



18 November 2024

Marc Morin
Secretary General
CRTC
Ottawa, ON K1A 0N2

Filed online

Dear Secretary General,

Re: OUTtv Network Inc., Part 1 Application 2024-05380-1 (Vancouver, 15 October 2024)

The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013 to undertake research and policy analysis about communications, including broadcasting. The Forum supports a strong Canadian communications system that serves the public interest as defined by Parliament in the 1991 *Broadcasting Act*.

The Forum's intervention supporting approval of the Part 1 application filed by OUTtv is attached.

We look forward to reviewing the applicant's reply if any. Should the CRTC decide to hold an appearing public hearing in this matter the Forum respectfully asks to participate in that process.

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OUTtv
Part 1 Application 2024-0538-1

Intervention of the Forum for Research and Policy in Communications (FRPC)

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18 November 2024

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Executive Summary

- ES 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established just over a decade ago in 2013. It undertakes research, legal analysis and quantitative research about communications including broadcasting. FRPC believes that the public interest is served when it meets Parliament’s objectives for the broadcasting system, as set out in section 3 of the 1991 *Broadcasting Act*, as amended in April 2023 by the *Online Streaming Act*.
- ES 2 OUTtv applied to the CRTC to amend the conditions of service set out in Broadcasting Decision CRTC 2022-223. Rather than asking for mandatory carriage under section 9.1(1)(h) of the current *Broadcasting Act*, OUTtv asks the CRTC to require BDUs to distribute its service as part of the basic package unless a BDU (or BDUs) negotiates different terms to which OUTtv agrees in writing. OUTtv then also asks that the Commission impose conditions of service on its licence that would require it to
- a. increase the level of Canadian content on the service from 35% to 55%
 - b. now require that 55% of the evening broadcast period (depending on which time zone is used) be Canadian
 - c. raise the percentage of its previous year’s expenditures devoted to Canadian programming from 25% to 55%,
 - d. require for the first time that 10% of its revenues be devoted to programming of national interest, and
 - e. require for the first time that 75% of its expenditures on non-news and non-information programming be allocated to independent production.
- ES 3 The Forum’s intervention begins by setting out concerns about the insurmountable challenges that the CRTC’s publication of short-term, unreliable data using shifting presentations poses to the evaluation of its policies, and hence to its transparency. We recommend that the CRTC publish all years of *Statistical and Financial Summaries* that it holds for the television, radio and BDU sectors, and for Individual discretionary services, beginning in Fall 2025. As we have already asked in our submissions to the CRTC since 2013, FRPC asks the CRTC to convene and host an annual meeting of parties interested in improving the quality of data available in broadcasting.
- ES 4 FRPC then describes the context of OUTtv’s application, noting in particular that apart from the advances offered by satellite technology Canada has changed not just its broadcasting statute but its human-rights legislation. In 2017, for example, Parliament amended the *Canadian Human Rights Act* so that the prohibited grounds of discrimination now include “...

sex, sexual orientation, gender identity or expression, marital status, family status, [and] genetic characteristics.

- ES 5 The Forum briefly traces the history of OUTtv’s relationships with BDUs, noting that the Commission had upheld the service in three complaints regarding distributors’ treatment of the service. FRPC also explores the matter of the Commission’s 2022 decision to renew OUTtv, noting that the decision’s use of an ‘expectation’ to include OUTtv in packages consistent with its theme and with the highest subscriber penetration levels meant that the requirement is unenforceable, as the *Broadcasting Act* only authorizes the CRTC to penalize breaches of its regulations and conditions of service.
- ES 6 The Forum also addresses the question of whether OUTtv’s financial condition is in any way unique from those of all discretionary services operating without a 9.1(1)(h) mandatory carriage order, in line with the CRTC’s discussion in its May 2024 decision to renew APTN’s mandatory carriage status and to grant it a subscriber-rate increase. Our analysis of the *Statistical and Financial Summaries* published by the CRTC for individual discretionary services found that subscribers to BDUs’ discretionary services operating without 9.1(1)(h) status decreased by an average of 19.5% from 2018/19 to 2022/23 and that independent (non-BDU) discretionary services’ subscribers decreased by an average of 9.4% -- OUTtv’s subscriber levels decreased by 56.8%.
- ES 7 The Forum notes that OUTtv’s proposals will benefit the broadcasting system with respect to its expenditures on and exhibition of Canadian programming, in particular providing certainty where little now exists because OUTtv is not offering vague and unenforceable ‘commitments’, ‘best efforts’ or expectations, but a willingness to be bound by enforceable conditions of service. FRPC considers that OUTtv’s condition of service regarding carriage on basic – unless both parties negotiate and agree on terms set out in writing – is an elegant and efficient solution to the longstanding problem of concentrated BDU ownership. As Canada’s three largest BDUs (BCE, Rogers/Shaw and Québecor) obtained \$5.3 billion in subscriber revenues in 2022-23 they can well afford to outlast far and less well-endowed, tinier discretionary programming services. While the CRTC’s alternative-dispute resolution system exists as an alternative to OUTtv’s proposal, the fact is that too little is actually known as to whether this system works – and if it does work, whether it works equally for all. When FRPC analyzed the CRTC’s own ADR data from 2015 to 2021, we found that its ADR processes lasted on average more than 7 months, with several (for information resolution, staff-assisted mediation, Part 1 applications and final-offer arbitration) lasting more than a year.
- ES 8 FRPC **supports** approval of OUTtv’s application due to the facts provided in its application in support of its arguments and to its proposals for conditions of service that will enable the service to undertake and broadcast more Canadian programming.

