period, it is crucial to establish three distinct contributing factors: firstly the development of a commercial broadcasting sector in the United States; secondly the development of a public broadcasting model in Britain; and finally the defensive policy response to the very real threat of Americanization that has come to define Canadian media regulation. Although there are other obvious, specific influences that contributed to the decision to create a national, regulated radio system, these three are distinctly tied to policy issues that surrounded the legislation of the 1932 *Canadian Radio Broadcasting Act.*

Though this work will not provide a deep analysis of the American or British radio systems, they are noteworthy in two significant ways. Primarily in that these systems were developed in advance of the Canadian system and set the stage for developing Canadian policy. When we examine the consolidation of Ofcom, there are clear tenets from the development of public broadcasting in the UK. The Canadian model is clearly influenced by both the UK and US, as seen in the hybrid public-private model that exists today. Secondly, and perhaps most importantly, there are long-lasting its effects due to the proximity of the US, which forced Canadian policy-makers towards regulation in part due to spectrum scarcity, and cultural

[11] Of course, there are considerable concerns when we discuss the increased use of technology surrounding questions of access, the emerging digital divide, and usage issues like caps, speeds and bandwidth.

infringement. As was highlighted in the literature review, this has created a culturally protectionist broadcasting system.

From the outset, there was a strong lobby against the adoption of a public broadcasting model in the US. Robert McChesney (1991) writes about existing tensions between the printed press and radio in the early stages of its development. He notes that from very early on there was a strong rejection of state intervention in printed media, and only when radio began to pose a threat to existing news services did the tone change. Like elsewhere, the US was plagued by the question of the radio, with issues surrounding the scope and desire for regulation. As Frank Peers (1969) notes, in the United States, radio and television developed primarily as commercial media. "The programs exist to sell goods, and the stations and networks are private ventures, only lightly touched by state regulation," (Peers, 3). Both the government and interest groups became concerned with control of this new technology, its content, and its potential widespread impact.

What is distinctly characteristic of the US model is the near systematic elimination of a non-profit public radio model during this era. Until the *Communications Act* of 1934 that established the Federal Communications Commission (FCC), there had been no formal provisions implemented to support or protect these interests. This model was uniquely financial at heart. Those who could afford to broadcast did, giving non-profit groups a significant disadvantage against those broadcasters who chose to affiliate themselves either with large-scale dailies or commercial networks. Anthony Smith (1973) wrote of the shift away from the public model of broadcasting that occurred in the States. He noted that the debate over controlling broadcasting had been done in completely different ways, though they were done in response to the same problem. As was reflected in their adopted system, Americans were distrustful of a public model because they feared the reverberations it could have regarding social change by fringe societal groups (Smith, 1973, 53).

Contrarily, the model developed in Britain capitalized on many of the issues the US chose to avoid by pursuing a commercialized, private radio system. While there was undoubtedly contention over the development of a radio model, early on Parliament adopted the view that because of spectrum scarcity, there should be regulation of the technology to promote high quality broadcasting because the wider public was consuming it. Smith writes that in Britain radio developed "as a kind of embassy of the national culture and the national polity within the nation. The free exchange of ideas, the representation of the whole range of national issues of contention, was filtered through a stately organization owning massive prestige; it implanted inevitably its own perspective of the world on the material which passed through its hands," (Smith, 1973, 53).

The dominance of the BBC can be attributed almost exclusively to scarcity and the impact this would have on the public. Quite simply, in accepting that the technology was scarce, it was accepted that if it was going to be broadcast, every word needed to count. In Canada, this same interpretation of scarcity meant that broadcasting should serve a public policy objective to unite, through national identity goals, an otherwise disjointed country. The US instead relied on a high number of smaller stations that spent much of the early years attempting to kick one another off the air until they joined the commercial networks. This model was perpetuated in Canada, but in addition to fighting each other, stations were seeking to combat Americanization of the airwaves, eventually necessitating intervention from the government. This chaos instilled in Britain a desire for an orderly system of allocating the limited spectrum, believing that radio lent itself to a natural monopoly because it could be centrally controlled. This would become one of the most unchallenged decisions in media history and it greatly impacted the Canadian model of thinking (Smith, 1973, 56-7).

As Sian Nicholas (2000) wrote, in contrast to the American model where stations sought to appeal to the largest possible audience for the purpose of commercial sponsorship, the BBC set out to attract as wide an audience possible across a broad programming schedule to sell more radio sets so there would be more money available (through subsidy) to continue the creation of higher quality programming (123). From the beginning the BBC recognized that radio was the first in what would soon become a medium of mass influence, capable of defying the boundaries that typically restricted wider audience consumption such as printed works or telegrams. Nicholas introduced the idea of a new kind of audience that he referred to as a shift away from the 'self-selecting readership' whose age, social class, interests and opinions were all targeted and catered for, towards a model that instead addressed a larger range of people and interests of all "ages and sensibilities," (123). Based on the confines of the technology at the time, this was an acceptable model for early radio development.

3.2 Why Regulate?

Author David Ellis (1979) wrote, "early broadcasting in Canada was defined by nothing if not its distinct lack of appropriate federal policy and regulation" (2), an issue that continues to affect regulatory decisions in Canada. Harriet Cooper (1974) argued that the history of mass communications control in Canada could be characterized by its lack of firm direction: "the government wanted the media to reflect and strengthen Canadian identity but until the [70s] it had no policy concerning the amount of Canadian content in broadcasting. There was a decided tendency to 'wait and see' rather than take immediate and effective action," (Cooper, 6). Perhaps rather than identifying this as an issue of being slow to regulate new technology, the issue is in the application of an antiquated regulatory system onto these new technologies, which becomes

problematic in the long run. Although broadcasting had begun in the 1920s, for nearly a decade there was virtually no clear path carved to determine what model of broadcasting would exist in Canada. Although the political interest in broadcasting did not come to a head until the late 20s, there was significant lead in to the Aird Commission in 1929 that resulted in the model we continue to see today. The Aird Commission was a pinnacle moment in Canadian media history. Many of the points recommended in the report have come to form the basis of our existing regulatory system and forever changed the direction of Canadian broadcasting.

What was happening south of the border initially seemed of little significance. It was not until the technology itself became more affordable that the US broadcasting model came to pose a challenge to Canadian broadcasters. American commercial broadcasters staked a claim in a significant portion of available spectrum long before Canada had developed any sense of how it would regulate or license radio broadcasters. In fact, the Radio Branch[12] did not even believe commercial radio had a chance of surviving and paid little attention since these stations were forbidden from charging tolls for relaying messages between their transmitters. Without a viable economic model, it was unfathomable that they could sustain themselves. The Branch was neither ready nor equipped to deal with the cultural implications of broadcasting, and is culpable for its complete inability to foresee a future in the medium.

3.3 The Aird Commission

Alongside the Act, the Aird Commission is one of the most important documents in Canadian broadcasting history, as it defined the culturally-protectionist, national identity

[12] The Radio Branch was under the direction of the Department of Marine and Fisheries as early as 1910. They owned and operated a number of coastal stations and leased others to the Marconi Company. Their main duty was to provide facilities and communication for naval ships to ensure safety. The Branch was arguably the first regulator in Canada, as they licensed and supervised commercial, experimental and amateur usage of wireless signals.

focused, public policy objectives that have come to define our system. It pushed for a public broadcaster to exist alongside commercial models and subsidized by Canadians. Without this document, we may have adopted a model similar to Britain or the US, but instead the government pushed for a uniquely Canadian model, influenced by the geographic, social, and political needs of the Canadian people. Hector Charlesworth (1935) argued that early radio services available to Canadians were marked by three issues: "poor Canadian programs, too much advertising, and the fact that most of the radio entertainment reaching them was from sources other than Canadian," (42). Feeling the very real encroachment of American signals, and feeling like the Canadian people were dissatisfied with the government's response to this, the Federal government appointed a Royal Commission in 1928 to address this problem and to make suitable suggestions for a Canadian broadcasting system.

