

# Transnational over-the-top video distribution as a business and policy disruptor: The case of Netflix in Canada

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## ABSTRACT

*Digital disruption is often characterized as the conflict between the exponential rate of change in technology, and the slower-paced, incremental rate of change in law, economy, policy, and society writ-large (Franklin, 2012). The rapid encroachment of over-the-top (OTT) content distribution raises policy issues concerning jurisdiction, access, pricing, consolidation of ownership, and source diversity (Holt, 2014), while undermining many of the traditional policy instruments. In this paper, we analyze Netflix's strategic expansion and meteoric growth in Canada, and focus on a landmark event in Canadian broadcasting policymaking: the Canadian Radio-television and Telecommunications Commission's (CRTC) "Let's*

*Talk TV" hearings of 2013-2014. Through an examination of public documents, we analyze the ways Netflix is considered an opportunity, ally, or a threat by consumers, broadcasters, independent producers, and governments. We show that in a reprioritization of values, many of the principles that motivated legacy broadcasting policy are being sidelined by a consumerist approach that gives freer rein to streamed services. However, Netflix's refusal to provide the Commission with information it was ordered to produce suggests the most serious disruption is to the notion that online video distribution can or should be regulated in the public interest.*

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## INTRODUCTION

Domestic broadcasting industries are considered vital to national cultural expression and democratic practice, and for that reason they frequently receive governmental support and protection and are regulated in the public interest. In Canada, the television broadcasting system serves as a major instrument of national policy regarding creation and distribution of domestic content, with attendant expectations concerning national cultural expression, cultural sovereignty, and democracy

### Keywords

media innovation, media policy, political economy, over-the-top video distribution, broadcasting

(Armstrong, 2010; Grant & Wood, 2004; Le Goff et al., 2011; Picard et al., 2016).

The “digital shift” in the media and content industries is disruptive, introducing major transformations in consumer behaviour, business models, and competition, and requiring broadcasters to develop multi-platform, multi-product proficiencies (Doyle, 2015; Naldi, Wikström & Von Rimscha, 2014; Oliver, 2014). Disruption of core technologies “inevitably creates tension for regulatory institutions” (Downes & Mayo 2015, p. 11), raising acute policy issues concerning jurisdiction, access, pricing, consolidation of ownership, and source diversity (Holt, 2014; Simon & Bogdanowicz, 2012). Disruption causes the legacy regulatory regime to become “unstuck” in the sense that “the old [policy] instruments, like existing national mechanisms for direct support and domestic content regulations, may no longer work,” while there is lack of a “clear idea about what to replace them with” (O’Regan & Goldsmith, 2006, p. 82). Regulatory “unsticking” exposes the mixture of entitlements and responsibilities constituting the legacy regime, as well as what Freedman (2015) calls “policy silences,” pathways that are not considered or discussed publicly.

The television broadcasting sector is experiencing an unfamiliar pattern of disruption: “big bang” expansion (Downes & Nunes, 2014) of highly capitalized, rapidly scalable transnational online services which quickly develop large bases among domestic consumers, making domestic incumbents appear as slow-moving, self-serving rent-seekers (Cable, 2016). The case of Netflix in Canada demonstrates how the Canadian broadcast industry is being disrupted through “big bang” innovation in the screen media sector. The U.S.-based Netflix has been operating in Canada only since 2010, but is estimated to have attracted nearly 50% of Anglophone Canadians as subscribers (MTM, 2016). Our paper focuses on a recent landmark event in Canadian broadcasting policymaking: the Canadian Radio-television and Telecommunications Commission’s (CRTC) “Let’s Talk TV” hearings of 2013-2014. On October 24, 2013 the Canadian broadcast regulator (CRTC) announced the launch of a year-long, three-phase review of the Canadian broadcasting system. The policy process, dubbed “Let’s Talk TV” (LTT), invited stakeholders, including individual Canadians, to “shape the future” of the television system so that it “is adaptable for years to come” (CRTC Notice 2013-563). The need for

the review was framed primarily around the observation that television is “evolving at an incredibly rapid rate – and Canada’s regulatory system must change with it” (Blais, 2013b). According to the regulator, on-demand video streaming has altered Canadians’ expectations of the traditional broadcasting system, leading to a growing dissatisfaction with the status quo and a marked need to revise the current rules regulating the operation of Canadian television (CRTC 2014-190).

Although at previous Canadian television policy hearings Netflix portrayed itself as complementary to the traditional Canadian television system, its recent activity, messages to shareholders, and venture into original content show that it now has other plans. Here, we examine the entry of Netflix into a domestic broadcasting system that is already affected by a political environment favorable to transitioning away from cultural protectionism towards deregulation and free market strategies, with a recent federal governing party that chose consumer sovereignty as a plank in its 2015 election platform. Below we discuss Netflix’s activities in Canada, its encounter with the country’s media regulatory agency, and the responses it has elicited in the Canadian television industry.

Through an examination of publicly available documents, including filings to the CRTC, letters to shareholders, leaked e-mails, and other company texts and communications, we analyze the ways that Netflix is considered to represent an opportunity or a threat by the various players in the Canadian television system: consumers, broadcasters, independent producers, and governments. We show that many of the principles that motivated and shaped legacy broadcasting policy in Canada are being marginalized by a consumerist policy approach that gives much freer rein to streamed services than to legacy forms of video distribution. This places incumbent broadcasters at a relative disadvantage vis à vis the over-the-top operators (OTTs), inspiring uncharacteristic expressions of interest from incumbents in a regulatory regime they formerly portrayed as burdensome. The unscripted *dénouement* of the LTT hearings came when Netflix publicly rejected the Commission's jurisdiction over online streamed video services in Canada and refused to provide the Commission with the information it was ordered to produce. This turn of events suggests that the most serious potential disruption in broadcasting's digital transition is to policy itself, by making moot the assumption that online content distribution should

or can be regulated in the national interest. The case presented here illustrates how disruption of regulated media industries involves processes of “unsticking” of regulatory regimes, exposing policy silences and showing that transnational challengers seek rapid expansion among domestic consumers not just for purposes of revenue growth, positioning, or branding, but also to provide leverage in domestic regulatory reform.