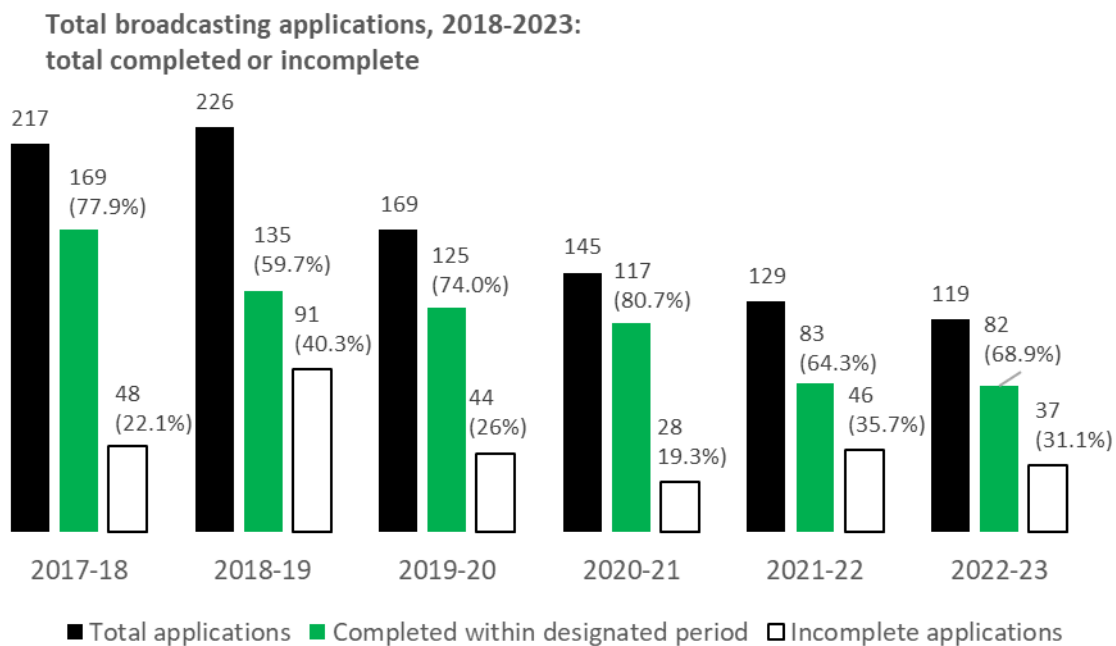
ES 9 The Forum recommends that

- a. the CRTC grant OUTtv's application in whole, and that any relief in addition to or in substitution for the specific elements of its application not derogate from their goal – distribution on the basic service or according to terms negotiated and agreed to by OUTtv in writing,
- b. the CRTC publish all Statistical and Financial Summary information that it holds for individual broadcast media (television, radio as well as BDUs) and individual discretionary services, beginning in the report it publishes to include licensees' 2023-2024 broadcast year and that
- c. the CRTC convene and host an annual meeting of parties interested in improving the quality of broadcast data published by the CRTC.

I. Introduction

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013 to undertake research and policy analysis about broadcasting and telecommunications. The Forum supports a strong Canadian communications system that serves the public interest.
- 2 The Forum is intervening with respect to Part 1 Application 2024-0538-1 filed by OUTtv on Thursday, October 15, 2024¹ and published online by the CRTC on Friday, October 18, 2024. The 2010 *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (Rules)* state that “[t]he Commission [sic] must post on its website all applications that comply with the requirements set out in section 22”.² The *Rules* do not state the timing for this step’s completion although, as Figure 1 shows, the CRTC itself evaluates its performance regarding the processing of broadcasting applications.

Figure 1 Timeliness of CRTC’s processing of broadcasting applications



CRTC, Service objectives for the processing of certain types of broadcasting applications, crtc.gc.ca/eng/publications2.htm [various fiscal years]

- 3 Prompt publication of applications enables the CRTC to meet its own standards, increasing public confidence in the Commission’s administration of its responsibilities under its enabling

¹ DM#4732579, Form 301, page 3, at s. 1.6(d).

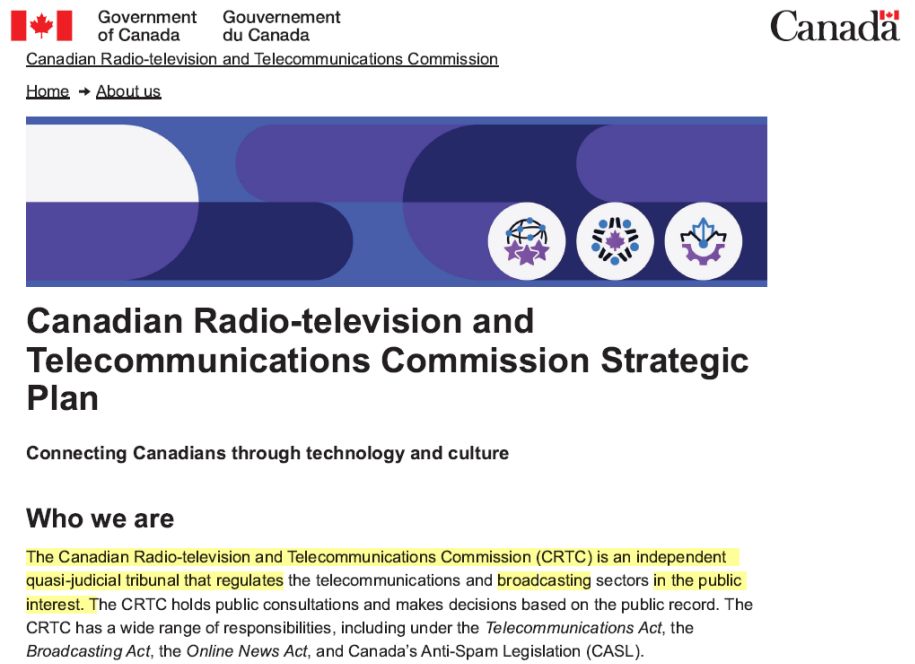
² [Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure](#), s. 23; s. 22(1) sets out requirements for service of applications on other parties, while s. 22(2) mandates the use of specific CRTC forms or the alternative steps to take in the absence of such forms. (The *Rules* do not define ‘applicant’.)

statutes. More to the point, prompt decisions increase the odds that Parliament’s broadcasting policy for Canada in section 3 of the *Broadcasting Act* can be implemented.

