



**Canadian Conference of the Arts
Irregular Regulation &
Canadian Television Program Funding
February 23rd, 2007**

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Executive Summary

- 1 The CCA welcomes the Committee's decision to allow a much needed public debate about the decision by two licensed cable companies to withhold monthly payments to the Canadian Television Fund (CTF). However, the CCA believes that the current crisis should be looked at within a full-picture examination of the Canadian Broadcasting ecological system and of how efficient it is at ensuring that the national cultural objectives set out in the *Broadcasting Act, 1991* are met, something which the CRTC appointed Task Force is not about to do.
- 2 As several witnesses have pointed out, the CTF is critical to Canadian television programming and therefore, to Canadian cultural policy. Every dollar allocated by the CTF triggers several more dollars in independent program production telling Canadian stories, creating programs for our children or expounding our views on the world we live in.
- 3 The Fund is part of an overall strategy to ensure the vitality of an independent creative sector as part of the overall broadcasting system, a key participant in achieving the cultural objectives included in the *Act*. Canadians benefit in the form of new and often award-winning programs in genres difficult to finance in this country, as well as economically through employment and income opportunities in this important sector.
- 4 Contrary to the reasons put forward by the media magnates, your Committee has heard ample evidence that the CTF is effective, efficient and accountable and that its track record shows that it has all the internal mechanisms and dynamics to adapt to change without any of the stakeholders having to resort to what is tantamount to civil disobedience.
- 5 The allegations of Shaw and Québecor regarding CTF inefficiency and lack of accountability have managed once more to deflect attention from the true emergency in our broadcasting system: inadequate funding structure and regulation based on blind faith that often seems better at ensuring financial profits of broadcasters and distributors than attaining national cultural objectives.
- 6 Facts show that the CRTC's purposeful creation of highly-concentrated broadcasting and distribution ownership and its unaccountably blind faith in deregulation have not generated the programming promised so many times to Canadians over the past 30 years, at least in English Canada. The current state of regulation and, more to the point, the regulator's repeated disinclination to enforce it, have led to this situation where the whole production sector can be taken hostage by powerful media conglomerates legitimately concerned only with their bottom line. These conglomerates seek less regulation, conveniently forgetting that without regulation and financial support, they themselves would not exist.
- 7 We concur with other witnesses that the cable companies' decision to suspend monthly remittances to the CTF is, in the current state of affairs, entirely legal. It is however entirely within the powers of the CRTC to plug the loophole the cable operators have used to exert political pressure for their own benefit, but due process and the requirement to give the public an opportunity to comment will take time and under the best of circumstances, several weeks at least. If and when this process takes place, the CCA will have many suggestions to make in due course.

- 8 The CCA is very concerned about the process put in place by the CRTC to make changes to the CTF. We are concerned about any solution “negotiated” behind closed doors and we question the legitimacy or even the legality of the approach adopted by the CRTC. Any substantial change to the current system which could not be resolved by the CTF Board itself should be the object of a public CRTC process where all Canadians have an opportunity to intervene. Suggesting that the CRTC will hold a public hearing after an August 2007 report, when the main purpose of the CRTC Task Force itself is to achieve a consensus among the major players renders the utility of any public comment in such a public hearing highly questionable.
- 9 The current crisis clearly raises, in a very forceful way, the fundamental question of who actually makes decisions regarding the cultural policies and strategies in Canada. As Mr. Douglas Barrett, the Chair of the CTF, said at the opening session of your hearings:

“...the real question here today is this: Who is to be primarily responsible for determining and designing the appropriate structures for supporting television production in Canada with public resources. Is it to be Parliament, its Ministers and officials plus the mandated regulator? Or, is it to be private stakeholder groups with the financial levers to drive the debate?”
- 10 Pending proper action by the CRTC to remedy the loophole that has led to the current *bras de fer* and to avoid considerable damage to the broadcasting system brought about by possible repeats of unilateral actions on the part of the recalcitrant parties, the CCA asks that the government ensure a short-term, interest-free loan to the CTF to the full level required for it to meet its commitments.

I The CCA welcomes the Standing Committee's intervention

- 1 The Canadian Conference of the Arts (CCA) welcomes the decision by the Standing Committee on Canadian Heritage to hold meetings to discuss the funding of the Canadian Television Fund. It is of utmost importance to debate in the open the current *coup de force* operated by some powerful players in the system who, out of self interest, have taken the whole television production environment hostage.
- 2 The CCA is the oldest and most broadly based cultural umbrella organization in Canada. It encompasses all cultural disciplines and walks of life. Its mission is to foster enlightened debate about federal policy issues affecting the whole Canadian cultural sector, from individual creators to institutions and industries.
- 3 Irrespective of its distribution platform, televisual content is the most consumed form of cultural expression in our country and it provides a major expression of our cultural national identity. This is why the current crisis is of such importance to Canadians at large and to the CCA in particular. We therefore thank you for having this opportunity to provide the Members of the Committee with our views.
- 4 The CCA believes that the current crisis should be looked at within a full-picture examination of the Canadian Broadcasting ecological system and of how efficient it is at ensuring that the national objectives set out in the *Broadcasting Act (1991)* are met. The CTF is an important part of this system, but so are CRTC regulation and how it is enforced, the overall funding of the system, the role of the public broadcaster, etc.