### INNOVATION, REGULATION, AND DISRUPTION

Digitization affects media industries by driving the cost of additional copies of media content to zero, enabling multiple uses and reuses of media content. It enables interactivity and extensive data collection regarding consumer behavior, provides “location agnostic” advantages to players who can leverage economies of scale and scope, and disrupts and reconfigures distribution networks. Media, IT, and telecommunication sectors that were formerly separate are becoming intermingled, leading to a new business ecosystem in which all segments compete with all other segments for access to end-users and consumers (Simon, 2012; Simon & Bogdanovich, 2012).

Although hundreds of Internet-based video services have emerged since the late 1990s, most of these services have been marginal or niche players (Cunningham & Silver, 2013), allowing domestic broadcasters and cable operators to enjoy a certain bargaining power in architecting delivery platforms (Baccarne et al., 2013; D'Arma, 2010; Evens, 2014; Meisel, 2013). However, the key architects of the emerging media ecosystem are not these niche video distributors, nor the domestic providers of fixed-line or wireless pathways to consumers, but instead providers of transnational cloud-based services, which encompass storage, processing, databases, software, networks, and platforms. According to Noam (2014), advantages of scale and scope are favouring the emergence of a small global oligopoly of cloud providers who exercise considerable market power over users and providers of hardware, software, transmission, and content inputs. Noam considers that the most likely cloud providers in the emerging online media ecosystem will be “tech companies that have morphed into media, such as Google or Apple, or ... hybrid ‘tech-media’ firms such as Netflix or Amazon” (p. 688). Most of the approximately 500 OTT service providers in the world in 2016 serve local markets; the top five OTT service providers (Netflix, Amazon, Hulu,

HBO, and YouTube) currently represent about half of the \$25 billion in worldwide OTT revenues (Arthur et al., 2016).

The expansion of players from the computer industry into new industries radically disrupts existing business models (Kushida, 2015). Downes & Nunes (2014) call the process of innovation in which newcomers take advantage of digital and cloud-based technologies to offer consumers massively better, cheaper and more customized experiences from the moment of market entry *big bang disruption*. Highly capitalized transnational OTT streaming video content providers have definite advantages over domestic cable, broadcasting, and satellite services, whose business model involves bundling content with distribution. OTT content providers are able to attract customers away from domestic distributors on the basis of lower cost, greater choice, greater convenience, and (thanks to their huge collections of data on viewing preferences) personalized playlists. They also enjoy deep pockets, brand recognition, and a favorable regulatory environment (Lee, 2014).

Governments regulated the first generation of television, over-the-air broadcasting, justifying their licensing requirements on the grounds of public ownership of scarce spectrum frequencies.

During television's second and third generations (multichannel satellite, cable, telecom networks, and digital television), although carriage capacity increased significantly, most governments continued to regulate domestic broadcasting systems by requiring licenses or notification for television distribution (Schweitzer et al., 2014). The fourth generation of television, video streamed over Internet broadband, provides high resolution, peer and person-to-computer interactivity, asynchronous viewing, multiplatform distribution, and user-generated peer-to-peer content (Noam, 2014), presenting significant challenges to policy regimes, their historical rationales, and regulated incumbents.

Cable (2016) emphasizes the increased incidence of "reformer startups" or fast-moving, well-capitalized newcomer firms that "operate in the face or shadow of prohibited regulatory regimes" (p. 2). These firms rapidly gain traction in the domestic market and grow large customer bases, deterring regulatory intervention and disrupting the policy regime. Policy disruptions are characterized by "a change in the material conditions of a market (either an existing one or a new one), which leads to an invalidation of existing regulatory expectations, norms, ideas and frameworks, and pressure to accommodate and eliminate this invalidation"

(Hasselbalch, 2014, p. 23). Two conditions must be met in order for a policy regime to become disrupted: 1) the innovator must move first, steering the market, and its development, and 2) the externalities arising from the innovation must be considered controversial and enter public and political debate (Hasselbalch, 2014). Three factors allow an innovator to move before the regulator: novelty (when the innovation presents something regulators have not encountered), speed (when it rapidly creates new markets), and obscurity (when it and its transactions develop and occur outside of the purview of regulators) (*ibid.*).

Downes & Mayo (2014) argue that regulatory inertia in the face of disruptive innovation in the communications sector stems from: 1) an increasing mismatch between regulations and the reality that regulated markets are now consistently driven by innovation, 2) the failure of regulatory bodies to adapt their rules when regulations made by competing or complementary bodies are altered, and 3) political forces which must navigate the institutionalized distribution of benefits created by previous policy regimes. The political dimension of regulatory decisions in the face of disruptive innovation is increasingly significant in situations where the status quo is justified in terms of abstract public

benefits (Cable, 2016). Because reformer startups offer consumers immediate benefits, regulations that negatively affect these benefits can carry significant political cost (*ibid.*).

Thus, due to their deep pockets and their exponential growth that occurs in the shadow of existing regulatory regimes, reformer startups have substantively more clout in their interactions with regulators than the less-capitalized startups of the past (Cable, 2016). Rational choice theory predicts that coalitions of opposing interest groups who decide on a common goal are more likely to succeed in steering regulatory decisions in their collective favour than groups with dissenting goals. Yet these coalitions ultimately may have divergent goals. Cable (2016) evokes regulatory economist Bruce Yandle's famous "Bootleggers and Baptists" catchphrase to refer to such a situation in which makers of illegal alcohol supported religious prohibitionists in order to drive up demand for product only they could supply. In the present case, transnational providers of online services ally with domestic consumers in support of consumer sovereignty in order to deter extension of domestic regulations.