4 Part 1 Application 2024-05380-1 asks the CRTC to amend the distribution order it issued when it renewed OUTtv’s licence in 2022.³ FRPC’s **supports** OUTtv’s application. In the remainder of this section FRPC addresses the issue of evidence in this broadcasting proceeding and others. The Forum then sets out context for OUTtv’s application in Part II, and describes its understanding of the OUTtv application in Part III. Its conclusions and recommendations follow in Part IV.

5 The CRTC describes itself as “an independent quasi-judicial tribunal that regulates ... broadcasting in the public interest.”⁴

Figure 2 ‘An independent quasi-judicial tribunal regulating broadcasting in the public interest’



6 Quasi-judicial proceedings share certain characteristics: “publicity, a hearing usually in public or a local inquiry of some kind, an effective opportunity to both sides to be heard, an obligation to carefully consider all evidence adduced and submissions made, and sometimes a right of appeal again allowing both sides to be heard.”⁵

7 The *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* require applicants and interveners to set out their objective (“nature of the decision sought”), their arguments (“grounds of the application”) and evidence (“relevant facts”).⁶

³ *OUTtv – Administrative renewal*, [Broadcasting Decision CRTC 2020-242](#) (Ottawa, 6 August 2020).
⁴ CRTC, *Canadian Radio-television and Telecommunications Commission Strategic Plan: Connecting Canadians through technology and culture*, [About Us](#) (Ottawa, 21 October 2024).
⁵ *COPITHORNE v. CALGARY POWER LTD. ET AL.*, (1956) 5 D.L.R. (2d), at page 598, rev’d by *COPITHORNE v. CALGARY POWER LTD. AND HALMRAST*, (1957) (AB CA) 10 D.L.R. (2d) at 161-180, rev’d by *CALGARY POWER LTD. AND HALMRAST v. COPITHORNE*, [1958] S.C.R. 24, 24-37 but not with respect to the hallmarks of quasi-judicial action.
⁶ Set out in the case of applicants under section 22(2)(e) and in the case of interveners, under section 26(f).

A. Publishing annual 5-year slices of data limits policy evaluation by the public

- 8 Since 1968 the *Broadcasting Act* has enabled the CRTC to license broadcasters for three different periods of time. Licence terms were limited to a maximum of 5 years from 1968 to 1990 and⁷ were extended to a maximum of 7 years from 1991 to 2022.⁸ In 2023 the *Online Streaming Act* amended the *Broadcasting Act* to enable the CRTC to issue licences for indefinite or fixed terms.⁹
- 9 Despite the change from 5-year to indefinite licence terms, the CRTC has since the 1970s only ever published financial and statistical summary information about broadcasters in five-year periods: each annual report sets out the most recent and its four preceding broadcast years.
- 10 Five-year periods do not enable the impact of the CRTC’s licensing and policy decisions to be adequately evaluated. For one thing, some CRTC policies change every decade or so, while others change less frequently. The CRTC has amended its policies about BDUs’ carriage of programming services at least five times in the last five and a half decades, for example, while it has amended its regulatory approach to Indigenous broadcasting twice in the same period:¹⁰ Table 1.

Table 1 Pace of change in CRTC regulatory policies

Carriage policy	Indigenous broadcasting policy
<i>Community Antenna Television</i> , Public Announcement (Ottawa, 13 May 1969)	
<i>Cable Television Service Tiering and Universal Pay Television Service</i> , Public Notice CRTC 1983-245 (Ottawa, 26 October 1983)	
<i>Distribution and Linkage Requirements</i> , PN CRTC 1987-261 (Ottawa, 26 November 1987)	
	<i>Native Broadcasting Policy</i> , Public Notice CRTC 1990-89 , (Ottawa, 20 September 1990)
<i>ACCESS RULES FOR BROADCASTING DISTRIBUTION UNDERTAKINGS</i> , Public Notice CRTC 1996-60 (Ottawa, 26 April 1996)	
	<i>Changes to conditions of licence for certain native radio undertakings</i> , Public Notice CRTC 2001-70 (Ottawa, 15 June 2001)
<i>Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services</i> ,	

⁷ *Broadcasting Act*, 16&17 Eliz. 2, c. 25, s. 17(1)(a).

⁸ *Broadcasting Act*, S.C. 1991, c. 11, B. 9.01, s. 9(1)(b).

⁹ *Online Streaming Act*, S.C. 2023, c. 8, s. 8(1)(b); *Broadcasting Act* S. c. 11, B. 9.01, as am. s. 9(1)(b): “Subject to this Part, the Commission may, in furtherance of its objects, issue a licence, the term of which may be indefinite or fixed by the Commission.”

¹⁰ The CRTC firsts began publishing financial *and* other information concerning then-“Type B Native Stations” in its *Broadcasting Policy Monitoring Report 2003 at page 36* (the data described the 5-year period from 1998 to 2002)..

Carriage policy	Indigenous broadcasting policy
Broadcasting Public Notice CRTC 2008-100 (Ottawa, 30 October 2008)	
<i>Let's Talk TV: A World of Choice - A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market</i> , Broadcasting Regulatory Policy CRTC 2015-96 (Ottawa, 19 March 2015)	

B. *Statistical and Financial Summaries' changes in services and presentation prevent long-term analysis*

- 11 Parties interested in evaluating the CRTC's decisions and policies regarding individual discretionary services' access to subscribers could make do with the CRTC's decades-old 5-years-at-a-time *Statistical and Financial Summaries* if they could cut and paste columns of data from each year's report into the most recent report. FRPC, for instance, initially intended to compare the performance of individual BDUs' discretionary services with the services of independent or non-vertically integrated services, over several decades.
- 12 Unannounced changes in the contents and formatting of the CRTC's *Statistical and Financial Summaries* contents and formatting render it impossible to undertake long-term comparisons of individual discretionary services. One such change is shown in Figure 3, a snapshot of the table of contents from the 1999-2003 table of contents of the *Statistical and Financial Summaries* of individual discretionary services. In this report, the data for each service appear on a separate page in the spreadsheet – 112 separate pages in total.