II Criticisms of the CTF: unfounded and unproven

- 5 The Committee has heard ample evidence that the CTF is effective, efficient and accountable and, as its own history shows convincingly, that it has all the internal mechanisms and dynamics to adapt to change without any of the stakeholders having to resort to what is tantamount to civil disobedience.
- 6 We value the CTF. We are confident that it is well administered. We agree that the 'double majority' voting system described by the CTF's chair ensures that taxpayers' and cable subscribers' funding is not allocated to vested interests, but in the interests of Canadian independent program production. To function in a business-like manner our cultural sector requires the same stability that every other business sector demands. We therefore welcomed the statement by the Minister of Canadian Heritage when she appeared before the Committee on Tuesday, February 13, 2007, that her "first responsibility is to ensure there is stability in the [broadcasting] system". We also support the Minister when she says that it is the responsibility of the Canadian Radio-television and Telecommunications Commission (CRTC) to ensure that the system works from a regulatory point of view and to see to it that its authority is respected and its regulations and conditions of licence respected. Unfortunately, as a close examination of past history shows, the CRTC has never really enforced its own decisions.
- 7 Accordingly, in our view, the true genesis of the current crisis lies not with the CTF or even with the two cable dominant companies, but with the CRTC itself. Unfortunately, nothing that was said by CRTC officials when they appeared in front of you indicates that things will improve on this front.

III Cause of the crisis: lax regulatory language

8 As was demonstrated through the hearings, the main reason this crisis exists is because the CRTC's 1997 regulation is poorly phrased and only requires BDUs to remit payments to the CTF once a year. Section 29(6) of the CRTC's *Broadcasting Distribution Regulations*, for instance, specifically directs large BDUs to remit the CTF payments once a year and as late as August 31. (See Appendix B: *The long and short of CRTC CTF Regulation*)

9 CRTC Circular No. 426¹ was clearly designed to provide guidance to those confronted with the interpretation of section 29. Unfortunately, the monthly remittance requirement is not set out in the *Broadcasting Distribution Regulations*, but **only** in this Circular:

Remittances to the CTCPF and to independently-administered production funds must be made on a monthly basis, no later than the fifteenth working day of the month following the month to which the fund remittance pertains. As an example, the remittance for the month of January 1998 must be made no later than the fifteenth working day of February 1998.

10 The existence of a CRTC "Circular" may clarify the CRTC's expectation about how BDUs will remit payments to the CTF, but has no legal force in law. In section 32(2)(b) of the *Broadcasting Act, 1991* Parliament established penalties for corporations that contravene or fail "to comply with any regulation or order" made by the CRTC. The legislation clearly does not refer to "circulars":

Offences

32.

....

[Contravention of regulation or order]

(2) Every person who contravenes or fails to comply with any regulation or order made under this Part is guilty of an offence punishable on summary conviction and is liable

...

(b) in the case of a corporation, to a fine not exceeding two hundred and fifty thousand dollars for a first offence and not exceeding five hundred thousand dollars for each subsequent offence.

11 It is also our understanding, following a very brief review of the broadcasting licences held by certain major cable companies, that the CRTC has not attached conditions to these licences requiring that remittances to the CTF be made monthly. (If the monthly-remittance requirement were attached as a condition of licence, section 33 of the *Broadcasting Act, 1991* provides for a summary conviction offence.²)

12 It is perhaps noteworthy that even if Shaw and Québecor did not comply with the CRTC's regulation by September 1, 2007 – thereby subjecting themselves to the

¹ CRTC, *Guidelines respecting financial contributions by the licensees of broadcasting distribution undertakings to the creation and presentation of Canadian programming*, Circular no. 426 (Ottawa, 22 December 1997)

² "33. Every person who contravenes or fails to comply with any condition of a licence issued to the person is guilty of an offence punishable on summary conviction."

possibility of prosecution under section 32(2)(b) – they would probably make more money than they would lose to a possible fine. Under the *Act*, the maximum fine for a first offence for each company is \$250,000. Shaw has indicated that its total funding amounts to \$56 million per year³ – *i.e.*, an average of \$4.6 million per month or \$37.3 million over the 8 months from December 2006 to August 2007. Assuming for the sake of argument that Shaw simply invested its monthly remittance in Government of Canada short term bonds (yielding a 4.08% return), it is possible that Shaw could earn several million by the end of August – far more than the maximum penalty for failing to remit the money at all. Viewed from that angle, the tactics taken by Shaw seem even more like a well calculated risk by a shrewd businessman.

IV Is the crisis over?

- 13 We agree that a serious crisis has threatened our broadcasting system, stemming from the unexpected decision by Shaw and Québecor to use a loophole in the current regulatory regime to withhold monthly payments on the annual remittances they are required to make to the Canadian Television Fund (CTF). While we welcome the current truce, we do not believe that the crisis is over because of the fundamental issues it has raised and the way it is being handled.
- 14 We suggest that part of the problem confronting Parliament is the CRTC’s decision in the early 1990s to begin regulating using persuasion, rather than the rule of law and well-established standards of enforceable and enforced regulations. The CRTC’s “moral suasion” model of regulation based on the good faith of licensees ignored clear evidence that Canadian broadcasting is not a competitive marketplace, but rather an oligopoly tightly controlled by a very small number of large and increasingly vertically-integrated companies.
- 15 It is our position that the behind-closed-door “negotiations” engineered by the CRTC with the full blessing of the government is not the proper way to deal with an issue which affects the public interest and is of concern to all Canadians. To our knowledge, it is the first time that the CRTC has set up a Task Force which will operate totally behind closed doors. There may indeed be a need for some closed door sessions, but as a minimum, the CRTC must hold public hearings once its Task Force has presented its report. Yet, if the main purpose of the CRTC Task Force itself is to achieve a consensus among the major players, of what utility will a public hearing after such a consensus is reached behind closed doors actually be? And exactly where is the transparency and public accountability in this process?
- 16 Based on the history of this crisis and on the CRTC track record of not enforcing its own regulation and conditions of licence, anything short of open and public scrutiny of the outcome of this *coup de force* is likely to be based more on industrial than cultural considerations, as borne out by the language used throughout the appearance of the