Led by Sir John Aird, then President of the Canadian Bank of Commerce, the Commission believed "the destiny of Canada depends upon our ability and willingness to control and utilize our own internal communications for Canadian purposes," (Romanow, 24). Over the course of a year, the Commission would travel the country, to the US and to Britain to explore radio models for adoption in Canada. This was the first step towards a history of policy focused on building a system that should be uniquely Canadian in content, regulation, and employees. The Commission pursued the nation-building potential for radio, believing that broadcasting, "will undoubtedly become a great force in fostering a national spirit and interpreting national citizenship," (Charlesworth, 42). Walter Romanow (1975) wrote that throughout the history of broadcasting regulation in Canada a defensive model has always been perpetuated through three objectives: "an adequate coverage of the entire population, opportunities for Canadian talent and Canadian self-expression generally, and successful resistance to the absorption of Canada into

the general cultural pattern of the United States," (27). These exact issues are reflected in Section 3(1) of the Act, which states that the Canadian broadcasting system should seek to:

> (i) Safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada, (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity...(iii) through its programming and the employment opportunities arising out of its operation, serve the needs and interests...of Canadian men, women and children.

Even the briefest reading of this section, or any survey of the publically focused model of broadcasting present in Canada today is reflective of similar objectives outlined in the late 1920s under the Aird Commission.

The historical significance of the Aird Commission is profound, with visible long-lasting effects that we cannot ignore as we look at developing a new media model. As Raboy writes, "the Aird report confirmed what most thoughtful Canadians apparently felt: that the only viable alternative to American domination of the Canadian airwaves was a national public enterprise," (29). The report made 13 principle recommendations aimed at the creation of a publicly owned and controlled system of broadcasting. Of their recommendations, the most significant was the establishment of a national company for broadcasting. Among its many recommendations, it most notably suggested that a "provincial authority should exercise control of programs broadcast by stations located within the boundaries of each province...[and] should be financed...from the revenue from a $3 license fee on receiving sets...and an annual subsidy from the Federal Government of $1,000,000 for the first five or ten years at least," (Charlesworth, 43). Despite the goodwill and interest over establishing a publicly owned model in Canada, the Great Depression dismantled any progress on the plan, given its heavy reliance on Federal funding.

In 1930, Graham Spry and Alan Plaunt established the Canadian Radio League to advance the recommendations and principles of the Aird Commission's report. They believed radio could help shape and form public opinion, making for a "single, glowing sprit of nationality making its contribution to the world," (Peers, 90). From the outset, the Canadian Radio League made it very clear that there was a critical linkage between the regulation of content and building a national public radio system. Spry was particularly adept at understanding the technological confines of the new medium, and argued in favour of monopolization through a public model because of this. This would also help secure his vision for a nation united through broadcasting. "The natural limitation of wave lengths and by the enhanced control, efficiency and economy that result from centralized operation, monopoly is the most satisfactory principle on which a national system of broadcasting may be based," (Peers, 90).

Hearing the public outcry over poor signal quality, lack of diversity in Canadian programming, and the influx of American content, the decision to pursue a nationalized model of broadcasting (and later, regulation) in Canada was absolutely appropriate at the time it was conceptualized. Much like the implementation of the NMEO, this decision was very much rooted in the broadcasting landscape *at the time of writing*. The flaw in Canada's decision to pursue this kind of aggressive, top-down regulatory model for broadcasting was that it tried to sustain this long after it had established cultural and social public policy objectives.

3.4 The Broadcasting Act and the CRTC

With public pressure from the Canadian Radio League and Prime Minister R.B. Bennett mounting, in 1932 a parliamentary committee re-examined the Aird report, arriving at many of the same conclusions. Although it also recommended the establishment of a national

broadcasting system, these considerations were drastically impacted by the economic climate, recommending that the system ought to "be self-sustaining, supported directly by those who received its services and by such revenues as it might derive from indirect broadcast advertising," (Charlesworth, 44). Prime Minister Bennett single-handedly pushed the re-examination of the Aird report through Parliament, believing the broadcasting system would be instrumental to Canada's development both socially and economically. Bennett was an advocate for public broadcasting, believing that the model at the time was unsatisfactory, and Canadians deserved more from the system, given that it was a public good. He believed that in establishing an adequate radio system that was properly employed, "the radio can be made a most effective instrument in nation building, with an educational value difficult to estimate," (Raboy, 39).

Bennett had a three-point vision for Canadian broadcasting. Firstly, he believed it should ensure the "complete control of broadcasting from Canadian sources, without which control broadcasting could never become a great agency for the communication of matters of national concern and for the diffusion of national thought and ideals and for fostering and sustaining national unity," (Charlesworth, 47). Secondly, the system should safeguard an "equality of service for people of all classes in all parts of the country. Private ownership of broadcasting, depending on advertising revenue, necessarily discriminated between densely and sparsely populated areas," (47). Finally, it should be an endeavour that preserves "the natural resource of the air for the benefit of all the people instead of turning it over for private exploitation at a time when its use in radio broadcasting was only in its infancy," (48).

This larger discourse sought to establish the importance of Canada as a nation; an objective that policy-makers believed could be achieved through a self-sustained broadcasting system. At a time when Canada was a relatively young country, the strong influence from both

its British roots and geographic proximity to the United States made it exceptionally vulnerable. In many ways, the relatively harsh, culturally protectionist model that was adopted was born out of necessity to ensure its place in the North American media landscape. It would be both an understatement and an oversimplification to say that much of Canada's early broadcasting policy was created in response to American domination. The encroachment on the airwaves in the 1920s was reminiscent to manifest destiny, and it became critical that the government react in a meaningful way. However, this has had longstanding effects that have skewed much of our cultural policy going forward. The NMEO is no exception to this.

Apprehension to Americanization is now so deeply ingrained that it has led to a stranglehold over nearly every aspect of Canadian media policy. While the nation-building model pushed for fast action in establishing a system for broadcasting, it also created apprehension against American influence that has never diminished (Russell, 254). This elusive idea of the nation occupies much of the space for debate when we discuss Canadian broadcasting. "The nation...has proved to be an imaginative field onto which different sets of concerns may be projected, and upon which connections may be forged between different aspects of social, political and cultural experience," (Edensor, 1). The idea of the nation deals directly with what is assumed to be shared cultural narratives, practices and experiences for use in creating common knowledge and ideologies across national boundaries. "Nationalist discourse draws extensively on metaphors from three domains. It assimilates the nation to an individual soul, body, or person; it homologizes the relation between citizens and nations to the relation between plants and the land; and it models the nation on the family," (Hogan, 166). These factors often work together to enhance the nationalistic dialogue, "increasing our sense of unity of the national identity group, sharpening our imagination of its polar difference from national out-

groups, naturalizing the internal hierarchies that organize power and authority in our society, and so forth," (Hogan, 166). Seeing this through an institutionalist framework, the propagation of the nation can be best established through a body like the CRTC.

Because regulation is tied to changing technologies, the history of regulation in Canada has moved through several distinct institutions that should be mentioned for the purposes of this paper. Regulating broadcasting in Canada has never been an easy undertaking. In 1932, under the *Canadian Radio Broadcasting Act* the Canadian Radio Broadcasting Commission (CRBC) was established to regulate radio in Canada. In 1936 when the CBC was established through amendments to the Act, it became both Canada's public broadcaster and regulator. In 1951 the Massey-Levesque Commission was assembled and its findings solidified the CBC as the national broadcaster and regulator. In 1957, the Fowler Commission found the utilization of the CBC as the regulator to be unsatisfactory, and recommended that its role as regulator be relegated to an independent body. This established the Board of Broadcast Governors to act as the regulating body in Canada.

Between 1958 and 1968 there were significant changes to the Canadian broadcasting landscape, including the implementation of foreign ownership restrictions and the establishment of a private television network. In 1964, the Government appointed the Fowler Committee to examine the role of broadcasting in Canada, given that these technological changes had solidified the belief that broadcasting must continue to be national in scope. In 1968, the Canadian Radio-television Commission (CRTC) was created to oversee regulation of Canadian broadcasting and *The Broadcasting Act* was passed. Under the Act, it "confirm[ed] the CBC's position as a national broadcaster; strengthen[ed] restrictions on foreign ownership; require[d] that Canadian programming be created by mainly Canadian talent; confirm[ed] the idea that the broadcasting

system can strengthen Canada's cultural, social and economic structures," (CRTC, *Origins*). In 1976, the organization was renamed the Canadian Radio-television and Telecommunications Commission (CRTC), marking the expansion of its jurisdiction to include telecommunications.