Figure 3 Discretionary services' presentation in early 2000s

TITULAIRE / LICENSEE	SERVICE	PAGE
Animal Planet Canada Company	AnimalPlan	38
Jasper Broadcasting Inc.	BBCCanada	56
Jasper Junior Broadcasting Inc.	BBCKids	32
The Biography Channel (Canada) Corp.	Biography	61
Learning and Skills Television of Alberta Limited	Book	13
Stornoway Communications Limited Partnership	bpm.tv	52
CHUM Limited	BRAVO	17
Breakaway PPV Corporation	Breakaway	2
Astral Broadcasting Group Inc.	CANAL D	91
Astral Broadcasting Group Inc.	Canal vie	108
Astral Broadcasting Group Inc.	Canal Z	101
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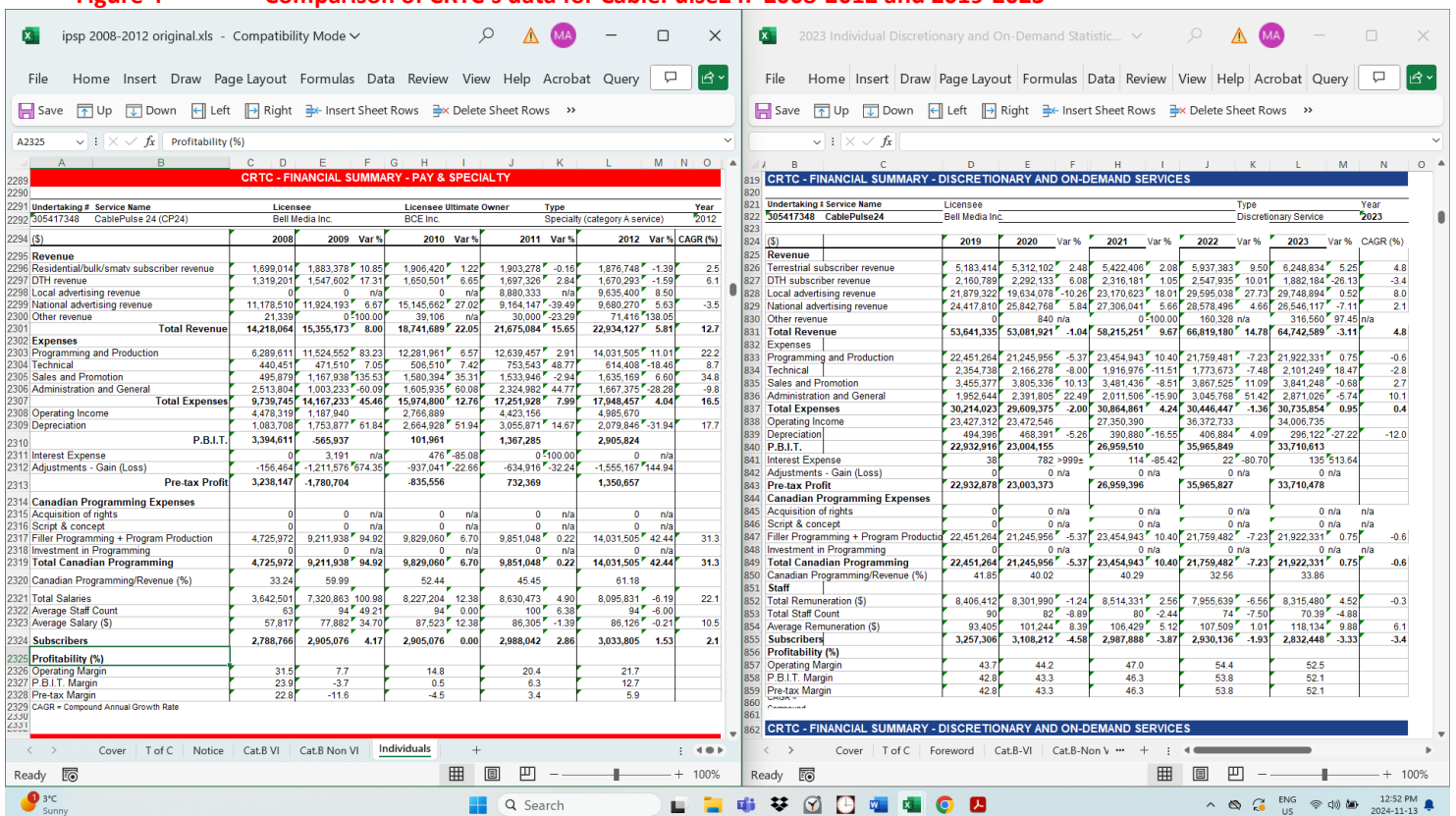
- 13 By 2008 the presentation in the *Statistical and Financial Summaries* changed, with all individual services' information set out in a single spreadsheet page. Merging the individual

pages of the CRTC's earlier discretionary *Statistical and Financial Summaries* into single pages for each report to then copy into a time-series would be a massive undertaking.

14 The shift from individual pages to a single page is just one obstacle affecting the public's ability to evaluate the impact of the CRTC's BDU-carriage policies. Another is that the number of discretionary services varies over time: the 2008-2012 *Statistical and Financial Summaries* describes 251 individual programming services while the 2019-2023 summary describes 172: pasting the 2008-12 data beside the 2019-23 spreadsheet data yields misaligned information.