³ Jim Shaw, *Letter to Chair of the CTF* (20 December 2006). Since individual cable companies’ remittances are not set out in the CTF annual reports, we are not entirely sure how this figure is calculated, Mr. Shaw later notes in his letter of 20 December 2006 that his company has remitted “over \$350 million in direct subsidies to the Canadian production industry.” If Shaw Communications remitted \$56 million per year since 1994, however, when the CPF began operations, it should have contributed over \$650 million (\$56 x 12 years). If Shaw has remitted payments to the Fund since 1994 for a total of \$350 million, its annual payments would amount to \$29 million, or half of what Shaw says it is now paying.

CRTC at the hearing on February 22. The clearly stated cultural objectives of the *Broadcasting Act* were never mentioned in the discussion, whereas once again, industrial and commercial considerations seemed paramount in the mind of the regulator.

V What can be done now?

A. Short-term bridge financing

- 17 Given the refusal by Shaw to guarantee that it will abide by the spirit if not the letter of the law if it does not get the changes it deems have been guaranteed to it and given the apparent decision by the CRTC not to amend the situation that led to the crisis, we remain concerned that the television industry may find itself in the same situation in a few months if the media conglomerates do not like the results of the current exercise.
- 18 After hearing the Heritage Minister repeat over and over again (and rightly so) that it was the CRTC's responsibility to ensure its decisions were respected, we were indeed surprised to hear that the CRTC does not intend to proceed immediately to amend the current situation, unless there is a repeat of the tactics employed by Shaw and Vidéotron. We were particularly surprised to hear the Chair of the CRTC say that this situation could be corrected within two weeks if necessary. It seems to us that the necessity of proceeding is self evident and we believe that as a minimum, existing procedures demand at least a 30 day gazetting notice on the part of the Regulator. *We therefore ask that the Minister instruct the CRTC to start the process immediately to eliminate the loophole which has made the withholding of monthly payments possible and avoid any future repeat performance on the part of the recalcitrant cable operators.*
- 19 We also request that in the eventuality of any broadcasting distribution undertaking resorting to muscle-flexing tactics similar to those used by Shaw and Québecor prior to the mending of existing regulation, the government ensure a short-term, interest-free loan to the CTF to the full level required for it to meet its commitments.
- 20 Some government's Members of the Committee have suggested that obtaining short-term funding to support the CTF's work during the critical April-August period may be difficult. In the past, however, the Canadian government has provided the CTF with short-term funding. In June 2003, for instance, the government increased its funding for the Fund by \$12.5 million, advancing this money against the CTF's funding for the 2003/2004 fiscal year. We are unclear why the current government cannot provide similar bridge-financing for the five months from April to August 2007, particularly at a time where another substantial budget surplus is forecast.
- 21 We agree with the CRTC that the recent Federal Court decision with respect to Part II licence fees applies to distributors' payments to the CTF. In *Canadian Association of Broadcasters v. Canada*, 2006 FC 1482 (CanLII) Justice Shore used a five-part legal test to conclude that the Part II fees constitute a tax. He found in particular that that the Part II fees were not imposed as a charge for a service or to finance a regulatory scheme, and were deposited into the federal government's Consolidated Revenue Fund to be used for general revenue purposes. These two characteristics of a tax are absent in the case of the CTF: first, the CRTC's regulation requiring distributors to support Canadian programming financially was imposed to finance Parliament's regulatory scheme for Canadian broadcasting, and second, the regulation ensures that the CTF

receives the funds for specific programming purposes. To alleviate any fear that the federal government may have with respect to short-term bridge financing to the CTF due to the Part II licence fee case, we urge it to request an opinion from the Department of Justice, as quickly as possible.

B. Broadcasting Act, 1991 solutions

- 22 We agree with the CRTC that the *Act* does not offer any immediate solutions to the problem created by Shaw and Québecor.
- 23 Although the broadcasting legislation enables the Governor in council to issue direction to the CRTC, section 7 of the *Act* clearly establishes that such directions may only be made regarding “broad policy matters” related to Parliament’s broadcasting policy and its regulatory policy (ss. 3(1) and 5(2), respectively). Although, ultimately, it would be for the courts to decide whether a GIC direction to require monthly payments by BDUs to the CTF is a ‘policy matter’, specific directions about monthly payments by specific licensees to a specific funding mechanism do not seem to fit easily into the category of ‘broad policy matters’.
- 24 As no regulations have yet been breached, the main recourse available to the CRTC at this time is to amend its regulation. Amending the regulation will require a public process, including the publication of the proposed amendment in the *Canada Gazette*, and a reasonable opportunity for public comment.
- 25 The CRTC could decide to impose monthly-CTF-payment requirements on both Shaw and Québecor by adding conditions to their BDU licences. However, at least five years would have to have passed since these licences were issued. We have not undertaken the in-depth research required to determine when each of the many BDU licences controlled by Shaw or Québecor was last renewed. We note, however, that the CRTC granted a two-year licence renewal for Shaw’s Star Choice DTH undertaking in 2001 (as a penalty for Shaw’s breach of conditions of licence for Star Choice).⁴ The licence was to expire in August 2003. Assuming the licence was renewed at the time, for either another short term or a full 7-year licence term, five years have not passed since the licence was renewed. The CRTC cannot therefore impose conditions of licence on the Star Choice licence requiring monthly payments to the CTF.
- 26 The CRTC could consider issuing a mandatory order. Leaving aside the legal question of whether the CRTC would be entitled to issue an order to Shaw and Québecor to comply with a Circular requirement, the CRTC would be required to hold a public hearing. The *CRTC Rules of Procedure* do not clearly set out the notification and timing requirements for such a hearing, but in the case of licensees’ applications to the CRTC, notice of such hearings must be published at least 30 days before such hearings take place.