The progression of technological change in Canada is significant to the development of regulation, as these have always developed in tandem. This is a unique and integral aspect to understand when discussing the possibility of developing a framework for new media regulation in Canada. Unlike the Ofcom model, which moves away from technology-specific regulation, Canada has a demonstrated history employing this model. In many ways, the choice to link public policy objectives to broadcasting technology is obvious. As technologies have (and continue to) change, they present an opportunity to deliver content to wider audiences, to provide these programs more efficiently, and perhaps more affordably. A model that links regulation to technology ensures that as the technology changes, so too does the policy. In theory, the policy should then be reflective of the technology. However, as has been demonstrated through the emergence of NMBUs in Canada, this model can no longer be perpetuated and requires space for re-examination. This does not necessarily negate the rich history of regulation focused primarily on social benefit, but it does preclude an admission that NMBUs may be the most challenging technology the Commission has had to deal with. Given the rapid pace of change, utilization of broadband Internet, and ability to offer extremely competitive business models, the traditional framework may no longer be the most appropriate.

In this section, I have provided an historical context for the regulatory system in Canada as we understand it today. Examining key policy decisions like the Aird Commission and the *Canadian Radio Broadcasting Act* demonstrate the longstanding history of a system that focuses

on cultural policy objectives and is rooted in a technology based on limited spectrum. New media is a major challenge to this long established system.

SECTION FOUR:
The Canadian New Media Environment

> *"Regulation must...make unified and strategic decisions for the whole market that reflect economic, technical and social policy trends and balance the needs of the market with those of the 'empowered' public," (Livingstone and Lunt, 52).*

As quickly as broadcasting changed in the late 1950s and 60s, the pace has only quickened with the development of Internet-based technologies. Presently, Canadians are among the highest consumers of online video,[13] and although it is still difficult to determine the exact impact of "cord cutting"[14], it is clear that consumption is not declining. The CRTC has made minimal inroads in their approach to new media, issuing an exemption order in 1999, which was renewed in 2009. This is slated for review in 2014. Since the extension of the NMEO in 2009, Netflix has launched in Canada. With a subscription base at over one million Canadians[15] it is difficult to know just how many users there are in Canada, given that each subscription is not reflective of the number of people in the household. Netflix's entrance and success in Canada has sparked the need for debate regarding existing policies and the establishment of digital policies. As I have argued throughout this work, OTT providers present a serious challenge to the existing regulatory system, and can importantly foster innovation and competition in the sector by providing a diversity of content that reaches more Canadians. However, in order to effectively foster this, it would be wise to seek a national digital strategy that addresses these issues.

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[13] "The percentage of Canadians using Internet TV is surprisingly high and has more than doubled over the past three years. As of late 2010 some 30.8% of Anglophones indicated they spent 1 hour or more per month watching Internet TV or other video on-line," (Kiefl, 5).

[14] This term refers to cable and/or satellite subscribers who have cancelled their subscription services in favour of online television and streaming services. Likewise, 'cord-shaving' refers to existing subscribers who downsize their packages to supplement with OTT providers and online streaming services.

[15] In a report released in March 2012, Netflix announced that it was reaching one in ten Canadians, or 10% of the population (CBC News).

4.1 The New Media Exemption Order

Due to mounting public pressure, in 1999 the Commission undertook a review of its approach to new media as part of the obvious changes occurring in the broadcasting system in CRTC 1999-84. Defined as *services* delivered over the Internet, the Commission did not see a reason to further define the scope of NMBUs for the purpose of the proceeding. They noted that to "impose licensing on new media would not contribute in any way to its development or to the benefits that it has brought to Canadian users, consumers and businesses." Prior to 1999, and again after its second extension in 2009, there has been uncertainty about "whether new media services constitute broadcasting in light of the breadth of the definitions of 'program' and 'broadcasting' as set out in the Act." The Commission noted that the majority of services available were predominately alphanumeric in nature, and thus did not fall under the scope of the Act, placing them beyond the CRTC's jurisdiction. In their proceeding, the CRTC sought input and responses on four main questions relating to the regulation of NMBUs[16], focusing the proceeding on the highly competitive nature of the industry, and its potential impact on existing services. Throughout, there was minimal discussion or examination over the impact of NMBU-usage on Canadians' viewing habits, though this is arguably one of the most important facets of the debate that ought to be considered.

The Commission made a clear demarcation between the importance of distinguishing the "ability to obtain Internet content 'on demand'...and the ability of the end-user to 'customize', or interact with the content itself to suit his or her own needs and interests," (CRTC 1999-84). This

[16] These were: 1) In what ways, and to what extent, do new media affect, or are they likely to affect, the broadcasting and telecommunications undertakings now regulated by the Commission?; 2) In what ways, and to what extent, are some or any of the new media either broadcasting or telecommunications services?; 3) To the extent that any of the new media are broadcasting or telecommunications, to what extend should the Commission regulate and supervise them pursuant to the Act?; and 4) Do the new media raise any other broad policy issues of national interest?

exact discrepancy lies at the centre of the current OTT debate. Although "some Internet services involve a high degree of 'customizable' content...[users] have an individualistic one-on-one experience through the creation of their own uniquely tailored content," (CRTC 1999-84). However, the major distinction that the Commission noted was that unlike programming over the airwaves, this would not be available for public consumption. What this analysis does not consider is the phenomenon of cord cutting that is increasingly taking place due to new OTT providers like Netflix, moving Canadians away from a primarily consuming regulated media.

When the Commission extended the NMEO under CRTC 2009-329, they stated that they believed "broadcasting in new media creates opportunities for the broadcasting system to better serve Canadians," and that they did not believe "new media currently poses a threat to traditional broadcasting licensees' ability to meet their obligations. In fact, new media is being used in a complimentary manner by many broadcasters for activities such as providing audiences with the ability to catch up on missed programs, promoting broadcast offerings, and building brand loyalty." The Commission firmly expressed that "broadcasters have the tools to adapt to the challenges posed by technical change and the motivation to incorporate new platforms and formats into their business models," (CRTC 2009-329). There is very little mention in this about the impact on consumers, or on the existing regulatory system. It is worth noting the shift in broadcasters' concerns between 2009 and 2011 when the OTT fact-finding mission began.

Rather than focusing the proceeding on the likelihood of NMBUs to shift Canadian viewership away from traditional broadcasting outlets that are covered under the Act, it focused instead on the presence of Canadian content in this new medium, ruling ultimately that there is sufficient representation of Canadian content on the web. Arguably, this is not where the issue lies in terms of examining OTT and NMBUs in the context of the Canadian broadcasting system.

In CRTC 1999-197, the Commission said "the decision to exempt new media broadcasting undertakings satisfies all the requirements of the Act in that regulation of these undertakings would not contribute in a material manner to the implementation of the broadcasting policy set out in section 3(1)," (CRTC 1999-197). While this may have been true in 1999, it certainly has shifted drastically since then, especially given that the NMEO was extended for another five years in 2009.

4.2 The OTT Fact-Finding Mission

In a similarly desperate cry for regulatory intervention, the examination of OTT was in many ways prompted by the private sector. In May 2011, the CRTC undertook a 'fact-finding' mission to determine the economic and policy implications of OTT providers in Canada due to mounting pressure from public and private broadcasters, as well as industry interest groups including the independent production sector. They broadly defined this proceeding, indicating from early on that this was not to instate a policy, but rather to gather information about the current digital landscape in Canada. They concluded that there is significant change underway which can be attributed to the converging of several factors. "New technologies, service providers and consumer behaviour underpin a transformation that is characterized by greater choice, a global marketplace and new opportunities for Canadian creators," (CRTC, *Results of the fact-finding exercise*).

The Commission noted that with great change comes great uncertainty, citing the fears of many vertically integrated broadcasters about well-established business models that are being challenged. Although there is truth to the notion that investing in new technologies is a major risk, it is difficult to argue that this should hinder fostering a vibrant new media industry that

reflects Canadians' viewing habits. This notion of 'viewing habits' is one of the most contentious areas of the OTT debate. The fact-finding mission revealed that the tools to quantitatively measure the impact of OTT and cord cutting are inadequate to provide a full understanding of content consumption across the industry, and that there is a lack of industry standards in terms of how broadcasters, interest groups, and Canadian users define OTT. The question is whether the need to quantitatively measure their impact is significant enough to delay regulatory action. Is it enough to see the changing landscape and anticipate change? If we look to the Ofcom model, the answer is yes. Importantly, the CRTC has passed on an opportunity to issue a policy that instead seeks not to regulate these entrants, but to instead foster and promote them, as the NFB has proposed.