In most jurisdictions, regulatory regimes for broadcasting have not extended their concerns about production, distribution, and exhibition of

domestic content to the digital sphere, continuing to focus their efforts on the legacy broadcasting system, and favoring market forces and consumer satisfaction as the driver of innovation, rather than other dimensions of public interest (Freedman, 2015b). On the whole, little effort has been made to secure new digital shared public spaces, which could complement, supplement, or perhaps eventually replace those shared televisual spaces historically safeguarded by legacy broadcasting policy (Freedman, 2010; 2015b). Notably, proposals to secure and cultivate shared *national* spaces in the digital realm are treated as relics of an earlier era.

### CULTURAL SOVEREIGNTY AND THE DOMESTIC POLICY ENVIRONMENT

Canadian broadcasting policy has developed an uneasy mixture of economic and cultural objectives to attain a measure of cultural sovereignty in the context of Canada's small national market, which is now dominated by a handful of domestic vertically and horizontally integrated media and telecommunications conglomerates (Edwardson, 2008; Winseck, 2008). The 1991 Broadcasting Act ("the Act") is the preeminent legislation that governs

broadcasting activities in Canada. The Act provides that "Canadian broadcasting shall be effectively owned and controlled by Canadians." The Canadian broadcasting system, the Act continues, should "serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" by encouraging "the development of Canadian expression" by "displaying Canadian talent in entertainment programming" and by "offering information and analysis concerning Canada and other countries from a Canadian point of view" (Part 1, Section 3). According to the Act, the broadcasting system should be reflective of Canada's multiculturalism, in both "its programming and ... employment opportunities" (Part 1, Section 3.1.d.iii). The Act also stipulates that each broadcasting undertaking must make "predominant use, of Canadian creative and other resources in the creation and presentation of programming" (Part 1, Section 3).

Achieving these policy objectives involves a "high-end trade off" wherein "once admitted into the market, Canadian companies are protected from competition, especially foreign competition" (Raboy & Bonin, 2008, p. 61). In return they are expected to contribute to the goals and objectives of the Broadcasting Act, including production and exhibition of unprofitable Canadian content. The

Act provides the basis for Canada's complex broadcasting "policy toolkit" (Grant & Wood, 2004), which currently consists of the maintenance of a Canadian national public broadcaster, Canadian content expenditure and scheduling requirements, foreign ownership restrictions on broadcasting entities, competition policy, and subsidies and tax incentives. The Act gives the Commission the power to exempt entities from any and all regulatory requirements if it "is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy" (Part 2, Section 9.4). Since 1999, foreign and domestic new media in Canada operate under the Digital Media Exemption Order (DMEO), and are not required to contribute to the goals ascribed to the Canadian broadcasting system.

Although some reports submitted to the 2014 "Let's Talk TV" hearings determined that over-the-top video streaming did not represent an immediate threat to Canadian incumbents, it was thought that a tipping point could be reached in three to five years. The question of how a national media regulatory agency might regulate a transnational video streaming service, and in whose interest, burst unexpectedly into the open when Netflix claimed to operate outside the jurisdiction of the Broadcast-

ing Act and declined the CRTC's request to provide information about subscribers, audiences, and the Canadian content it distributes.

### NETFLIX: FRIEND OF CANADIAN CONSUMERS

Canada was the first target of Netflix's international expansion. After Netflix's 2010 entry into Canada, its popularity with Canadian consumers grew rapidly. Through its pricing, its advocacy of net neutrality, and its tolerance of Canadian customers using virtual private networks (VPNs) to tap into the company's much richer program offerings in the U.S. market, Netflix has positioned itself as more friendly to Canadian consumers than the incumbent domestic broadcasters. In typical big bang disruptor fashion (Cable, 2016; Downes & Nunes, 2014; Hasselbalch, 2014), Netflix has been able to offer greater choice, convenience, and affordability at market entry, rapidly growing its market share in the face of regulatory uncertainty.

Canadian audiences are highly attracted to imported American drama and comedy, and domestic broadcasters resist the obligation to produce and exhibit Canadian content because it is less expen-

sive and more lucrative to import content from elsewhere. Canadian broadcasters therefore generally treat Canadian content as a burden they must endure in exchange for the industrial protections they receive (Grant & Wood, 2004; Le Goff et al., 2011; Picard et al., 2015). When English-speaking Canadians watch drama or comedy on television, it is imported content four times out of five (CRTC, 2013). Meanwhile, Canadian consumers and critics lament the mediocrity of English-language Canadian television content, especially drama, which generally has underperformed among English-speaking Canadian audiences (Coutanche, Davis & Zboralska, 2015).

Of all the players in the domestic television ecosystem, it is the domestic broadcasters that have developed the most problematic reputation among consumers, who express their dissatisfaction across a multitude of fora, including interventions submitted to CRTC public consultations and through less formal channels such as online newspaper comments sections, social media, and blog posts. Frequently cited complaints include: billing errors; dissatisfaction with content and the way it is programmed (i.e. the perception that there is too much repetition in programming) and sold (i.e. the way content is bundled and organized across vari-

ous tiers); a belief that broadcasters' services are inflated in price; and a dissatisfaction with customer care. A recent study found that 51% of Canadian linear television subscribers contact their providers for customer service, and that 33% of these individuals do not have their complaints resolved by their service provider on the first call (J.D. Power, 2014).