Solution	Description	Time frame
GIC direction	S. 7 (1) of the <i>Act</i> enables the Governor in Council to issue policy directions of general application on broad policy	<ul style="list-style-type: none"> consult CRTC before publishing proposed order (s. 8(4)) publish proposed order in <i>Canada</i>

⁴ See CRTC, *Short-term licence renewals for the satellite relay distribution undertakings operated by Cancom and Star Choice*, Decision CRTC 2001-288 (Ottawa, 28 May 2001).

	<p>matters regarding the policy objectives in s. 3(1) or the regulatory policy in s. 5(2)</p> <p>S. 7(2) provides that the GIC may not make an order about a particular licence or licensing matter</p>	<p><i>Gazette</i>, and invite comments from interested parties (s. 8(1))</p> <ul style="list-style-type: none"> • lay copy of order before each House of Parliament on any of first 15 days on which the House is sitting after making the order (s. 7(5)) • consult with CRTC before making order (s. 7(6)) • Implement proposed order after 40 sitting days (s. 8(3))
Prosecution for breach of regulation	S. 32(2) allows prosecution of licensees that contravene a regulation	<ul style="list-style-type: none"> • Court rules apply
Imposition of new condition of licence	S.9(1)(c) allows CRTC to amend any condition of licence 5 years after licence has been renewed or issued	<ul style="list-style-type: none"> • Requires notice to be published in <i>Canada Gazette</i> (s. 19) • Requires public hearing unless CRTC is satisfied that hearing not required (s. 18(2))
Suspend licence	S. 9(1)(e) allows CRTC to suspend any licence (CRTC suspended broadcasting licence of Standard Radio's CKFM-FM for 3 days in 1988 – see Decision CRTC 88-512)	<ul style="list-style-type: none"> • Requires public hearing (s. 18(1)(d)) • Requires notice to be published in <i>Canada Gazette</i> (s. 19)
Revise the regulation	S. 10 allows the CRTC to make regulations	<ul style="list-style-type: none"> • Requires notice of proposed regulation to be published in <i>Canada Gazette</i> (s. 10(3)) • Requires reasonable opportunity for public comment (s. 10(3))
Issue mandatory order	S. 12(2) allows CRTC to issue orders enforceable by the courts	<ul style="list-style-type: none"> • Requires public hearing (s. 18(1)(d)) • Requires notice to be published in <i>Canada Gazette</i> (s. 19)
Hold public policy hearing	<p>S. 18(3) allows the CRTC to hold public hearing, report, issue any decision or give any approval in connection with a complaint or representation regarding a matter under its jurisdiction if it believes it would be in the public interest to do so</p> <p>S. 15(1) allows the GIC to require the CRTC to hold hearings or report on any matter within the CRTC's jurisdiction</p>	<ul style="list-style-type: none"> • Requires notice to be published in <i>Canada Gazette</i> (s. 19) • Minister must consult with the CRTC regarding any proposed request (s. 15(2))

VI Conclusion: A call for transparency on cultural public policy matters

27 We appreciate the opportunity to comment on the unwarranted, untimely and fundamentally unnecessary controversy surrounding the CTF. This controversy has its

origin in a poorly-worded CRTC regulation that should be reviewed in a public process and amended afterwards by the CRTC.

- 28 We concur with other witnesses that the cable companies' decision to suspend monthly remittances to the CTF is, in the current state of affairs entirely legal. It is however entirely within the powers of the CRTC to plug the regulatory loophole, but due process will take time under the best of circumstances. The CCA has many suggestions to make if and when this process occurs and will intervene in due course.
- 29 We support the CTF and its Board. The CCA is concerned about attempts to describe the current crisis as an acceptable way of bringing about change and that "negotiations are in order". We are particularly concerned about any solution being "negotiated" behind closed doors. Any substantial change to the current system which could not be resolved by the CTF Board itself should be the object of a public CRTC process where all Canadians have an opportunity to intervene.
- 30 On February 20, 2007, the CRTC announced that it was setting up an internal Task Force under the chairmanship of its Vice President Broadcasting "to develop a consensus to resolve the concerns raised by stakeholders or, failing that, to set out possible options to resolve any remaining issues. The Task Force will make its final report public. *If it is required or deemed advisable based on this report, the Commission will then issue a public notice and hold a hearing. The work of the Task Force requires intense interaction and the utmost openness between all stakeholders, and may necessitate the sharing of confidential information. The work must therefore be conducted in confidence.*"⁵ (our emphasis)
- 31 The CCA is deeply concerned by this CRTC's announcement for a number of reasons. It is in our view remarkable that without any formal complaint to the regulator by either Shaw or Vidéotron, that without any type of public process, scrutiny or independent analysis, the CRTC's Press Release simply echoes the cable companies' argument, agreeing that there are "serious concerns" about the CTF, that these concerns cannot be addressed within the existing structure of the CTF and that the CTF's Board of Directors has failed to address the concerns.
- 32 A second reason for concern is the decision to create the precedent of a purely CRTC internal Task Force operating behind closed doors and by invitation only. We question the legitimacy or even the legality of the solution adopted by the CRTC. Any substantial change to the current system which could not be resolved by the CTF Board itself should be the object of a public CRTC process where all Canadians have an opportunity to intervene. Any other approach may feed suspicions that a tacit political accommodation may already have been reached with the two companies involved in this muscle flexing exercise, as suggested in the testimony of Mr. Jim Shaw in front of the Committee.
- 33 A third reason for concern is that based on the testimony of CRTC officials, it seems that once again, the review of the CTF will be treated narrowly as a stand-alone issue, instead of being examined broadly in terms of the Fund being one part of much bigger system whereby the production and exhibition of Canadian audiovisual content is ensured.