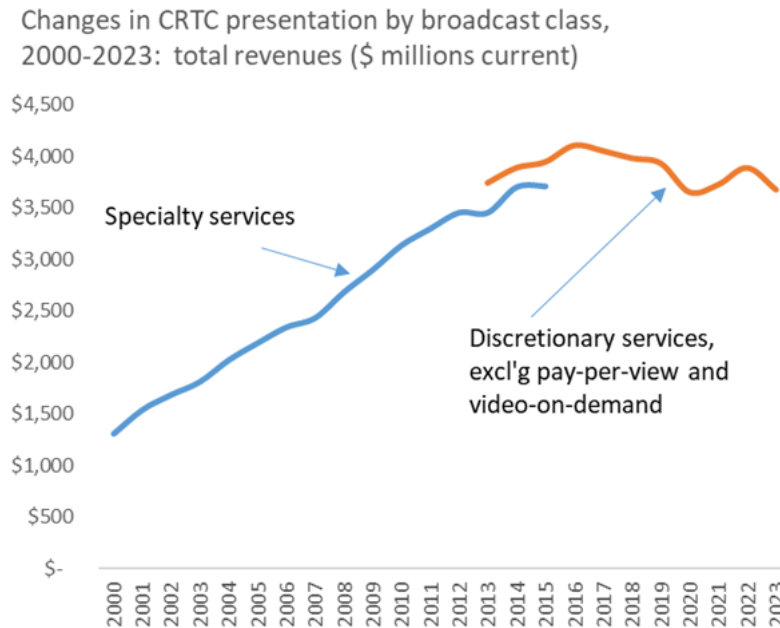
15 Figure 4 sets out a third obstacle. It compares the CRTC *Statistical and Financial Summaries* for CablePulse 24 for 2008-2012 (left) with the same service's data for 2019-2023 (right). Close inspection shows that the earlier data occupy one more line (44 lines) than the later data (43 lines). Again, simply copying the earlier data for all services and pasting these beside the newer data yields misaligned values.

Figure 4 Comparison of CRTC's data for CablePulse24: 2008-2012 and 2019-2023



16 Similarly, when the CRTC changes the presentation of information about classes of broadcasting undertaking, the data become incomparable over time. For example, from 2000 to 2015 the CRTC reported financial and statistical information for 'specialty services'; in 2018 it began instead to report information about discretionary services excluding pay-per-view and video-on-demand services: Figure 5.

Figure 5 Changes in presentation of specialty and discretionary TV services



17 These changes complicate evaluation of the CRTC’s policies regarding the distribution – or carriage – of programming services other than ‘conventional’, over-the-air television broadcasters serving individual communities.

C. CRTC published data are unreliable over time

18 A third problem is that even if the obstacles just mentioned – format switches from many pages of data to one, changes in the number of services in operation, the addition or deletion of blank lines from one year’s report to the next and changes in overall presentation – were overcome, the data being reported by the CRTC are unreliable. That is, the data to describe the same year vary from one report to another.

19 The data the CRTC publishes in a given year obviously depend on the number of licensees that submit the required annual returns on time: results from licensees whose returns are received late are included in the follow year’s *Statistical and Financial Summaries*. In other words, the number of respondents for a given year may increase the following year, once the late-filing respondents’ data are included. This is simply good practice.

20 What is not clear is why the numbers of individual services for the same year both increases and decreases. Table 2 lists the CRTC *Statistical and Financial Summaries* published for 2010-2014 to 2019-2023, showing the broadcast years described by the reports for vertically and non-vertically integrated services. The 2013-17 and 2014-18 reports for non-vertically integrated services show, for instance, 99 and 100 reporting units, respectively, for the 2014 (broadcast) year. However, the other hand the number of reporting units for non-vertically integrated discretionary services in 2018 decreased from 84 to 74, and in 2019 from 70 to 58. Overall, almost half (46%) of the reporting units shown for years after the initial publication

differed from that initial figure, and in four cases (for the 2018, 2019, 2021 and 2022) broadcast years the number of reporting units decreased.

Table 2 Differences in numbers of reporting units shown in *Statistical and Financial Summaries*, by year of report

Year of CRTC report	Type of discretionary service	Year described by data, showing numbers of reporting units													
		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
2010-14	Non-VI	87	74	91	99	96									
2011-15	Non-VI		74	91	99	96	94								
2012-16	Non-VI			91	99	96	95	83							
2013-17	Non-VI				100	97	97	83	77						
2014-18	Non-VI					121	121	104	96	84					
2015-19	Non-VI						121	104	96	84	68				
2016-20	Non-VI							104	96	83	70	62			
2017-21	Non-VI								97	84	70	63	68		
2018-22	Non-VI									74	58	53	53	51	
2019-23	Non-VI										70	65	68	69	68
2010-14	VI	24	24	27	27	27									
2011-15	VI		24	27	27	27	27								
2012-16	VI			27	27	27	27	14							
2013-17	VI				27	27	27	14	14						
2014-18	VI					84	85	75	73	85					
2015-19	VI						85	75	73	85	81				
2016-20	VI							75	73	85	81	80			
2017-21	VI								73	85	81	80	76		
2018-22	VI									95	91	90	87	84	
2019-23	VI										81	80	78	75	74
No colour	First appearance of reporting-unit data for a given year														
Green	Number of reporting units shown matches number of reporting units for same year in previous report														
Pink	Number of reporting units shown increased from number of reporting units for same year in previous report														
Yellow	Number of reporting units shown <i>decreased</i> from number of reporting units for same year in previous report														
Differences between first and other instances of reporting units		Total number of second & more instances of reporting units for given year					Differences between first appearance and other reports (pink cells)				Differences as % of total number				
Number of Non-VI data points		36					21				58%				
Number of VI data points		36					12				33%				
Total data points		72					33				46%				
Source: CRTC discretionary service <i>Statistical and Financial Summaries</i>															
Note: "Non-VI" – licensed discretionary services not operated by BDU licensee; "VI" – discretionary service operated by licensed BDU															

21 Non-CRTC parties seeking to evaluate the impact of the CRTC’s BDU-carriage policies with respect to non-vertically integrated programming services such as OUTtv are placed at a disadvantage by the CRTC’s long-standing and ongoing decision not to publish long-term, comparable and reliable historical data about discretionary programming services. The absence of long-term time-series data from the CRTC and the unexplained changes in the data reported make it impossible for most of the public and public-interest organizations to undertake objective data analysis. Lack of reliable data makes it difficult to assess the CRTC’s decisions, and a serious indirect consequence of the lack of long-term, comparable data from the CRTC is that the evidence provided by large vertically integrated broadcasters with the resources needed to undertake quantitative research may be granted more weight. Over the long run, the lack of reliable data published by the CRTC makes it more likely that the Commission’s decisions may rely more heavily on the data provided by the largest

broadcasters in the industry, rather than on the evidence-light ‘perspectives’ of the public in whose interest the CRTC says it regulates.