The fact-finding mission demonstrated that within the Canadian broadcasting industry, there is support for the existence and proliferation of OTT models. Many groups[17] submitted that OTT services provide a means of wider distribution for Canadian content and that it allows for more innovative content. Although many touted the benefits of OTT providers, the question was raised about how Canadian content could remain prevalent with an abundance of content flooding the market. While it is true that there is an increase in content production worldwide, as highlighted in the literature review, Jenkins argues that new media providers have an opportunity to target specific content niches, which allow producers to make more innovative programming with a dedicated audience base. NMBUs offer an avenue to further monetize Canadian content by making it available through other platforms. Simply: more content means wider distribution across more platforms. Unlike the traditional broadcast distribution system where carriage plays a major role for channel selection, placement and packaging, OTT offers a place for otherwise

[17] Google Inc., Netflix, Apple Canada Inc., the CBC, the National Film Board (NFB), Teksavvy, Pelmorex, Canadian Internet Policy and Public Interest Clinic (CIPPIC).

niche content to thrive. It has also provides an outlet for additional Canadian producers to cultivate additional revenues by making many of their prime time revenues available on another platform.

4.3 From Citizen to Consumer

Until recently, broadcasting has been an almost impenetrable medium for new entrants. The absolute barrier to entry of limited spectrum necessitated the need for public regulation and direct intervention through television policies worldwide. In both the European and Canadian cases, this was done through culturally protectionist mechanisms rooted in broader public policy objectives. Programming has always been regarded as a public good, and was regulated as such. Particularly in the Canadian system, programming has always held significant power when addressing regulatory issues, as it seems to be seen as the system's heart. As Motta et al (1997) note in their article, *"Concentration and Public Policies in the Broadcasting Industry,"* the notion of cultural goods as the basis for regulatory intervention—a model perpetuated in the Canadian and European system, is no longer relevant due to changing technology. It is not possible to regulate based on content, given the pervasiveness of Internet-based technologies, because these give consumers complete control over what they watch and when they watch it. In light of this, a top-down regulatory approach cannot continue to exist with any sort of efficacy. To provide a complete picture of these regulatory systems, it is important to accept the assumption that—until recently—television programming was exclusively defined as a public good, consumed over public airwaves. Therefore, because spectrum was limited, broadcasters were duty bound to produce Canadian content that would theoretically reflect the population. This kind of rhetoric is evidenced in nearly all of Canada's broadcasting policy since 1932.

Recent advancements in technology have fundamentally changed our understanding of content consumption both technologically and culturally. With this underpinning and informing much of Canadian broadcasting policy, it is easy to see why the inclination is to continue to pursue a model that perpetuates these values. The question becomes whether we can feasibly regulate OTT providers due to two factors: the technological challenge of the Internet, and the new consumption habits of OTT users. Arguably, OTT providers are the antithesis of the existing Canadian broadcasting system based on technology and content alone. This speaks nothing to their competitive pricing structure and the convenience that existing broadcasters just simply cannot meet.

Although the Commission ruled that new media undertakings were not yet impacting the Canadian regulated broadcasting system in a significant way, the point is moot in terms of how this influences the way one examines the increasing prevalence worldwide of OTT. While it is indisputable that conventional radio and television still represent the primary vehicle for media consumption in Canada, as broadband speeds and caps continue to rise, and as a younger demographic becomes more familiar and comfortable using Internet-based models, it is at the behest of the Commission to properly field these changes, much in the same way Ofcom has, although this does not mean the CRTC should adopt a similar model.

In examining the CRTC's approach to new media (both through the NMEO and the OTT fact-finding mission), there is an obvious 'wait-and-see' approach that hinges on the ability of the regulator to exempt rather than entertain new, flexible regulatory policies to meet changes in technology. Upon close examination of the language, it is evident that the decision to develop a regulatory policy addressing OTT providers and more broadly, new media, is based on the impact these new providers appear to have on the content production industry, basing this

decision on the continued centrality of Canadian content in the broadcasting system. While Canadians are certainly not cord-cutting their cable subscriptions in droves, the trend is increasing enough to indicate that the CRTC ought to be taking a more serious approach if their mandate is to ensure that Canadian content is being fostered through broadcasting.

The notion that regulation should be tied to content and programming is distinctly Canadian. Motta et al (1997) argue that the imposition of content quotas to promote culture is not overly convincing, and exhibits a number of long-term policy problems, which Raboy's work also highlights in the previous sections. They write that content quotas may actually "conceal protectionist temptations which have very little to do with culture," (Motta, Polo, Rey and Roller, 325). In fact, one of the major reasons that OTT has become such a serious policy issue in Canada is that it threatens a deeply established and pervasive system of independent producers and subsidy mechanisms. Given the highly complex nature of the broadcasting system, there are inevitably some significant roadblocks when discussing a strategy to implement regulatory change that must be acknowledged.

OTT providers challenge the Canadian broadcasting and regulatory system in very tangible ways. In addition to fragmenting the market away from conventional television viewing, these new platforms threaten the long established cultural policy objectives that are tied to a Canadian public who consume television conventionally. These include subsidy mechanisms, Canadian content spending and exhibition quotas, advertising models, and genre protection. The CRTC's jurisdiction is challenged in the sense that NMBUs are seen as an affront on the existing regulatory system, threatening the primacy of regulated public and private broadcasters. Further, because the Supreme Court of Canada ruled against ISPs as broadcasters, there is very little the CRTC can do in terms of tangible regulatory mechanisms to protect the existing system. The

only option, it seems, is to create a more flexible system that promotes innovation from these providers.

In this section, I have provided an environmental scan of existing new media approaches in Canada, and contextualized the jurisdictional capabilities of the CRTC to meet the challenge of NMBUs in the broadcasting system. In examining the NMEO and the OTT Fact-Finding Mission, it becomes apparent how significant a challenge NMBUs are to the Canadian regulatory system. This is seen through the challenging environment these services provide both in terms of their classification as service providers, and the attempt to impose a regulatory framework onto a system that simply cannot support some historically rooted regulatory mechanisms that have come to define the Canadian regulatory landscape. Perhaps more importantly, examining these proceedings highlights the variety of perspectives that exist on the regulation of new media, and the potential avenues that may be used to harness, regulate, or exempt these services. In the following section, I will highlight roadblocks in creating a new media policy framework, and will defer to a case study on Ofcom to provide an option for potential consideration in Canada.

SECTION FIVE:
Challenges in New Media Regulation
An OFCOM Case Study

"The public's interest...defines the public interest," (Hood, 61).

It would be naïve to assume that we can simply change the entire existing regulatory structure overnight. As was mentioned in the first section of this paper, re-evaluating the CRTC's approach to new media is only a small fraction of the need for a larger review and development of a national digital strategy for Canada. In this section, I will highlight some of the existing roadblocks to this process, and will provide a brief case study on the consolidation of Ofcom as a potential model we can look to for guidance in achieving greater regulatory flexibility. There are a number of problems for addressing OTT in Canada. While the issue of regulating or not regulating new media and OTT providers is a particularly interesting one that touches on many issues in the Canadian broadcasting system, the assumption that it may be addressed with any swift action is flawed.

Due to the nature of the existing regulatory framework in Canada, all of the legislative power to make amendments and policies for the broadcasting system lays in the Act. Therefore, without a substantial overhaul, we cannot push for a model that promotes regulatory flexibility in any significant way. This stands in stark contrast to the situation in the UK whereby the consolidation of Ofcom was the result of a combined effort for a massive overhaul of the existing legislation and regulatory bodies with years of consultation between concerned parties to arrive at the most appropriate framework. In the same way that the CRTC has taken a risk by not regulating new media, Ofcom was a massive undertaking that required significant regulatory risk, as they effectively dismantled their longstanding regulatory regimes. Without focusing too

heavily on the bureaucratic process of developing new regulation in Canada, there are three major issues of contention when discussing whether or not and how to regulate new media undertakings in Canada if we are looking to adopt a similar model to Ofcom.