⁵ CRTC News Release, February 20, 2007

- 34 Pending proper action by the CRTC to remedy the loophole which has led to the current *bras de fer*, we ask that to avoid considerable damage to the broadcasting system brought about by possible repeat of unilateral actions by any distributor, the government ensure an interest free loan to the CTF to the full level required to maintain the integrity of the television production system.
- 35 For the same reasons, we ask that the Minister instruct the CRTC to immediately start the process required to amend BDU *Regulations*, so as to eliminate the loophole which has made the withholding of monthly payments possible and avoid any future repeat performance on the part of the recalcitrant cable operators
- 36 Finally, we ask the Members of the Committee to urge the CRTC to
- a. Not prejudge the allegations of Shaw and Québecor;
 - b. Give paramount importance to the cultural objectives of the *Broadcasting Act* in whatever process it follows in its study of the CTF;
 - c. To allow for a meaningful open process in this matter;
 - d. As suggested by the Canadian Association of Broadcasters at the February 20 hearing and in keeping with the Regulator's mandate and the spirit of the *Broadcasting Act (1991)*, to broaden the debate by launching a full review of the funding of audiovisual content on all distribution platforms, including new media.
 - e. to Review the implications of the highly-concentrated broadcasting and distribution industries with respect to compliance with Parliament's broadcasting policy.

Appendix A: The origins, governance and funding of the CTF

37 Canada's cable television companies first proposed the idea of a programming fund to which they would contribute voluntarily at a CRTC hearing in 1993. The CRTC built on this proposal to create a fund with more dedicated resources. In 1994 the CRTC formally announced the establishment of the Cable Production Fund (CPF), and set out its fundamental operating principles and guidelines.⁶ The CRTC

... determined that increased licence fees would be the most appropriate means of stimulating Canadian production, by serving to maintain and increase the quality of programming and by attracting private investment through increasing the revenue stream generated by Canadian programs.

38 We understand that from 1994 to 1996, BDU payments to the CPF were voluntary, and tied to the suspension of the CRTC's sunset rule on capital expenditure rate increases (or "Capex").

39 Capex refers to the rate increases paid by subscribers to fund capital projects by cable companies in whole or in part. Beginning in 1968 when the CRTC began regulating cable companies, once these increases entered the base fee paid to cable companies they were never removed. (This stands in contrast with the CRTC's general treatment of telecommunication companies – there, increases granted for capital expenditures were typically removed once the expenditures had taken place.) In 1990, two decades after beginning to regulate cable companies, the CRTC decided to introduce a sunset provision:⁷ it required cable companies to begin returning Capex increases levied after 1986,⁸ 5 years after these were granted.

40 In 1993 the CRTC agreed to suspend the sunset provision for Capex, by allowing cable companies that remitted half their Capex to the CPF to retain the other half. In 1995, 129 cable companies remitted \$27.9 million to the CPF – and presumably retained the other \$27.9 million for their own purposes.⁹ Shaw's 1997 CPF expenses apparently amounted to \$5 per subscriber, for an estimated total of just over \$7.5 million.¹⁰ We do not know if other cable companies rebated cable subscribers amounts owed due to the Capex sunset rule.

41 The funding and management of the CPF changed in 1996. In September, the Minister of Canadian Heritage announced the creation of the Canada Television and Cable Production Fund (CTCPF) that would meld the existing CPF and Telefilm's Broadcast Fund. The new fund was supplemented by new government funding of \$250 million over a three-year period beginning in 1996-97. On 22 November 1996 the new CTCPF wrote the CRTC to ask the Commission to transfer its oversight of the CPF to the

⁶ Public Notice CRTC 1994-10 (Ottawa, 10 February 1994).

⁷ CRTC, *Proposed Amendments to the Cable Television Regulations, 1986*, Public Notice CRTC 1990-83 (Ottawa, 23 August 1990).

⁸ See CRTC, *Cable Production Fund Contribution Guidelines*, Circular 410.

⁹ CRTC, *Cable Television Statistical and Financial Summaries, 1990-1995*, at 33. The 4

¹⁰ Shaw Communications, *Annual report 1997* at 41. The estimate is based on \$5 x 1,509,407 subscribers. The *Report* shows average revenues per subscriber of \$365 in 1997.