- 22 The CRTC must change its approach to publishing objective information about all broadcasters, so as to be transparent: without this change, neither the CRTC’s Commissioners, the public nor Parliament will be able to evaluate the CRTC’s performance and the outcomes of its policies.

Recommendation 1 The CRTC should publish all *Statistical and Financial Summary* information that it holds for individual broadcast media (television, radio as well as BDUs) and individual discretionary services, beginning in the report it publishes to include licensees’ 2023-2024 broadcast year.

- 23 In several several proceedings over the past decade¹¹ FRPC has asked CRTC in to convene and host an annual meeting of parties interested in improving the quality of data available in broadcasting.

- 24 To the best of our knowledge the CRTC has not accepted this proposal, although we note that in early 2024 Ipsos held 17 ‘workshops’ with 382 unidentified participants¹² to discuss how to define Canadian content, and that participants in these workshops “tended to focus” among other things “on ... [a] transparent and accountable system through better data resources”¹³ It is unclear whether the CRTC will be addressing and correcting the unreliability of its data as a consequence of these workshops, however, meaning that it will be difficult or – considering that the CRTC has destroyed all of its TV program logs from before 2014 – impossible for either Parliament, the public or the CRTC to evaluate the impact of its policies using objective data and sound empirical research methods.

Recommendation 2 The CRTC should convene and host an annual meeting of parties interested in improving the quality of broadcast data published by the CRTC.

¹¹ For example, in: FRPC, *Call for comments on a targeted policy review for the commercial radio sector*, Broadcasting Notices of Consultation 2013-572 and 2013-572-1 (Ottawa, 30 October 2013 and 13 December 2013), Comments (Ottawa, 30 January 2014), at paras 192-194; FRPC, *A review of the policy framework for local and community television programming*, Broadcasting Notice of Consultation CRTC 2015-421 (Ottawa, 14 September 2015) – final reply by FRPC (Ottawa, 16 February 2016), at paras. 74-78; FRPC, *Renewal of television licences held by large English- and French-language ownership groups*, Broadcasting Notice of Consultation CRTC 2016-225 (Ottawa, 15 June 2016), Intervention (Ottawa, 15 August 2016), at paras. 87-93; FRPC, *Call for comments – Proposed new Broadcasting Fees Regulations*, BNoC 2023-280 (Ottawa, 23 August 2023) at para. 47; FRPC, *Call for comments – Guidelines regarding consultation and engagement practices in proceedings relating to official language minority communities and official languages*, Broadcasting Notice of Consultation CRTC 2024-202 (Ottawa, 9 September 2024) – Reply (18 November 2024), at para 43.

¹² Possibly at a cost of \$110,549.25” for a November 9 2023 contract to “deliver range of facilitation, reporting and analysis services for consultative workshops”:

https://search.open.canada.ca/contracts/?sort=contract_date+desc&search_text=crtc+ipsos&page=1.

¹³ Ipsos, [Defining Canadian Content – Workshops with Stakeholders and Industry: What We Heard Report](#), (Toronto, September 2024), “Common aspirations for an updated CanCon definition”.

25 The issue of CRTC data unreliability is relevant in this proceeding because the absence of reliable data over time complicates historical evaluation.

II. Context of OUTtv's application

26 This section provides an overview of the historical technological and legislative framework within which the CRTC crafted its approach to television programming services like OUTtv, and identifies key changes in the *Broadcasting Act* and *Canadian Human Rights Act* that have been made since OUTtv was first licensed in 2000.

A. Satellites and Parliament's broadcasting policy

27 In late 1972 Canada's Anik A1 satellite began to provide telecommunications service and within a decade the CRTC began to grant licences for pay television services.¹⁴

28 At the time the CRTC thought its Pay-TV decisions would generate significant contributions to Canada's broadcasting system and that pay television services would increase the diversity of programming available to all Canadians, strengthen regional reflection, enhance Canadian programs' quality and distinctiveness, provide new revenue and opportunities for producers then excluded from Canada's program production industry and generate new programs in both official languages.¹⁵

29 During the period that Parliament was completing the massive work of rewriting Canada's *Constitution* – including, for the first time, a *Charter of Rights and Freedoms*¹⁶ that in turn clarified the importance of the 1977 *Canadian Human Rights Act*¹⁷ -- the CRTC was for the first time licensing services to which cable subscribers could choose to subscribe.

30 The CRTC's first round of optional TV service-licensing ended poorly: four of the six pay TV services licensed in 1982¹⁸ merged with other companies or ceased operations. In 1984 – “faced with a situation which augured badly for the survival of Canadian pay television” –

¹⁴ CRTC Public Notice (Ottawa, 21 April 1981) invited applications; *Pay Television*, Decision CRTC 82-240 (Ottawa, 18 March 1982) granted 6 pay television licences.

¹⁵ *Introduction to Decisions CRTC 88-772 to 88-777: The Renewal of the General Interest Pay Television Network Licences and Certain Specialty Service Network Licences*, [Public Notice CRTC 1988-173](#) (Ottawa, 27 October 1988), “BACKGROUND”, citing Decision CRTC 82-240 (Ottawa, 18 March 1982).

¹⁶ *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁷ R.S.C., 1985, c. H-6.

¹⁸ First Choice, Alberta Independent Pay Television (Superchannel), Ontario Independent Pay Television, Star Channel (which ended service in December 1983), Lively Arts and World View Television. The CRTC also licensed Cathay International and Télévision de l'Est du Canada (TVEC) in separate decisions in 1982. In 1983 it licensed Aim Satellite Communications to provide a discretionary service, which subsequently merged with Allarcorn's Superchannel.