The CRTC is an arms-length government body with a focus on regulation in the sphere of telecommunications, broadcasting, and ownership. The CRTC was founded on the idea of creating a national broadcasting system that would seek to promote national culture, identity and employment through the protection and promotion of Canadian content by means of licensing and regulation. The goals of the CRTC "[have] been informed by the mandate of nation building, and it is important to recognize from the outset that the [Act] defines broadcasting in Canada not as an industry but as 'a public service essential to the maintenance and enhancement of national identity and cultural sovereignty,'" (Lorimer, Gasher, Skinner, 154). In its current configuration, the CRTC is comprised of 13 full-time and six part-time commissioners who have been appointed by Cabinet for renewable five-year terms. The 13 full-time commissioners include the chairman, and the vice-chairman of broadcasting, and the vice-chairman of telecommunications. There are Commissioners who represent each of Canada's regions. Although all commissioners are involved in broadcasting decisions, jurisdiction over telecommunications is limited to full-time commissioners.

The CRTC reports to Parliament through the Minister of Canadian Heritage, but also works alongside Industry Canada, which is responsible for the *Telecommunications Act*. Although the CRTC operates at an arms-length to the Federal government, cabinet-mandated directions can override their jurisdiction, as was the case with foreign ownership regulation. In this way, it is too simplistic and incorrect to assume that the CRTC is able to undertake any issue relating to broadcasting or telecommunications for review. In discussing new media, the only

way we could see significant change would be for the Government to mandate a review of the Act to allow a new framework to be undertaken. This will be elaborated on in the following subsections.

Ofcom is the communications regulator in the United Kingdom. Similarly to the CRTC, its scope spans across broadcasting and telecommunications, but has additional jurisdiction over postal services. Ofcom seeks to ensure that "people in the UK get the best from their communications services and are protected from scams and sharp practices, while ensuring that competition can thrive," (Ofcom, *What is Ofcom?*). Like the CRTC, Ofcom's jurisdiction is bound to the 2003 *Communications Act*, which states that its mandate is to ensure that:

> The UK has a wide range of electronic communications services, including high-speed services such as broadband; a wide range of high-quality television and radio programmes are provided, appealing to a range of tastes and interests; television and radio services are provided by a range of different organisations; people who watch television and listen to the radio are protected from harmful or offensive material; people are protected from being treated unfairly in television and radio programmes, and from having their privacy invaded; and a universal postal service is provided in the UK – this means a six days a week, universally priced delivery and collection service across the country; and finally, the radio spectrum...is used in the most effective way, (Ofcom, *What is Ofcom?*).

Some of the main areas Ofcom presides over are licensing, research, codes and policies, complaints, competition and protecting the radio spectrum from abuse. As an organization, its structure is entirely different than the CRTC, although both bodies do oversee many similar areas. Important to note is the difference in the number of decision-making staff between the two organizations that changes its ability to undertake larger policy reviews and directions.

Ofcom is primarily governed by its board, which is comprised of an executive and non-executive branch. This group provides strategic policy direction for the organization, and consists a non-executive chairman, executive directors (including the Chief Executive) and non-

executive directors (Ofcom *How Ofcom is run*). In addition to this group, Ofcom also has an Executive Committee, a Policy Executive, a Spectrum Clearance and Awards Programme Management Board, an Operations Board, a Content Board, and several committees (these, like with the CRTC are assembled for consultation).

In a comparison of the two organizations, it is clear that Ofcom's mandate has moved away from public policy objectives and relegates these instead to the BBC for things like nationalized content and representation. Primarily, Ofcom is concerned with providing an efficient model of broadcasting and telecommunications: this is a service model that places consumer rights first, but these rights are guaranteed by virtue of being a citizen where Ofcom's jurisdiction extends. Unlike the CRTC, which seeks to utilize regulatory mechanisms to implement public policy, Ofcom seeks to provide regulatory intervention on issues of service and abuse (when necessary) to ensure a well used, high quality broadcasting system. In understanding the very distinct structures of the CRTC and Ofcom, we can begin to explore a case study that highlights the UK's approach to new media regulation in light of significant regulatory overhaul.

5.1 The Consolidation and Creation of Ofcom

The decision to consolidate regulatory bodies in the UK was a substantive undertaking that took nearly 10 years to complete. As early as 1995 the Office of Telecommunications (Oftel) had published a three part series (*"Beyond the Telephone, the Television and the PC" I-III*) that surveyed the media landscape in the UK. They noted that the UK's regulated industry was on the verge of serious technological change characterized by the blurring of boundaries between otherwise historically distinct sectors. The second instalment of the work (1998) urged that the UK should seek to adopt a policy framework that "avoid[s] focusing on a particular technology

or a core set of 'services,'" (Oftel, 1998). Instead, they moved for the UK to consider a regulatory framework that adheres and is reflective of the changing nature of the industry. Quite clearly, it asserted that the government must establish what its policy goals are and how regulation can help or hinder these objectives. To accomplish this, Oftel identified three areas that would require policy definitions to address these changes: a three-pronged framework to define economic, social, and political objectives. In doing this, they identified three high level policy objectives for consideration in addressing changes in media: firstly to "deliver the best deal for the consumer in terms of quality, choice, and value for money"; secondly to "secure maximum economic benefit for the UK"; and thirdly to "enhance social cohesion and promote welfare," (Oftel, 1998).

Perhaps more importantly, Oftel identified five secondary objectives. These were: "1) predictable and consistent regulation—but only where needed; 2) the importance of competition; 3) enabling effective competition; 4) consumer protection; and 5) fit with European and international developments," (Oftel, 1998). This assertion shifted the language away from industry players and towards a consumer-friendly regulatory approach with clear ties to social, economic and political objectives. It uniquely identified the potential for competition policy as a basis for broadcasting and telecommunications policy, moving away from long-established public policy objectives. Perhaps most importantly was the acknowledgement that convergence does not only pertain to technology. Rather, it is broadly understood and also includes new ways of doing business and interacting with society.

After years of consultation, Ofcom was created in 2003 following the enactment of the *Communications Act*. Formed by five legacy regulators[18] Ofcom provides an umbrella model for

[18] These were: The Independent Television Commission (ITC), the Broadcasting Standards Commission (BSC), the Radio Authority (RA), the Radiocommunications Agency, and Oftel.

broadcasting, spectrum, and telecommunications in a manner that reflects broader changes in governance and provides a softer, lighter approach to regulation that claims to "democratize power by dispersing and devolving the role of the state, establishing accountable and transparent administration, and engaging multiple stakeholders, including civil society, in the process of governance," (Livingstone and Lunt, 52).

As Paul Smith writes, the establishment of Ofcom was more than just a 'tidy up' of media regulation; rather, it was an "institutional culmination of a significant shift in the focus of UK television regulation, away from the allocation of relatively scarce spectrum to achieve public service objectives and towards the control of market power to facilitate free market competition," (Smith, 2006, 929). Importantly, its establishment was a response to digitalization, whereby the shift required significant policy response. Smith notes that a conservative lens heavily influenced the air surrounding Ofcom's creation, with an emphasis on *laissez-faire* politics. Assuming that the entire industry was moving towards a converged environment of zeroes and ones, policy-makers noted that "it becomes impossible to sustain a regulatory system based on the application of different sets of rules for different forms of communication, such as broadcasting and telecommunications," (Livingstone and Lunt, 52). The change in the UK's regulatory system was indicative of a larger undertaking of the policy framework, whereby, acknowledging the increasing power of consumers, it began to focus more heavily on economics as a basis for regulation. This is marked by a shift in the language from a focus on citizens to a focus on consumers. This view aligns very clearly with the conservative perspective outlined in section one.

As Livingstone and Lunt identify, given the burgeoning individualization of media consumption due to the proliferation of Internet technology, policy makers were forced to

acknowledge that consumption habits in the UK were changing: audiences were no longer passive, and had become extremely active in their ability to make viewing choices, whether through conventional over-the-air, cable or satellite subscriptions, or new OTT providers. They wrote, "today our viewers and listeners are far more empowered.... There can no longer be a place for a regulator...determining what people 'ought' to have," (Livingstone and Lunt, 51). Their definition of a citizen-consumer was uniquely derived from this, acknowledging that Ofcom was developed as a mechanism that would use competition policy as the basis for regulating broadcasting and telecommunications as opposed to the longstanding tradition of only using public policy.