Department of Canadian Heritage; the CRTC subsequently did so in December 1996.¹¹ In July 1997 the CRTC set out its policy regarding BDU payments to the CTF.¹²

- 42 The voluntary payment system became mandatory in 1997. References to the sunset Capex provisions were dropped, and most cable companies were required to remit a proportion of their gross revenues to the CTF. The CRTC introduced revised BDU regulations that laid out remittance requirements for BDUs in December 2007, and on the same day issued a Circular to describe these regulations.¹³
- 43 The CTF is a public-private partnership.¹⁴ It has been described by the Department of Canadian Heritage as “an independent, non-profit body.”¹⁵ At the moment of writing this, we have not been able to locate by-laws or other constituting documents about the CTF.
- 44 The CRTC originally envisaged the CPF’s Board as being broadly-based, with representatives from the production, distribution and broadcasting sectors.

CAB	3 members
CCTA	3 members
CFTPA & APFTQ	3 members
Tele-education Canada	1 member
CBC	1 member
<u>Pay & specialty services</u>	<u>1 member</u>
Total	12 members.

The CRTC clearly thought the Board’s composition would change, and invited the Board to seek representatives from other sectors.

- 45 The CTF’s Board receives “[p]ublic policy direction ... exclusively from the Minister and the Department of Canadian Heritage”.¹⁶ We understand that the CTF’s current governance structure was revised in July 2005 to respond to concerns from the Auditor General. A double-majority voting system was introduced: it requires that the CTF’s Chair and at least four other Board members pass an independence test and be fully independent of any commercial connection with the television production or broadcasting businesses, and that CTF policies and decisions receive majority support first from a majority of the independent members and then from a majority of the remaining members.

¹¹ CRTC, *Transfer of Oversight of the Cable Production Fund (CPF)*, Public Notice CRTC 1996-159.

¹² CRTC, *Contributions to Canadian Programming by Broadcasting Distribution Undertakings*, Public Notice 1997-98 (Ottawa, 22 July 1997). The \$27.9 million presumably retained by these 129 BDUs amounted to just over 13% of all BDUs’ pre-tax profits of \$208.4 million in 1995.

¹³ CRTC, *Broadcasting Distribution Regulations*, Public Notice CRTC 1997-150 (Ottawa, 22 December 1997), and CRTC, *Guidelines respecting financial contributions by the licensees of broadcasting distribution undertakings to the creation and presentation of Canadian programming*, Circular no. 426 (Ottawa, 22 December 1997).

¹⁴ Deputy Minister, Canadian Heritage, *Letter to the Chair of the CTF*, 28 July 2005.

¹⁵ Corporate Review Branch, Canadian Heritage, *Summative Evaluation of the Canadian Television Fund Program*, online: pch.gc.ca < http://www.pch.gc.ca/progs/em-cr/eval/2005/2005_11/2_e.cfm>.

¹⁶ Deputy Minister, Canadian Heritage, *Letter to the Chair of the CTF*, 28 July 2005.

46 The “voice of creators” was added to the Board in 2006,¹⁷ and currently, the CTF’s Board has 18 members and 1 vacancy:

CTF Board, February 2007 (* Independent Board members)	
1 * Chairman	Douglas Barrett, President & CEO PS Production Services & Partner, MacMillan Binch Mendelsohn LLP
Canadian Heritage’s 4 Nominees	
2 * Director	Jean-Pierre Blais ADM, Heritage
3 * Director	<p>Bruce Ryan, CA, CFA, VP Ember Resources Inc. Mr. Ryan has been involved in the North American oil and gas industry since 1985. His career has included positions in senior finance, with a venture capital firm, as a chief financial officer and a corporate secretary and director of a number of TSX-listed companies</p> <p><http://www.emberresources.com/management.php></p>
4 * Director	<p>Gail Scott, Criminal Injuries Compensation Board Gail Scott of Toronto, graduated with a Bachelor of Arts in English and French in 1964 and received her Graduate Diploma in Journalism in 1966, both from Carleton University in Ottawa. Her work in Television for 18 years included being National Assignment Editor for CBC Television Network, as well as Parliamentary Correspondence – Ottawa, Host/Field Producer for W5, and Host of Canada AM for the CTV Television Network. Ms. Scott has taught extensively over a ten-year period for the faculty of Journalism at Ryerson Polytechnical University and served as Commissioner of the CRTC between 1987 and 1998. She is the past President and Director of the Michener Foundation Awards and a member of the Canadian Women in Communications.</p> <p><http://www.cicb.gov.on.ca/en/members.htm></p>
5 Director	<p>Anne-Marie Jean, Executive Director, Culture Montreal Anne-Marie Jean holds a bachelor’s degree in communications and studied administration at the University of Ottawa. She arrives at the head of Culture Montréal with solid qualifications, and our organization stands to benefit from her skills and experience. An accomplished professional and seasoned administrator, Ms. Jean can be characterized as a true team leader who favours consensus building and openness in exchanging ideas and carrying out projects. “Over the years,” she states, “I’ve learned the</p>

¹⁷ Deputy Minister, Canadian Heritage, *Letter to the Chair of the CTF*, 28 July 2005.