“the Commission ... approved major structural and ownership changes to the remaining pay television networks.”¹⁹

B. CRTC reduced requirements to ensure discretionary services’ survival

31 By 1984 Canadian pay TV services’ financial position had not improved, thanks in part to low penetration levels and “insufficient ... suitable Canadian feature film product”.²⁰ The CRTC therefore reduced the pay TV services’ Canadian content requirements to limit ‘overexposure’ (that is, excessive repeat broadcasts of the same programs to meet licensing requirements), and to address the services’ “financial predicament”.²¹ The federal government also announced a few months later that pay and specialty TV services would be eligible to seek program production funding from the Canadian Broadcast Development Fund.²² The CRTC also granted new, ‘specialty’ service licences to MuchMusic and The Sports Network,²³ adding that it would review “the feasibility of reaching the minimum Canadian content levels” set out in the decision “in the light of [the licensees’ experience] during the first two years of operation.”²⁴

32 Three years later the CRTC licensed 9 new specialty services – for distribution “as part of the basic cable service” – and allowed cable licensees that distributed some or all of these services “as part of the basic cable service” to charge subscribers a “mark-up”: 1¢ for every 2 Canadian specialty services carried on basic, up to 5¢ if the cable systems carried “the full package of specialty services (depending on the language of the system and package involved)”.²⁵ (Hypothetically, this markup would have yielded a company like Rogers Cablesystems – with 1,280,400 subscribers in 1985²⁶ – more than \$150,000 if it carried just

¹⁹ *Introduction to Decisions CRTC 88-772 to 88-777: The Renewal of the General Interest Pay Television Network Licences and Certain Specialty Service Network Licences*, [Public Notice CRTC 1988-173](#) (Ottawa, 27 October 1988), “BACKGROUND”.

²⁰ *Introduction to Decisions CRTC 88-772 to 88-777: The Renewal of the General Interest Pay Television Network Licences and Certain Specialty Service Network Licences*, [Public Notice CRTC 1988-173](#) (Ottawa, 27 October 1988), “BACKGROUND”.

²¹ *Ibid.*

²² Announcement by Minister of the then-Communications Department on 9 December 1986.

²³ *Applications for a Network Licence to distribute a Canadian Music Specialty Programming Service*, Decision CRTC 84-338 (Ottawa, 2 April 1984); *Action Canada Sports Network*, [Decision CRTC 84-339](#) (Ottawa, 2 April 1984).

²⁴ *Action Canada Sports Network*, [Decision CRTC 84-339](#) (Ottawa, 2 April 1984).

²⁵ *INTRODUCTORY STATEMENT TO DECISIONS CRTC 87-895 TO 87-906: CANADIAN SPECIALTY AND PAY TELEVISION SERVICES*, [Public Notice CRTC 1987-260](#) (Ottawa, 30 November 1987).

²⁶ Task Force on Broadcasting Policy, *Report*, (Ottawa, Minister of Supply and Services Canada: 1986) at Chapter 27, page 631.

two of the nine new services licensed or more than \$760,000 if it carried all 9 services,²⁷ adding approximately half a percentage point to its basic-cable revenues.²⁸)

C. *Tantalizing prospect of successful and innovative discretionary services*

- 33 Since the late 1980s the CRTC has licensed more than two hundred services resembling the original ‘specialty’ services. Their programming is focussed on specific themes, and they earn revenue from subscriber fees and (for the most part) national advertising.
- 34 Over the course of its licensing activities Parliament’s legislative objectives have changed. In 1982, for example, Canada’s new *Constitution* established through the *Charter of Rights and Freedoms* that all persons in Canada are equal without regard to sex.²⁹ By 1995 this right of equality also applied to sexual orientation.³⁰
- 35 In licensing OUTtv in 2000 as “PrideVision”,³¹ therefore, the CRTC was reflecting the evolution of Canadian law and human rights while simultaneously facilitating the production and broadcast of new and innovative programming.

D. *From PrideVision to OUTtv*

- 36 PrideVision was one of almost two dozen national Category 1 specialty television service first licensed by the Commission in 2000.³² The Commission explained its belief that the service would meet the needs of an underserved community, and through its reflection of this

²⁷ *Ibid.*, at Chapter 24, page 559, Table 24.5 (“Average Rates for Basic Cable Service, 1972-1985”):

Rogers’ subscribers (1985):	1,280,400
Basic approved rate (1985):	\$9.76
Basic revenue/month (1985 est.):	\$12,496,704
Basic revenue/year (1985 est.):	\$149,960,448
5¢ markup x subscribers x 12:	\$768,240

²⁸ \$768,240 % \$149,960,448 = 0.51%

²⁹ *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 15:

Equality Rights

Marginal note: Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Marginal note: Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

³⁰ *Egan v. Canada*, [1995] 2 S.C.R. 513.

³¹ The CRTC issued

³² The CRTC licensed 21 specialty television services in *New national Category 1 specialty television services approved*, [Decisions CRTC 2000-449 to 2000-469](#) (Ottawa, 24 November 2000), and published its “reasons for approval, as well as the terms and conditions of the new licence ... at a later date”: see *PrideVision – a new specialty channel*, [Decision CRTC 2000-456](#) (Ottawa, 14 December 2000).

community in its programming help to reduce stereotyping. The CRTC said that PrideVision would

contribute to increased diversity in the Canadian broadcasting system by providing programming that is of specific interest to the gay and lesbian community, which is currently an under-served and under-represented audience. A channel devoted to this audience will be unique to the broadcasting system in Canada, among the first of such services world-wide. It will have the potential to be a "bridging" service, creating understanding and thereby reducing stereotyping.

³³

- 37 Yet it was already clear in 2000 that without an express order by the CRTC, broadcasting distribution undertakings (BDUs – cable and direct-to-home (DTH) satellite distribution systems) would “determine which services [they carry] and which [they] do not” and that “services in which a BDU has any interest, control or otherwise, will be accorded carriage.”³⁴
- 38 By May 2001, in fact, a working group comprising representatives of the Canadian Association of Broadcasters, the Canadian Cable Television Association, Bell ExpressVu and Look Communications failed to agree on an industry code for negotiating affiliation agreements.³⁵ Just four months later PrideVision advised the Commission that Shaw’s cable and DTH systems imposed marketing requirements on its service that Shaw did not impose on other services: the CRTC agreed that Shaw was subjecting PrideVision to an undue disadvantage.³⁶
- 39 The CRTC said “it would require distributors [using] digital technology to distribute all Category 1 services appropriate to their market.”³⁷
- 40 By 2004, however, PrideVision had incurred operating losses of \$11 million (Figure 6). The CRTC approved a change in its ownership and control and the service was renamed OUTtv.³⁸

³³ *PrideVision – a new specialty channel*, [Decision CRTC 2000-456](#) (Ottawa, 14 December 2000).