Canadian media scholars have argued that the CRTC historically has been under regulatory capture by the private sector (Hoskins & McFadyen, 2004; Raboy, 1990; Raboy & Bonin, 2008; Skinner, 2008), or alternatively that Canadian communications policy has existed in a "vacuous netherland," marked by "the worst of all possible worlds" where "neither regulated monopoly, meaningful competition, [n]or regulatory responsibility prevail" (Winseck, 1998, p. 257). Given Canadian rules against majority foreign ownership of broadcasting and telecommunications entities, Canadians did not have many alternatives until the arrival of Internet-based streaming services such as Netflix. Netflix has committed itself to providing an excellent user experience, and has identified consumers' troubled relationships with domestic incumbents as an opportunity to exploit:

We are a relief from the complexity and frustration that embody most MVPD [multichannel video programming distributor] relationships with their customers. We strive to be extremely straightforward. There is no better example of this than our no-hassle online cancellation. Members can leave when they want and come back when they want. (Netflix, 2015a)

Although penetration rates of Internet are high in Canada, the country ranks low on key indicators related to Internet quality, value, and download speed when compared to other OECD countries (Ookla, 2015a, b, c). Netflix has publicly criticized Canadian ISPs for their cost and quality of service. In 2012, Netflix's chief content officer, Ted Sarandos, commented that "what they're charging for Internet access in Canada" is "almost a human rights violation" and that Netflix's performance in the Canadian market would be even better were it not for the "almost third-world access to the Internet" sold at bandwidth caps that are prohibitive to streaming (Tencer, 2012). Indeed, scholars have long recognized that the vertically integrated Canadian incumbents, with assets in telecommunications, content creation, traditional television distribution, and Internet distribution, have the capacity to

provide undue preference to themselves by raising Internet rates, or lowering Internet data caps, and engaging in unfair traffic management strategies, rendering the streaming of audiovisual content from third parties potentially cumbersome and unaffordable (Guindon & Dennie, 2010; Middleton, 2011; Quail, 2012; Winseck 2008). Internet pricing and quality fundamentally affect streaming behaviours (Stewart, 2015), and are thus of paramount importance to Netflix.

Net neutrality has emerged as a politically charged issue in Canada and abroad, and Netflix has conspicuously placed itself on the side of consumers in this regard. Netflix has presented itself as a champion of net neutrality, giving itself a positive aura from the perspective of advocates and consumers. Netflix's advocacy of net neutrality presents a powerful veneer of the greater good over its own economic interests. Strong net neutrality laws allow Netflix to profit from the sale of its services directly to consumers without having to make costly investments in network infrastructure. In 2015, Netflix spent 1.32 million dollars (U.S.) on its lobbying efforts, most of which were aimed at Internet-related issues (Center for Responsive Politics, 2016), and U.S. federal records indicate

that in 2012, Netflix formed a political action committee (PAC), permitting it to contribute directly to federal campaigns (Thier, 2012).

Despite the fact that Netflix and consumer interests are *currently* closely aligned, the limits of this relationship have yet to be tested. Although publicly a champion of net neutrality, Netflix has, on multiple occasions, agreed to deals in which its services become prioritized, effectively undermining its commitment to the principle, including a multi-year direct traffic access deal with Comcast in 2014 (Brandom, 2014; Gustin, 2014), and one with Australian ISPs that sees its content excluded from data caps (Netflix, 2015b). Now that it has reached its current size, Netflix has indicated that even if net neutrality rules were to weaken under the current Trump administration, its bottom line would be materially unaffected “because we are now popular enough with consumers to keep our relationships with ISPs stable” (Netflix as cited in Dunn, 2017).

Another aspect of Netflix’s consumer-friendly aura, adding weight to the Baptists and Bootleggers analogy (Cable, 2016), was Netflix’s long-time tolerance of customers who surreptitiously bypassed the rights market in their own territories. In 2015, an estimated one-third of Anglophone Canadians

used a virtual private network (VPN) to access the U.S. version of the service, bypassing the Canadian rights market completely (Kwong, 2015). Canadians were eager to access the U.S. version of the service due to its richer content catalogue at the time.

Netflix’s user contract has long contained a clause that permits it to suspend user access on the suspicion of territory circumvention (Netflix, 2014c). For years the company did not act on these provisions, although it faced increasing pressure from rights owners to do so. Indeed, Netflix’s (leaked) contract with Hollywood’s Sony Studios reveals that it is required to “use ... geolocation bypass detection technology” to identify territory circumvention services (WikiLeaks, 2015a). Leaked private e-mails between Sony executives revealed their “deep dissatisfaction” with Netflix’s inattention to the matter, and the apparent intentionality of this behaviour, noting that Netflix had the incentive to be permissive with VPN usage “since they are getting paid by subscribers in territories where Netflix does not have the rights to sell our content” and “have every motivation to continue” given that increased subscriptions lead to a higher market valuation (WikiLeaks, 2015b). Canadian rights holders also objected to Netflix’s extended tolerance of rights violations. The senior vice president

of the Canadian vertically integrated communications firm Rogers, David Purdy, allegedly remarked that VPNs should be made illegal by the Canadian government in order to maintain a distinct rights market in Canada (Tencer, 2015). Bell Media president Mary Ann Turcke equated Canadian consumers’ usage of VPNs with stealing, triggering a wave of consumer and media backlash (Dobby & Bradshaw, 2015). While Netflix was being permissive with its tolerance of VPN-masking behaviour, old-media incumbent and Hollywood studio-owned streaming service, Hulu, had long enforced a stronger, payment-based authentication system, which had largely eradicated out-of-market access to its service (Van der Sar, 2014). Netflix thus could have similarly imposed stronger geolocation restrictions if it had been so inclined at the time. The issue was therefore not primarily a technological one, as implied by Netflix when it appeared before the Commission during LTT (CPAC Digital Archives, 2014b).

Rather than enforcing stricter protocols, in 2015, Netflix CEO Reed Hastings publicly commented that he hoped Netflix would be able to “get global and have its content be the same all around the world so there’s no incentive” to use a VPN (Hopewell, 2015). Just one year later, after Net-



flix's entry into another 130 territories and Hastings' declaration that the world was "witnessing the birth of a global TV network" (Liedtke, 2016), Netflix finally began enforcing its own longstanding policies on out-of-market access (O'Neil, 2016; Slater-Robins, 2016). Increased pressure on Netflix to honour its agreements with rights holders is likely behind the change in strategy. Prior to its recent global expansion, it made economic sense for the company to tolerate surreptitious access, given that many paying users were only able to access the service through VPNs when living in areas where the company was not officially a market player (Slater-Robins, 2016). In view of Netflix's recent global expansion, the risks associated with its permissiveness (i.e. potential legal action by rights holders) now outweigh the benefits.