In becoming a 'super-regulator' Ofcom moved away from a model that focused on regulation based on scarcity and cultural protectionism, premised on the vulnerability on the British public. As Smith (2006) explained, in the mid to late 90s in Britain there was a call for a more unified system of communications regulation that could be done most efficiently if all regulatory agencies found a common denominator. For Ofcom, that was economics. With a focus on economy came a focus on consumers, rather than traditional notions of a citizenry. Ultimately, Ofcom presupposes that citizen and consumer interests are one in the same as we shift away from spectrum-limited broadcasting because advances in technology allow us to consume more content than ever before and in new ways. Thus, regulation becomes about protecting individual choice rather than content requirements.

Smith (2006) noted this, seeing the regulator primarily as a body that should seek to protect consumer interest and those citizens who may be vulnerable due to limited access and a growing digital divide. "Citizen interest...narrows the notion of citizenship, associating it (paradoxically) with vulnerability...justifying regulatory intervention is more easily sustained on

the grounds of vulnerability than on the grounds of public value," (Smith, 2006, 60). He continues, noting, "the government or whoever would need to do something to intervene, to protect these citizens and to make sure that they don't get left behind, because the market by itself will not take care [of it]," (60). Consumer-citizens are identified as primarily interested in issues surrounding consumer choice, individual rights, liberalized markets and the risks that might affect them, including price, product information, contract and content options.

The development of a super regulator was the only way to make this substantial of a policy change, given the complex structure surrounding broadcasting and telecommunications regulation. The recognition and legitimization of these new media technologies in the system represent a communications revolution that calls for a regulatory framework that seeks to:

> [Protect] the interests of consumers in terms of choice, price, quality of service and value for money, in...promoting open and competitive markets; maintaining high quality of content, a wide range of programming and plurality of public expression [and] [p]rotecting the interests of citizens by maintaining accepted community standards in content, balancing freedom of speech against the need to protect against potentially offensive or harmful material, and ensuring appropriate protection of fairness and privacy, (Livingstone and Lunt, 53).

The duty of the regulator in a new media environment has become one that furthers the interests of citizens, and the interests of consumers as two distinct, but intertwined parties, understanding that the duality of the citizen-consumer is one whose interests focus on their wants and their individual choices.

5.2 Regulatory Lenses

Ofcom's decision to pursue a unified regulatory strategy is rooted in a belief that regulation should reflect the market: in this case, a converged environment that sees "the ability of different network platforms to carry essentially similar kinds of services and the consequent

coming together of consumer devices such as the telephone, television and personal computer," (Oftel, 1995). Presently, the two approaches adopted by Ofcom and the CRTC could not be more different. On one hand is a model that has embraced convergence, new technology, and has made the regulatory framework as fluid as the technology that it seeks to comprehend. It decisively chose to model its regulation on economics, competition, and to view broadcasting through a traditionally telecommunication lens. It leaves a lot to the hand of the free market and seeks to only intervene when there are issues of access, fairness and quality. In the UK, the regulator has acknowledged that "with the liberalization of telecommunications systems around the world and the growth of 'borderless' technologies like the Internet there will be an increased need to consider issues in the context of international developments as well as purely from a UK perspective," (Oftel, 1995). On the other hand, the Canadian model has drawn "firm, albeit expansive lines in the sand on the application of existing regulation to telecom and broadcasting on the Internet," (Gates, 118).

Author Arlan Gates (2000), provides a critical examination of the use of competition and convergence as a basis for broadcasting regulation. He supports the Commission's decision to exempt new media from regulation, as he believes that they have left the door open to later regulate should they choose to. Public policy objectives change at a much slower pace than goals embedded in economics or technology, and basing regulation on them ensure a certain amount of stability for the system. Gates argues that "competition law may be ineffective in a sector characterized by a fast pace of change in both technology and industry organization," (94). Further, "in the context of convergence, the friction between competition and other types of regulation is occasionally dismissed on the assumption that new technologies, like open markets, will generate competition by default," (104). Gates argues against the Ofcom model writing,

"sector-specific regulation is highly desirable from the point of view of administrative competence. Particularly in light of convergence, it is unreasonable to expect generalist competition authorities to be as knowledgeable about sectors such as telecommunications and broadcasting as the agencies engaged in regulating them," (94). Given the highly complex nature of the Canadian system, this is an important factor to consider.

The model the CRTC has adopted is public interest regulation, which prioritizes social values above economic goals, promotes universal service and imposes domestic content requirements. This model becomes problematic in the face of vertical integration[19] and new media, as sectors that were previously distinct and highly differentiated find themselves intertwined. Traditionally utilized policy tools like universal service (telecom) and content requirements (broadcasting) are sector-specific and these become challenged. As we are seeing with the regulatory model in Canada, this may be irreconcilable in the case of OTT providers, which marry the telecommunication and broadcasting sectors through their content-delivery platform. This regulatory model requires a trade-off between objectives of national regulation and potentially anti-competitive behaviour by these technology companies. What this creates is a climate that Gates refers to as 'reverse dominance': here, new players may be able to dominate the sector due to asymmetrical regulation and competition policy that favours new entrants through a lack of regulation.

Arguably the biggest problem facing the Canadian regulatory model may be the question of whether or not and how to regulate OTT. There is a very practical problem with this

[19] In CRTC 2011-601 *Regulatory framework relating to vertical integration*, the Commission defines vertical integration as "the ownership or control by one entity of both programming services, such as conventional television stations, or pay and specialty services, as well as distribution services, such as cable systems or direct-to-home (DTH) satellite services. Vertical integration also includes ownership or control by one entity of both programming undertakings and production companies. Vertically integrated companies include Rogers Communications Inc., Quebecor Media Inc., Bell Canada and Shaw Communications Inc."

longstanding usage of public policy objectives as the basis for regulation: we have not yet defined these goals in the context of sectorial integration, which leaves broadcasters without a clear indication of how to comply. In many ways, the NMEO has set the industry up for this kind of uncertainty in a way Ofcom has not. Under Ofcom, they have instead adopted a model that is based on increased digitalization and a shift from passive to active consumers. In all, the UK has sought to normalize the relationship between the regulator and the consumer that is founded in economics and centres on five issues that promote regulatory flexibility. These are: content (price, scarcity), choice (growing numbers of consumers and providers), bridging between technology and delivery, critical masses of consumers, and finally, interactivity (Oftel, 1998).

5.3 Roadblocks for creating an OTT/new media strategy

There are a myriad number of issues that would prohibit us from adopting Ofcom's (or any) model in any reasonable timeframe, though this does not mean we cannot look to this as potential option in Canada. Perhaps most importantly, the Act does not directly address Canadians as consumers. Rather, it exists as a cultural document with industrial strategy undercurrents, aiming to guide the sector to foster economic prosperity through public (cultural) policy objectives. The Act uses a set of policy tools to maintain the system, which include: exhibition quotas, expenditure quotas, production subsidies, foreign ownership restrictions, public ownership and access rules that become challenged in this converged environment. It is more than changing the language to reflect 'consumer' instead of 'citizen' in the Act[20]; rather, it is an endeavour to address the changing needs of consumers as these relate to the broadcasting industry and services provided by it. Doing this would require shifting the focus of the Act

[20] 'Consumer' is only used once in the 1991 Broadcasting Act in Chapter 11, Section 46, relating to the CBC's ability to sell consumer goods: "...(*k*) produce, distribute and sell such consumer products as may seem conducive to the attainment of the objects of the Corporation."

towards an industry-centric document that seeks to foster competition and choice, rather than national or cultural identity.