CTF Board, February 2007 (* Independent Board members)	
	importance of building and maintaining consultative and support networks, essential tools in proposing solutions and making changes.” ... < http://www.culturemontreal.ca/lettreinfo/050824_newsletter.htm >
CCTA's 3 nominees	
6 * Director	Lori Assheton-Smith, Director, Lori D. Assheton-Smith Professional Group
7 Director	Robin Mirsky-Daniels, Executive Director, Rogers Communications Inc.
8 Director	Alex Park, VP, Programming, Shaw Cablesystems G.P.
CFTPA's 2 nominees	
9 Director	Scott Garvie, Senior VP Business and Legal Affairs, Shaftesbury Films Inc.
10 Director	Paul Pope, Senior Producer, Pope Productions
APFTQ's 1 nominee	
11 Director	Claire Samson, President and CEO, APFTQ
Association for Tele-Education of Canada's 1 nominee	
12 Director	Michèle Fortin, President and CEO, Télé-Québec
CAB's 4 nominees	
13 Director	Judith Brosseau, Senior VP, Programming and Communications (Canal D, Historia, Séries+), Astral Media Inc.
14 Director	Corrie Coe, Director, Programming Administration, CTV Television Inc.
15 Director	Andrew Eddy, Vice-President, Program Strategy and Investment, Movie Central
16 Director	Pierre Lampron, VP, Institutional Relations, Québecor Média inc.
CBC's 1 nominee	
17 Director	Marcela Kadanka, Senior Director, TV Arts & Entertainment, CBC Television
Canadian Association of Film Distributors and Exporters' 1 nominee	

CTF Board, February 2007 (* Independent Board members)	
18 Director	Michel J. Carter, C.A., MBA, ADM.A, Former President and Chief Executive Officer of TQS Inc. and COGECO Radio-Télévision Inc
DTH's 1 nominee	
19 Director	Vacant

- 47 We understand that the CTF's funding originates from two primary and two secondary sources. The two primary sources are Canadian taxpayers (through the Department of Canadian Heritage), and Canadian BDU subscribers (through BDU companies). The two secondary sources, which are also intermittent, are the CTF's reserves and its recoveries on its investments in Canadian program productions.
- 48 The CTF appears to have answered the two concerns expressed by the Auditor General in 2005. (See *Department's response to the recommendations of the Auditor General* <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20051105ab_e.html>.)
- 49 We note that over the last five years the proportion of CTF's funding that comes from cable BDUs has decreased. Cable BDUs remitted 35.7% of the CTF's funding in 2000-01, down to 32.4% in 2004-05. (We were unable to locate data for 2005-06.) To some extent this decrease results from the increase in the revenues of BDUs such as Direct-to-home satellite companies over time.

\$M Current	2000-01 (1)		2001-02 (1)		2002-03 (1)		2003-04 (1),(2)		2004-05 (2)		2005-06 (3)	
Operating Costs	\$0.45	0.20%	\$0.45	0.20%	\$0.45	0.20%	\$0.41	0.20%	\$16.65	7.70%	\$8.70	3.70%
Grants and Contributions												
Canadian Heritage	\$99.55	52.20%	\$99.55	49.90%	\$99.55	39.60%	\$87.10	43.30%	\$87.11	40.20%	\$99.60	41.90%
BDUs												
Cable	\$68.00	35.70%	\$67.40	33.80%	\$69.50	27.60%	\$64.50	32.10%	\$70.20	32.40%		
DTH	\$23.00	12.10%	\$32.50	16.30%	\$45.50	18.10%	\$49.50	24.60%	\$56.60	26.10%		
Total, BDUs	\$91.00	47.80%	\$99.90	50.10%	\$115.00	45.70%	\$119.02	59.20%	\$126.79	55.00%	\$137.30	57.70%
Reserves					\$37.00	14.70%						
Recoveries on prod'n investme							\$10.40	5.20%	\$11.49	5.30%		
Total, Grants & Contribution	\$190.55	100.00%	\$199.45	100.00%	\$251.55	100.00%	\$201.10	100.00%	\$216.52	100.00%	\$237.88	100.00%

Sources

(1) Canadian Heritage, *Summative Evaluation of the Canadian Television Fund Program* http://www.pch.gc.ca/progs/em-cr/eval/2005/2005_11/2_e.cfm

(2) CTF, *Annual Report 2004-2005* ("Statement of Operations");

(3) CTF, *Stakeholders' Report 2006*

50 But once the effects of inflation are considered, it becomes clear that the amount of funding from cable BDUs has not only shrunk as a proportion of the CTF's funding, but has actually decreased. Between 2001 and 2005 cable companies' funding for the CTF fell by \$3.3 million (in constant dollars). It is fair to note that funding from Canadian Heritage also decreased in real terms, by just over \$8 million since 2001.

\$M Constant (1992=100)	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06
<i>CPI (1992=100)</i>	1.164	1.19	1.223	1.246	1.273	1.299
Operating Costs	\$0.39	\$0.38	\$0.37	\$0.33	\$13.08	\$6.70
Grants and Contributions						
Canadian Heritage	\$85.52	\$83.66	\$81.40	\$69.90	\$68.43	\$76.67
BDUs	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Cable	\$58.42	\$ 5 6.64	\$ 56 .83	\$ 51 .77	\$55.15	\$ -
DTH	\$19.76	\$27.31	\$37.20	\$39.73	\$44.46	\$ -
Total, BDUs	\$78.18	\$83.95	\$94.03	\$95.52	\$99.60	\$105.70
Reserves	\$ -	\$ -	\$30.25	\$ -	\$ -	\$ -
Recoveries	\$ -	\$ -	\$ -	\$8.35	\$9.02	\$ -
Total, Grants & contributions	\$163.70	\$167.61	\$205.68	\$161.40	\$170.09	\$183.12

Appendix B: The long and short of the CRTC'S CTF Regulation

Section 29(6) of the CRTC's *Broadcasting Distribution Regulations*

29.