In summary, with respect to its public image and branding, Netflix has closely aligned itself with consumer interests such that many regard it as an emancipatory and innovative disruptor of the much-derided Canadian status quo. In the next section, we analyze "Let's Talk TV" interventions to show how OTT is perceived to disrupt the Canadian broadcasting system.

### LET'S TALK TV

The CRTC's review of the Canadian broadcasting system, "Let's Talk TV," invited stakeholders, including individual Canadians, to "shape the future" of the television system so that it "meets the needs of Canadians as consumers, creators and citizens" and "is adaptable for years to come" (CRTC 2013-563). The hearings had broad scope and examined programming, distribution and access, and accessibility issues. The Commission warned that the evidence collected during the LTT process could indicate the need to "remove or adapt some ... existing regulations" and that the Commission was not "interested in satisfying anybody's sense of entitlement, based on the way things used to be" (Blais, 2013b).

The LTT process demonstrates the significant political tensions that come along with the introduction of disruptive innovation into regulated markets. By making changes to existing regimes, regulators are at once at risk of alienating voter-consumers, disturbing the complex set of institutionalized benefits and tradeoffs developed in the previous regime, and inadvertently acting as barriers to innovation with the absence or introduction of new rules. As Cable (2016) contends, however,

each regulatory process is "its own political economy, and we cannot assume that the benefits of innovation necessarily outweigh" traditional policy concerns (p. 12).

Although the CRTC is an independent body that is supposed to operate at arm's length from the government, it is not completely insulated from politics (Salter & Odarthey-Wellington, 2008) and its orientation is certainly affected by the government of the day (Raboy, 1994). The chairperson is appointed by the federal government. The regulator thus brings its own conceptual lens, which defines and limits the field of potential action, and determines which issues are deemed to be salient and worthy of attention.

Freedman's (2010) concept of "policy silence" is particularly useful for examining the trajectory of LTT in order to recognize potential alternative pathways that were not given consideration. According to Freedman (2010), policy scholars must "dig a little deeper" than the visible spectrum of the policy process (p. 347). Policy silence refers to the options that are not considered, to the questions that are kept off the policy agenda ... and to the values that are seen as unrealistic or undesirable by those best able to mobilize their policy-making power. (Freedman, 2010, p. 355)

From our analysis of the major LTT documents, it seems clear that the Commission never intended to impose any regulatory requirements on Netflix or any other foreign OTTs. Notably, a question about whether foreign OTT services should be subject to domestic content requirements was absent from the 80 questions the Commission posed to stakeholders in the Notice of Consultation (CRTC 2014-190) it issued to launch the final, most formal phase of the LTT process, or in the later working document (CRTC 2014-190-3), which proposed various concrete policies for consideration. There was no question regarding what to do with foreign OTTs, and no policy options concerning the issue were put forward for consideration. Although explicit questions about the imposition of cultural obligations on OTTs never made it to the more formal documents introduced later in the LTT process, the early “Choicebook” survey, designed for participation from the general public, did feature one question on the topic. The question asked the public to side with one of two statements, made by two fictional characters, Jenny and John. John’s statement associated the imposition of Canadian content requirements on OTTs with increased costs: John “does not think online services should be required to contribute to Canadian-made program-

ming if it is going to increase the price for consumers” (CRTC, 2014b). Although Jenny’s statement did not mention costs, and expressed only a conviction that OTTs should contribute to the creation of Canadian jobs and content, the implicit suggestion that such requirements would automatically result in increased costs to consumers was reinforced by John’s statement. The survey thus made the notion of OTT contributions to domestic content unattractive to survey participants, 67% of whom agreed with John.

The Commission’s active concern throughout the policy process was the identification and removal of regulatory “barriers” that supposedly have impeded the Canadian broadcasting system in “adapting to change” (CRTC 2014-190). The Commission portrayed Netflix and other OTTs as ushers of the change, noting that Canadian consumption of video is increasingly moving from “scheduled and packaged programming services to on-demand and tailored programs” (CRTC 2014-190). According to the Commission, the rise of on-demand viewing on the Internet has changed viewers’ expectations more generally, and has led to a growing dissatisfaction with the Canadian traditional system at large (CRTC 2014-190; Blais, 2013b). Using OTTs as the exemplar, the Commission then pro-

posed the forced unbundling of cable and satellite program packaging in the linear television realm so that it more closely resembles the responsiveness and consumer choice offered by OTTs.

The Commission seems not to have intended to modify the Digital Media Exemption Order under which foreign OTTs such as Netflix operate. Instead, the Commission sought to showcase Netflix in the LTT hearings as a beacon of innovation and a model for Canadian incumbents. However, this approach backfired when Netflix refused to provide the Commission with the information needed to make the case, and the hearings concluded with Netflix’s outright rejection of the Commission’s jurisdiction over its operations in Canada.

In the following sections, we discuss the major arguments presented by the various stakeholders, including Netflix, on the topic of foreign OTTs in Canada. Most broadcast industry stakeholders (other than Netflix) perceived the Commission’s use of Netflix as exemplary of a 21<sup>st</sup> century broadcast model as deeply flawed, and argued against using this model as the basis for making wide-ranging and substantive changes to the regulation of traditional linear broadcasting.

## STAKEHOLDER POSITIONS

Broadcasting regulatory proceedings such as LTT often engender stark divisions of opinion among stakeholder groups. In the case of LTT, major industry stakeholders unanimously agreed that foreign OTTs such as Netflix are having a profound and tangible impact on the Canadian broadcasting system. Most of Canada's major Anglophone broadcasters either expressly recommended that the Commission impose contribution requirements on foreign OTTs such as Netflix (Bell, 2014; CBC, 2014), or argued that if the Commission is not prepared or able to impose such requirements, it should similarly refrain from imposing them on domestic services (Corus 2014; Rogers, 2014; Shaw, 2014). Only one major (Anglophone) broadcaster (Shaw, 2014), argued against the application of regulatory requirements on foreign OTT services such as Netflix. Canada's principal trade associations and guilds representing actors, directors, writers, and independent production firms (ACTRA, 2014; CMPA, 2014; DGC 2014; WGC, 2014), and the province of Ontario (the epicentre of Canadian television production), each argued that Netflix and other foreign OTTs should be required to contribute to the creation of Canadian content.