To address this linguistic change, policy-makers and the regulator must answer why and whether we want to continue to protect Canadian culture through a broadcasting framework. In recent decades, it has become clear that it is increasingly challenging to identify common or core attitudes, opinions, ideas or beliefs that are distinctly Canadian, as this definition was initially intended, due to a dramatic broadening of the Canadian cultural landscape. When we discuss Canadian culture, we are no longer limiting that view to the country's three founding peoples—Aboriginals, French, and English. The combination of increasing cultural diversity and the spread of technology has made justifying legislating broadcasting through cultural public policy goals extremely difficult. "If we cannot identify the goals with any degree of precision, it becomes difficult, perhaps impossible, to evaluate whether the policy instruments chosen to advance those goals are the most appropriate," (Hunter, Iacobucci and Trebilcock 5). The regulator must accept that the lines between telecommunications and broadcasting are rapidly blurring, and telecom policy tends to find its base in economic objectives such as access, pricing, and delivery infrastructure. In the case of Ofcom, noting this change, the regulator moved to adopt a more wholly economic model for regulation, deeming cultural policy objectives as too fluid and hard to define to regulate fairly.

If we examine the most recent Act, it contrasts the Ofcom model. One of the defining features of the 1991 Act is that it set out a wider range of social and cultural goals for the Canadian broadcasting system. It defines broadcasting as a "public service essential to the maintenance and enhancement of national identity and cultural sovereignty," (Skinner, 8) and was very much rooted in the technological impact of increasing direct-to-home (DTH) providers.

DTH makes the decision to not undertake a policy framework for OTT and new media all the more perplexing, as the market in 2012 is relatively similar. In 1991, it was considered necessary to review the Act due to the impact of DTH on existing services. The CRTC identified "three intersecting environmental forces as forcing change on the system: changing technology, increasing competition and what has been described as the 'new consumer,'" (Skinner, 8). These were rooted in what the Commission deemed to be the *digital revolution* in Canada. This revolution had given rise to access to new programming and concepts that could be delivered through inter-changeable delivery systems—the argument that the Internet and OTT provide a comparable service is worth noting.

The Commission was motivated to examine the Act due to the expanding consumer choice for media (and media delivery) options in Canada. As Skinner writes, "the greater choice and customization of services heralded by this new technology was framed as 'serving to produce a new consumer environment and consciousness...[that would] transform the captive subscriber into the discriminating consumer," (9). Much in the same way as has been done with the question of OTT, the CRTC instead used the threat of increased fragmentation to focus its energy on Canadian content production, specifically to foster competition through "aggressive encouragement to the production and distribution of more and better Canadian programming," (Skinner, 9), including new production funds and new services. Analysis of the NMEO and OTT fact-finding mission has shown that the Commission's emphasis has remained on the production of Canadian content, and not on its consumption (delivery) by (and to) Canadians.

The regulator is not entirely blameworthy when it comes to the lack of policy (or more precisely, the policy of non-policy) addressing OTT and new media in Canada. To do this would be a narrow accusation that does not adequately address the impact of technology on regulatory

policy. In a C.D. Howe report released in 2010 titled *"Scrambled Signals: Canadian Content Policies in a World of Technological Abundance"* authors Lawson A.W. Hunter, Edward Iacobucci and Michael J. Trebilcock note that there are three related technological developments that have become key agents for change, and are effectively making it impossible to anticipate technological change in the short to medium-term future, with significant impacts on consumers, governments and regulatory bodies. They cite the broadbanding of networks, wireless ubiquity and digital convergence as three major changes that are leading to, as Eli Noam has said, a digital revolution that is the "equivalent of moving from horses, to trains, to personal automobiles, to personal jets all within a few years," (Hunter, Iacobucci and Trebilcock, 1).

The combination of these three factors has laid the groundwork for challenging the Canadian broadcasting system in a tangible way. Better penetration of broadband networks has created an increasingly powerful network through which to transmit information for the creation of individualized content platforms, with wide geographic reach. Further, as technology continues to evolve, there is standardization among file formats removing technical barriers required to share and participate in these kinds of platforms. For OTT providers like Netflix, this is done very simply: the Internet is used to carry the content onto the user's specified platform, whether that is a gaming console, smart television, mobile phone, or computer screen. What this represents is a move away from a 'push' system of broadcasting, towards a 'pull' system—and this is exactly where the regulatory challenge lays for the Canadian system.

As Hunter, Iacobucci and Trebilcock note, the push-driven model of Canadian content promotion that has "prevailed until now, predicated on relatively few channels and audiences with limited choice [a model that] cannot be sustained in the face of a 'pull' driven model of creative content provision where consumers control what they view, when they view it and on

what platform," (2). The authors argue that in this new environment, most of the standard regulatory tools used to promote Canadian content and to support the system are being rendered obsolete. The report categorizes four eras of broadcasting that are overlapping as technology develops—the over-the-air (OTA) era, the 500-channel era, the wired IPTV era, and the wireless IPTV era. The authors assert that the frameworks initially applied in the OTA era are simply no longer suitable as we move towards an increasingly wireless IPTV environment.

When the Canadian regulatory system was developed, the push model was dominant and most well suited for fostering and regulating Canadian content. The nature of this spectrum-limited model is the most conducive for a culturally-protectionist model. As channel offerings and later, distribution platforms developed, the ability to provide a top-down regulatory model was eroded as a pull model became more widely adopted. Wired, and increasingly, wireless distribution platforms like OTT and mobile content foster a system where viewers are able to control the content they view, making it nearly impossible to enforce exhibition quotas.

In light of these changes, there are five issues that challenge the current Canadian regulatory model when discussing OTT and new media providers. Firstly, viewers have the potential to watch video distributed from anywhere in the world—even the utilization of mechanisms like geo-blocking fall outside of the regulatory sphere in terms of acquiring content from non-Canadian sources. Secondly, even if we assume that Canadians will only view content from Canadian websites, the exhibition quota-model is ineffective because there is no way to apply a time-based model to these websites. Thirdly, it is wholly impractical to regulate Internet content. Which websites would we regulate? On what would we base these regulations? Who would monitor it? When the NMEO was extended in 2009, the Commission added a reporting

requirement[21] to all providers defined as broadcasters, with exact details to be determined at a later proceeding. What this means, is presently the only broadcasters required to report on their new media content are those that already fall within the regulated system. Using that metric, if we measure whether or not new media and OTT have significant impact on the availability of Canadian content online, it is unsurprising that the Commission determined there to be significant Canadian content on the Internet. Presently, the only undertakings subject to reporting on new media are private broadcasters and the CBC—groups who are already paying for, and required by condition of license to exhibit Canadian content. It is only logical that they would seek to monetize it through another avenue without regulatory restraints.

Fourthly, the existence of OTT and NMBUs erodes brand loyalty to broadcasters by separating content and network, focusing audiences on the content and not the experience of watching it in a traditional setting. Finally, it erodes foreign ownership regulations by circumventing spectrum-based and regulated methods of delivery through the utilization of ISPs. This is particularly interesting in the case of OTT, as foreign ownership requirements[22] aim to promote domestic culture, under the auspice that domestically produced undertakings will be more likely to foster Canadian culture. We simply cannot assume that foreign OTT providers like Netflix will not do the same. This is why in the 2003 Act that constituted Ofcom, the UK government lifted restrictions that had previously been in place on the foreign ownership of

[21] This stated, "The undertaking submits such information regarding the undertaking's activities in broadcasting in new media, and such other information that is required by the Commission in order to monitor the development of broadcasting in new media, at such time and in such form, as requested by the Commission from time to time," (CRTC 2009-660).

[22] Section 3(a) of the Broadcasting Act specifies, "the Canadian broadcasting system shall be effectively owned and controlled by Canadians." Further, that before a broadcasting license can be issued, that corporation must be incorporated or continued under the laws of Canada or a province, whereby (a) the chief executive officer or, where the corporation has no chief executive officer, the person performing functions that are similar to the functions performed by a chief executive officer, and not less than 80 percent of the directors are Canadians; (b) in the case of a corporation having share capital, Canadians beneficially own and control, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80 percent of all the issued and outstanding voting shares of the corporation and not less than 80 percent of the votes.

analog television and radio broadcasters. Presently, Canada is the only developed country that continues to place foreign investment and ownership restrictions on BDUs.