....

(6) Except as otherwise provided by a condition of its licence, **if a Class 1 licensee had 20,000 or more subscribers on August 31 of the previous broadcast year** and distributes its own community programming on the community channel, **the licensee shall make, in each broadcast year**, a contribution to Canadian programming not less than the greater of

(a) 5% of its gross revenues derived from broadcasting activities in the year, less any contribution to local expression made by the licensee in that year, and

(b) 3% of its gross revenues derived from broadcasting activities in that year.

(bold font and underlining added)

51 The CRTC's regulations clearly suffer from a certain complexity:

THE LONG AND SHORT OF THE CRTC'S CTF REGULATION	
CRTC's <i>Broadcasting Distribution Regulations</i>	CCA Summary
29. (1) In this section, "contribution to local expression" means a contribution made in accordance with Public Notice CRTC 1997-25, entitled <i>New Regulatory Framework for Broadcasting Distribution Undertakings</i> .	
(2) If a licensee is required under this section to make a contribution to Canadian programming, it shall contribute (a) to the <u>Canadian production fund</u> at least 80% of its total required contribution; and (b) to one or more independent production funds, the remainder of its total required contribution.	The CTF gets no less than 80% of BDU payments to Canadian programming BDUs can allocate up to 20% of their payments to Independent production funds
(3) Except as otherwise provided under a	BDUs with

THE LONG AND SHORT OF THE CRTC'S CTF REGULATION

CRTC's <i>Broadcasting Distribution Regulations</i>	CCA Summary
<p>condition of its licence, if a licensee had fewer than 20,000 subscribers on August 31 of the previous broadcast year and does not distribute its own community programming on the community channel, and if a community programming undertaking is licensed in the licensed area, the licensee shall make, in each broadcast year, a contribution of 5% of its gross revenues derived from broadcasting activities in the broadcast year to the community programming undertaking.</p>	<ul style="list-style-type: none"> • less than 20 thousand subscribers, • no community channel of their own, • <u>and</u> with a licensed community programming service in the area <p>must send 5% of gross revenues to the community programming service</p>
<p>(4) Except as otherwise provided under a condition of its licence, if a licensee had 20,000 or more subscribers on August 31 of the previous broadcast year and does not distribute its own community programming on the community channel, and if a community programming undertaking is licensed in the licensed area, the licensee shall make, in each broadcast year, a contribution of not less than 3% of its gross revenues derived from broadcasting activities in the broadcast year to Canadian programming and a contribution of 2% of its gross revenues derived from broadcasting activities in the broadcast year to the community programming undertaking.</p>	<p>BDUs with</p> <ul style="list-style-type: none"> • 20,000 or more subscribers, • no community channel programming, • and a licensed community programming service in the area, <p>must send 3% of gross revenues in the broadcast year to the CTF, and another 2% to the community programming service</p>
<p>(5) Except as otherwise provided by a condition of its licence, if a Class 1 licensee had fewer than 20,000 subscriber on August 31 of the previous broadcast year and distributes its own community programming on the community channel, the licensee shall make, in each broadcast year, a contribution of not less than 5% of its gross revenues derived from broadcasting activities in the year to Canadian programming, less any contribution to local expression made by the licensee in that year.</p>	<p>BDUs with</p> <ul style="list-style-type: none"> • up to 20,000 subscribers • and a community channel <p>must send up to 5% of their gross revenues to the CTF, minus any spending on the community channel</p>

THE LONG AND SHORT OF THE CRTC'S CTF REGULATION

CRTC's <i>Broadcasting Distribution Regulations</i>	CCA Summary
<p>(6) Except as otherwise provided by a condition of its licence, if a Class 1 licensee had 20,000 or more subscribers on August 31 of the previous broadcast year and distributes its own community programming on the community channel, the licensee shall make, in each broadcast year, a contribution to Canadian programming not less than the greater of</p> <p>(a) 5% of its gross revenues derived from broadcasting activities in the year, less any contribution to local expression made by the licensee in that year, and</p> <p>(b) 3% of its gross revenues derived from broadcasting activities in that year.</p>	<p>BDUs with</p> <ul style="list-style-type: none"> • more than 20,000 subscribers • and a community channel <p>must send to the CTF the larger of</p> <p>5% of their gross revenues minus any community channel spending</p> <p>or</p> <p>3% of their gross revenues</p>
<p>(7) Except as otherwise provided by a condition of its licence, if a Class 2 licensee distributes its own community programming on the community channel, the licensee shall make, in each broadcast year, a contribution of not less than 5% of its gross revenues derived from broadcasting activities in the year to Canadian programming, less any contribution to local expression made by the licensee in that year.</p>	<p>BDUs with (probably)</p> <ul style="list-style-type: none"> • more than 2,000 subscribers • and a community channel <p>must send to the CTF at least 5% of gross revenues minus any community channel spending</p>
<p>(8) Except as otherwise provided by a condition of its licence, if a licensee does not distribute its own community programming on the community channel and if no community programming undertaking is licensed in the licensed area, the licensee shall make, in each broadcast year, a contribution of not less than 5% of its gross revenues derived from broadcasting activities in the year to Canadian programming.</p>	<p>BDUs with</p> <ul style="list-style-type: none"> • no community channel, and • no community programming service in the area <p>must send at least 5% of gross revenues to the CTF</p>

52 To our knowledge, the Shaw/Québecor decision has been the first instance in which a distributor has chosen not to comply with the CRTC's Circular.