Additionally, we found that of the 137 interventions from individual Anglophone Canadians to the Commission's final phase of the policy process that expressed a definitive statement either for or against the issue, all but *three* were in favour of extending cultural obligations to Netflix and other OTTs.

Three key arguments pertaining to foreign OTTs recurred regularly in the submissions from major industry stakeholders (broadcasters, creator groups, and governments):

- 1) Industry stakeholders believed that the Canadian government has created an environment that is more favourable to foreign firms than to Canadian ones: Netflix does not pay sales tax in Canada, incur expenses related to regulatory processes, or make financial contributions toward the funding of Canadian content. According to one incumbent, this amounts to a cost advantage of 19-20% (Bell, 2014). In addition, Netflix has no regulatory constraints, including no restrictions on sources of programming, no limits on advertising, no accessibility expenditures for described video or closed captioning, and does not contribute toward the infrastructure costs required for service delivery (Bell, 2014; Corus, 2014; Rogers, 2014). The bottom line is that foreign OTTs benefit financially and strategically from Canada's regulatory protections

– including Canada's net neutrality policy – and undue preference rules, but do not contribute in a reciprocal manner (CBC, 2014; MTCS, 2014).

- 2) Stakeholder groups pushed back against the Commission's apparent embrace of the "digital sublime" (Mosco, 2005), or belief in the unqualified transformational power of the Internet – in this case, as a new global distribution platform, and the solution to Canada's problem of having a domestic market that is too small to support the production of expensive content. In a speech to industry delegates prior to the launch of LTT, CRTC Chairman Jean-Pierre Blais remarked that new broadband-based technologies and services offer Canadian creators an "unprecedented opportunity," "extraordinary possibilities," and open "doors to niche markets unimaginable even a decade ago" (Blais, 2013a).

Stakeholders were skeptical about the value of these opportunities. One intervention representing Canada's writers summarized the concern well. The organization argued that the notion that the Internet eradicates barriers to the creation and distribution of quality content is mistaken, and leads to a conviction in neoliberal economics and deregulation, in the belief that the new "perfect markets" created by the Internet will naturally lead to the

creation of the best content, which will automatically find its ideal audience online, with the financial rewards of such content flowing to those who most deserve them. (WGC, 2014)

Other stakeholders pointed out that the low barriers to entry in the digital space lead to the erroneous belief that “one can compete in the digital interactive world with cottage industries” (Corus, 2014, para. 49). Stakeholders called attention to the difference in size: While the major Canadian broadcasters may be large players in the Canadian industry, transnational digital companies have a substantial scale advantage that Canadian companies do not (Corus, 2014). The major industry stakeholders also contended that Netflix’s business model cannot be adopted by broadcasters since they have many other obligations that Netflix does not have, including obligations to be responsive to local communities through news and information services, upgrading costs, and investments in human capital and skills retraining (Bell, 2014b; CMPA, 2014; Corus, 2014; WGC, 2014). Others pointed out the curious economics of Netflix, noting that it has built its empire with content that was produced by the legacy broadcasting and film systems, which provided the training grounds for

content producers to learn their crafts. Stakeholders were concerned that an OTT model could not provide the same training grounds for new artists since Netflix does not produce nearly the same quantity of content, in Canada, that is produced by the legacy system (Corus, 2014; WGC, 2014).

3) Finally, a recurrent argument pertaining to Netflix relates to its refusal to divulge data about its audiences, an issue frequently reported by industry observers (for example, Stilson, 2014). In their submissions, stakeholders (ACTRA, 2014; Bell, 2014a; DGC, 2014; MTCS, 2014) urged the Commission to require foreign OTTs to submit annual reports on their levels of spending on Canadian content, and their revenues in the Canadian market so industry and audience developments can be better monitored.

### NETFLIX AND THE REGULATORY SHOWDOWN

Netflix’s own written intervention to the LTT process demonstrated a clear understanding of traditional Canadian broadcasting policy goals, and many of its arguments responded directly to cer-

tain key objectives codified in the Act. Among its most substantive claims, Netflix (2014) maintained that it serves “diverse communities,” unlike traditional broadcasters who, due to a reliance on advertising, focus primarily on content with mass appeal. Netflix further argued that through consumer demand and market forces alone, it has stimulated innovation in the delivery of, and access to, programming; that it grows demand for Canadian audiovisual content and expands content production sources; and that it extends the reach of the public broadcaster and Canadian content more generally by disseminating this content to global audiences.

Although Netflix did not request to present at the oral hearing, the Commission invited it to appear. During the oral component, the Commission, looking for evidence to “support the conclusions that Netflix is advocating – that Internet video providers can support the policy objectives under the Broadcasting Act ... without the need for any additional regulatory action” (CRTC, 2014c), requested information from Netflix to substantiate the claims made in its written submission. Specifically, the regulator was seeking information about the number of Netflix’s Canadian subscribers, how Canadian content performs globally, how much Canadian

content is watched by Canadians, how much of Netflix's library is Canadian, and how much Netflix spends on Canadian original content (CPAC Digital Archives, 2014b).

After several requests by the CRTC and a heated debate, Netflix refused to comply. In a letter addressed to the Commission following the hearing, Netflix stated that the Commission's orders for the information "are not applicable to Netflix under Canadian broadcasting law" (Vlessing, 2014) and that Netflix's responses are filed "voluntarily" and do not represent "an acknowledgment of or attornment to either the jurisdiction of the Commission by Netflix, or the substantive application of Canadian law (including the provisions of the Broadcasting Act) to Netflix" (Netflix, 2014d). Following Netflix's refusal to provide the requested information, the Commission struck its participation from the public record completely, removing its written submission and even the transcripts of its oral participation at the hearing from LTT documentation, thereby adding to the accumulation of policy silences.