The second major area of contention when looking to adopt Ofcom's regulatory model is that the Act is a technologically neutral document that results in a definition of broadcasting that is very difficult to treat practically. In early 2012, the Supreme Court of Canada overturned an appeal that called for Internet service providers (ISPs) to be considered as broadcasters under the Act. The court overturned this decision, arguing that the terms 'broadcasting'[23] and 'broadcasting undertaking' were interpreted and implemented in a context and language that does not mean to capture them as broadcasters, but rather as modes of transmission. They asserted that the Act makes it clear that 'broadcasting undertakings' are assumed to have some measure of control over programming, citing section 3(1) that focuses directly on the marriage of broadcasting and content. The SCC ruled that ISPs do not in fact carry out broadcasting, as the Act interprets this as an endeavour that is duty-bound to public policy objectives. Rather, ISPs only provide access to content as required by their end-users, meaning that they do not engage with these larger public policy objectives of the Act.

Prior to the Supreme Court hearing, in 2010 the CRTC asserted that the Act was meant to be technologically neutral, that the "mere fact that a program is delivered by means of the Internet, rather than by means of the airwaves or by a cable company, does not exclude it from the definition of 'broadcasting,'" (Federal Judicial Affairs Canada). The Commission maintained that the Act should evolve with the development of new means of transmission and should apply regardless of the technology used in broadcasting programs. This logic is fundamentally flawed

[23] Section 2 of the Act defines broadcasting as "[a]ny transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place."

when we begin to question the existence of OTT providers; they act as content aggregators by using the Internet to deliver their programming. We can see that scenarios like this are exactly why Ofcom moved to distance its regulation from the technology itself. There are two interpretations of technological neutrality when discussing the Act. First is that regardless of the technology being used, content is being delivered and that makes any delivery mechanism a broadcaster. Second is that the terms 'broadcasting' and 'broadcast undertaking' make it very clear that the delivery mechanism plays an active role in programming, which is what makes it a broadcaster. This is what the SCC ruled in favour of. This kind of ambiguity is exactly what makes the Act so difficult to put into practice or to amend when there are significant changes in technology. In reality, unless the Commission undertake a review of the Act, they have no choice but to continue exempting new media and OTT providers.

Finally and perhaps most importantly is the judicial structure of the Act. It provides the Commission with only two options: to license, or to exempt. Because it is entirely *ex ante* in its application, there is no flexibility to build an *ex post* regime, unlike the case of Ofcom, where rules for exhibition or content regulation may be applied in this way. Under the current confines of the Act, the CRTC must either exempt new media undertakings, or attempt to create a licensing framework by amending the Act. At this juncture, they have decided that given the limited information in terms of consumer usage and their impact on advertising and subscription, they are unable to make an informed decision on whether and how to regulate OTT providers and new media. In their 2007 report to the CRTC, Laurence J.E. Dunbar and Christian Leblanc provided a holistic analysis of the regulatory framework for broadcasting in Canada, including recommendations on the limitations of the Act as they relate to new media undertakings like OTT.

The statutory framework established in the Act directs all regulatory decisions made by the Commission to adhere to the implementation of the policy goals established in Section 3(1). Dunbar and Leblanc believe the Commission should seek to adopt a 'smart regulation'[24] approach in light of challenges arising from new media that would require the regulator to engage in an approach to regulation that would help clearly identify which policy objectives they are seeking to pursue and whether it can be adequately addressed in the absence of regulatory intervention. The authors recommend that the CRTC adopt a competition-reliant model for regulation. They note that in Canada this has always existed, but it has been artificially inflated and regulated through mechanisms like limits on market entry, regulated programming formats, advertising restrictions, genre protection, restrictions on program content and production, and on distribution and marketing of these programs. Facing rapid technological change, the report urges the Commission to pursue more competition and more consumer choice to best meet their policy objectives (Dunbar and Leblanc, ix).

Importantly, the report grounds the Commission's decision to exempt new media as informed by a viewpoint centered on a 1999 Internet-era in Canada. That is to say, that many of the issues identified in the original NMEO are simply no longer an issue today. The Internet is no longer primarily a text-based information medium; there is high penetration of broadband across the country; multiple platforms have been developed for online content delivery; there are more resources than ever being spent by advertisers online; and there has been a marked shift from short-to-long form programming (video) available online from broadcasters. The Internet is a much different place than we might have imagined it in 1999—the concept of something like Netflix was truly incomprehensible at the time of the exemption order. The NMEO is simply no

[24] They define 'smart regulation' as a methodology whereby regulation is directed at achieving policy objectives through achievable means; whereby compliance must be within the control of the regulated entity; there are performance-based standards; and finally, employs mechanisms that are the least costly and intrusive (vii).

longer relevant for addressing new media and OTT in Canada. In 1999 and again in 2009 the CRTC was not ready to accept that Internet programming could ever become a substitute for conventional television.

CONCLUSIONS

In this paper I have attempted to provide an environmental scan of the existing new media landscape in Canada through five sections. In the first section, I identified key concepts for the study of new media, provided a literature review that corresponds to the three lenses through which we can view OTT regulation. In the literature review, I identified three important perspectives in the discussion of media regulation. In the second section, I provided the theoretical framework for institutionalists and explained the case study methodology of the work.

To effectively understand the existing regulatory structure in Canada and the approach adopted by the CRTC in the NMEO, an overview of the CRTC and the history of regulation in Canada beginning in the 1920s with a focus on the Aird Commission and the 1932 *Canadian Radio Broadcasting Act* were also included in the third section of this paper. In the fourth section, I provided an analysis of the NMEO and the OTT Fact-Finding mission undertaking by the CRTC in 2011. Finally, in this fifth section I analyzed a case study of the OFCOM model and identified roadblocks for developing a new approach to new media regulation in Canada, arguing ultimately that we require a larger, national digital strategy to most effectively achieve this.

In surveying the existing approach to new media in Canada, and juxtaposing this against the country's depth of regulatory history, it is evident that the existing framework is under considerable duress due to these NMBUs, particularly OTT providers like Netflix. The traditional model of linking technology to a regulatory framework is no longer the most appropriate in the face of convergence. This is evidenced through the rapid pace of development, the penetration of broadband Internet, and new content platforms that have facilitated a move toward individualized content. A top-down regulatory model simply cannot exist with any

efficacy in this environment, and we must begin to re-imagine the Canadian broadcasting landscape.

The scope of this paper is only limited in its examination of the new media environment in Canada, and requires additional exploration. This paper may have provided a more holistic view of the new media landscape in Canada by examining consumption habits in younger demographics, as these groups are very realistically at a risk for having never watched conventional television as we know it today. As our audiences become more technologically savvy, we must understand how and why they are turning to new media. Further, in addition to examining the OFCOM model, Canada would do well to explore other jurisdictions' approaches to new media, including the United States, Japan, and Australia, among others. To provide the most effective solution, we would do well to gather the most information as possible to inform our decisions and policy directions.

Until the Act is adapted to allow for more flexibility as it relates to broad regulatory application, the Commission's (and broadcasters) hands are tied when it comes to the discussion of new media providers. In recent years, the Commission has pledged a commitment to regulatory flexibility and easing regulatory burden. This can be seen through CRTC 2010-167, the group-licensing regime for private, English-language broadcasters. This framework allows broadcasters to re-allocate funds for Canadian content spending, and lowers requirements on types of programming, among other major changes. While this has been heralded as a step in the right direction, ultimately this is still a system that applies to a *licensed* portion of the broadcasting landscape. This option is not open for OTT providers, as they would need to be licensed in order for the Commission to be provided any flexibility in their regulation.

While some agree that to regulate Canadians' consumption habits via NMBU platforms like Netflix while the rest of the world continues to compete in an open market would be counter-productive, others see the CRTC as continuing to be in the best position to provide policy direction on issues relating to new media, and as centrally important if we hope to see a larger national digital strategy for Canada implemented. This is the line of argumentation I have taken in this paper. We must, as we begin discussions about re-assessing our regulatory framework look towards finding a balance between competition and public policy objectives through the creation of a flexible model that addresses consumer and citizen needs in this changing landscape. We should seek to minimize regulatory burden and promote innovation through the new outlets provided by OTT and new media for the promotion of Canadian content and other public policy objectives. The dichotomy of either exempting or licensing new media is just as problematic as arguing that we must look either at politics, or economy, equity, or efficiency, public, or private. Because of its converging nature, new media blurs lines and forces us to re-examine traditional methods for regulation.

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MA MAJOR RESEARCH PAPER

Going Over-the-Top:
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Siobhan Ozege

Professor Tuna Baskoy

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