### **DISRUPTION, CONSUMER SOVEREIGNTY, AND ELECTORAL POLITICS**

Despite the lack of concrete (and requested) evidence from the major foreign OTT provider of professional screen programming in Canada on how it contributes to the goals of the Broadcasting Act without any formal regulatory requirements to do so, and with reasons for concern provided by other industry stakeholders regarding OTT distribution of video content, the Commission concluded that "licensing digital media broadcasting undertakings is generally not necessary to achieve the broadcasting policy objectives set out in the Act" (CRTC 2015-86). Notably, the Commission opted not to initiate a separate review of the Digital Media Exemption Order, as was suggested by some industry interveners (Bell, 2014; OMTCS, 2014; WGC, 2014) who requested a review in order to be able to derive a more complete picture of the over-the-top environment and its effects on the Canadian industry. It similarly decided not to institute annual requirements for non-Canadian broadcaster affiliated OTTs, such as Netflix, to disclose information regarding their Canadian business operations and expenditures, as was also suggested by other industry interveners in order to restore overall trans-

parency in the broadcasting system (ACTRA, 2014; Bell, 2014; DGC, 2014). This would have required the Commission to strongly assert its jurisdiction over non-Canadian broadcaster affiliated OTTs. These overlooked potential policy pathways could have been part of a larger initiative to design a cultural policy toolkit for the digital age.

Further evidence that the Commission regarded Netflix as an exemplar to be emulated by incumbents can be seen in its decision to incentivize the adoption of an open OTT model. The Commission created a new "hybrid" category of service (CRTC 2015-86) that exempts previously regulated video-on-demand platforms based in traditional delivery systems (cable, satellite, IPTV) from all Canadian content requirements and restrictions, provided that broadcasters make the same pay service available online to *all* Canadians on an OTT video-on-demand platform. In an effort to encourage incumbents to move into the online space, the Commission initially proposed that incumbent broadcasters be able to count their expenditures on Canadian content placed online as part of their required spending on Canadian programs (CRTC 2014-190-3), but ultimately decided not to implement this measure. Without any Canadian content requirements in the online space, and now linked

video-on-demand services on traditional television, the Commission's decisions assume that incumbents will voluntarily produce or acquire Canadian content for online distribution.

In its desire to align the linear environment with the more flexible OTT space, the LTT process concluded with the regulator requiring the unbundling of cable and satellite channels by December 2016 (CRTC 2015-96). While maintaining requirements that broadcasters spend a set portion of revenues on Canadian content, the Commission eliminated all requirements for exhibition of Canadian content from television except in the prime time evening hours. These changes, taken together, are expected to affect the quantity of Canadian content that is commissioned, and the range of available choices, with spending on domestic Canadian content over the next four years forecast to decline to one-third of what it is today (Nordicity & Miller, 2015). The forced unbundling of channels is expected to reduce content diversity since special interest channels that could never survive in the small Canadian marketplace on their own are currently sold in bundles with other, more successful channels. Without this bundling, the channels are unlikely to achieve the audience share necessary to thrive in the Canadian domestic market. It is in this sense that the

regulator has demonstrated a rupture from some of the public good values and goals related to cultural sovereignty that it previously sought to secure in the legacy broadcasting space. In its reprioritization of values, consumer concerns – the desire for convenience and more control, for example – have been given top billing.

It is important to mention also that the timing of the Commission's major television policy review coincided with an upcoming federal election. The party then in power, the Conservative Party, selected a consumerist platform for this election. At the start of CRTC Chairman Blais' appointment, the Minister of Heritage sent a letter to the new appointee expressing his belief that the Commission could do a better job of addressing consumer issues, by, among other things, ensuring that consumers have access to "more" and "affordable" programming choices across all distribution platforms, including the Internet (Moore, 2012). The Minister also expressed his hope that the Commission "regulate broadcasting undertakings *only to the extent necessary*" (*ibid*; emphasis added).

In the 2013 Speech from the Throne, the federal government announced (long before any LTT decisions were made by the CRTC) that in order to protect "everyday Canadians," it intended to "re-

quire channels to be unbundled" (*ibid.*). Shortly thereafter, the Commission received an Order-in-Council requiring it to submit a report about how consumer access to programming on a per-channel (unbundled) basis "can be maximized in a manner that most appropriately furthers the implementation of the broadcasting policy for Canada" (Order-in-Council 2013-1167).

There were thus clear political expectations that the Commission conduct the LTT hearings in a manner consistent with the consumerist orientation endorsed by the federal conservatives. While the LTT hearings were still ongoing, and before the Commission took any decisions, the (Conservative) Minister of Heritage publicly commented that the federal government would "not allow any moves to impose new regulations and taxes on Internet video" (Bradshaw, 2014a). Although the CRTC publicly made assurances about the fairness of the hearing (*ibid.*), the independence of the Commission from government became a topic of debate amongst industry observers and news organizations (see for example O'Brien, 2014; Winseck, 2014). During the federal election, and to much public ridicule (including several YouTube parody videos, as well as a substantial Twitter backlash), then Prime Minister Stephen Harper launched a campaign video

in which he is shown sitting in front of a television screen with the Netflix logo prominently displayed, assuring voters that only his political party could be trusted not to impose a “Netflix tax” and to “focus on the needs of Canadian consumers, and to keep your taxes low” (Harper, 2015).

Regardless of how direct an influence the federal election and the government’s stated hopes had on the CRTC, it is clear that the regulator was operating under prevailing assumptions that certain policy pathways were to be favoured over others.

### CONCLUSION: REGULATE OR CHILL

According to a popular theme, digital disruption arises from a collision between exponential rates of technological change and slower-paced or incremental rates of change in law, economy, policy, and society (Franklin, 2012). Broadcasting policy, in particular, is often portrayed as being reactive and more sensitive to the welfare of incumbent broadcasters than to the welfare of citizens or consumers. The “near-glacial pace” of regulatory change in democratic systems is attributed to its intrinsic features including its public character, deliberative

nature, and inclusivity (Downes & Mayo, 2015, p. 23).

The “digital revolution,” and the “tornado” of digital disruption that accompanies it, are being framed by many as not merely unstoppable, but also as intrinsically good (Morley, 2006; Mosco, 2005). Thus, in many countries the rationale for regulatory intervention in broadcasting has shifted from spectrum scarcity to the interests of “citizen-consumers” who seek a greater range of choices from domestic broadcasters (Freedman, 2015a; Freedman, 2015b; Lunt & Livingstone, 2011).

Our examination has revealed the complexity of Netflix’s presence in Canada, and how it has been able to capture such a substantial share of the Canadian market in such a short period of time. Canada has provided ideal conditions within which Netflix can thrive, disrupt, and induce regulatory policy to become unstuck. The regulator’s commitment to a greater reliance on market forces, and its overall prioritization of consumer choice, have made Netflix’s entry and continued presence an easy one. Netflix and OTTs have furthermore provided a way for the Commission to legitimize its application of wider deregulatory measures to the Canadian linear television system. The Commis-

sion appears to have used the seeming inevitability of the changes related to technological disruption, and the unsubstantiated claim that OTTs contribute to the goals of the Broadcasting Act through market forces alone, to ease regulatory requirements. Policy silences (Freedman, 2010), notably the lack of consideration of alternative measures to deal with OTTs, have supported the hands-off approach to streaming services, and failed to consider the development of shared, non-commercial, digital public spaces.

Although Netflix received the majority of public attention due to its ostentatious rejection of the Commission’s jurisdiction, Google also ran afoul of the Commission’s requests for the company to provide evidence to substantiate claims it made during LTT about how it contributes to the goals of the Broadcasting Act (CRTC, 2014d). Unlike Netflix, Google did not publicly reject the Commission’s jurisdiction, noting “we stand by the submissions we made in this process and believe we made a positive contribution to the discussion” (Google spokesperson, as quoted in Bradshaw, 2014b). However, the result was the same – the Commission was forced to make its decisions without complete information, “based on the remaining evidence on the re-

cord” (CRTC, 2014d). The Commission then similarly struck Google’s submitted documents from the LTT public record.

While the Canadian government has thus far refrained from extending sales tax and cultural obligations to the online space, other jurisdictions are exploring alternative policy pathways and attempting to assert themselves in this direction: Australia is moving forward with the extension of sales tax to foreign streaming services (Pash, 2015); the French government is considering several initiatives; and the City of Chicago recently extended its amusement tax to apply to streaming services and introduced a new cloud tax targeting leased computer-based services such as Amazon Web Services (Hinz, 2015; Pletz, 2015). The question of how successfully these measures can be implemented is unclear. From a strictly consumer standpoint, these measures are unwelcome. Chicago-based subscribers to popular OTT services have already filed a lawsuit to challenge the city’s extension of the amusement tax to streaming services, arguing that the city does not have the authority to implement such an initiative (Pletz, 2015). The city has also delayed the implementation of its cloud tax more than once, allegedly due to criticism from consumers and tech businesses alike (Hinz, 2015). Netflix has stated

that, for its part, it plans to comply with Chicago’s new sales tax by “adding it to the cost we charge subscribers” (Anne Marie Squeo, Netflix spokesperson, as quoted in Farivar, 2015). Netflix and other OTTs might therefore be more accepting of strictly tax-related initiatives, rather than cultural ones, since the former do not affect their spending, strategic operations, or creative and business decisions, and can be put into effect without additional costs to the companies themselves by offloading the extra charges onto subscribers. Netflix, in particular, is also in such a strong market position that consumer behaviors would likely be unaffected by an added tax, and the negative aura associated with such a move would primarily be centered on the jurisdiction that imposed the tax, rather than Netflix itself.

Some participants in the LTT hearings argued that *disruption through policy* is a greater immediate threat to the Canadian broadcasting industry than economic disruption (Miller, 2014). In countries without high levels of broadband connectivity, Netflix and other streaming services do not represent an immediate threat (Strangelove, 2015). But in countries in which the business model of incumbents emphasizes providing broadband connectivity bundled with access to licensed imported

content, the threat is more tangible, especially in countries such as Canada where the audiovisual regime is an elaborately designed mixture of entitlements and responsibilities. Netflix’s public rejection of the Commission’s jurisdiction adds an important new layer of complexity to domestic broadcasting’s digital shift. The arrival of large, unregulated transnational video distributors makes it unclear how or whether legacy audiovisual policy goals concerning national, regional, and cultural representation can be implemented, measured, or enforced. These issues are intertwined with larger questions surrounding the future cultivation of informed citizenries and functional democracies through civic discourse and shared national experiences.

In fact, the LTT hearing can be considered to be a preview of the impending tensions in the media sector between transnational corporations and domestic governments’ mandates to ensure media development in the public interest, making the idea of cultural sovereignty seem very quaint indeed. Regulated incumbents will not fail to point out the asymmetry of policy regimes that impose obligations on one set of players and not the other. When they do not provide audience, market, and expenditure data to regulators, streaming services



such as Netflix, which are both “everywhere and nowhere,” introduce policy silence in the form of strategic opacity in previously transparent sectors. The relative sovereignty of national markets is undermined, as it is no longer clear where and how people are watching domestic content.

It is urgent to reconstruct the “policy toolkit” for 21st century mediated cultural policy in a way that ensures that all relevant policy pathways are considered. Under the lead of a new Liberal government in Canada, the country has recently launched an expansive review of cultural policy, the results of which will not be known for some time. Any substantive reconstruction of the policy toolkit must involve reconsidering the predominant role attributed to legacy broadcasting in ensuring cultural expression, upgrading the responsibilities and resources attributed to public service media, and eliminating uncertainty about jurisdiction over digital space in national territory. It is crucial that such a reconstruction recognize the significant power held by “reformer” startups like Netflix, and consider novel approaches, including cooperation amongst regulatory agencies, to induce compliance of transnational players. The longer that regulatory agencies wait to act, the more difficult and turbulent the implementation of new policies will be.

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