³⁴ *APPLICATIONS FOR LICENCES TO OPERATE NEW PAY AND SPECIALTY SERVICES FOR DIGITAL DISTRIBUTION / DEMANDES DE LICENCES VISANT LA DISTRIBUTION NUMÉRIQUE DE NOUVEAUX SERVICES DE TÉLÉVISION SPÉCIALISÉE ET PAYANTE*, TRANSCRIPT OF PROCEEDINGS FOR THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (Hull, 5 September 2000), at paragraphs 31970-31971:

[Mr. Znaimer] It seems obvious that it in the open-entry Category 2 environment that will follow this hearing it will ultimately be the distributors who will determine which services can be carried and which do not [*sic*].

You can be assured that services in which a BDU has any interest, control or otherwise, will be accorded carriage. For these reasons, we -- and we are not alone -- urge the Commission to licence as many Category 1 services that you are satisfied are focused, attractive and socially useful and that as many possible should be non-BDU affiliated as they, the BDUs, will take care of themselves.

³⁵ *Principles for the launch of Category 1 and 2 digital services*, [Public Notice CRTC 2001-57](#) (Ottawa, 25 May 2001), paragraph 2.

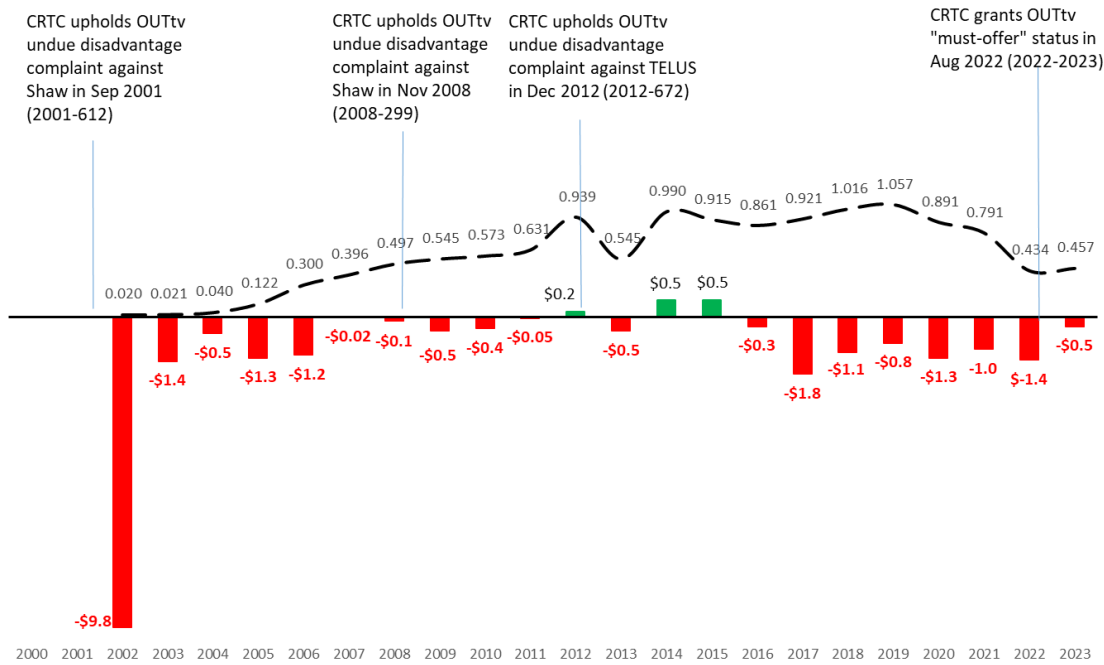
³⁶ *Complaint by PrideVision against Shaw Cablesystems Ltd. and Star Choice Television Network Ltd. regarding "Free Previews" - Undue Disadvantage*, [Letter] [Decision CRTC 2001-612](#), 28 September 2001

³⁷ *Principles for the launch of Category 1 and 2 digital services*, [Public Notice CRTC 2001-57](#) (Ottawa, 25 May 2001), paragraph 7.

³⁸ *PrideVision - Acquisition of assets*, [Broadcasting Decision CRTC 2004-191](#) (Ottawa, 28 May 2004);

Figure 6 OUTtv subscribers and losses, 2000-2023

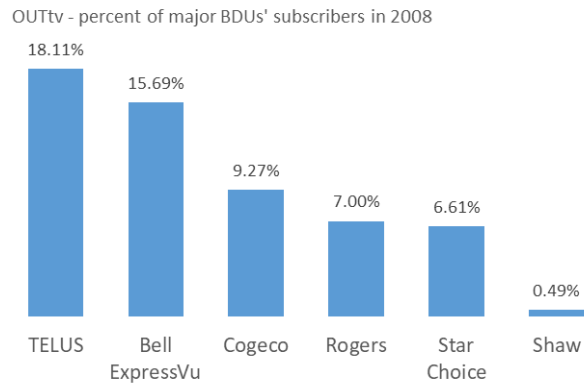
OUTtv Subscribers (000,000s) and profits before interest and taxes (\$M): 2000 - 2023



Source: CRTC, *Statistical and Financial Summaries*, Individual pay and specialty (discretionary) services [various years]

Figure 7 OUTtv – % of major BDUs’ subscribers in 2008

41 OUTtv continued to suffer from inequitable distribution, including from Shaw cable: Figure 7. Where five other BDUs yielded subscriber levels ranging from 7% to 18%, OUTtv obtained 0.49% of Shaw’s subscribers.



Source: *Complaint by 6166954 Canada Inc., licensee of OUTtv, against Shaw Cablesystems Ltd. pursuant to section 9 of the Broadcasting Distribution Regulations, Broadcasting...*

42 In 2008 the CRTC upheld OUTtv in a second complaint involving Shaw’s marketing of the service; the CRTC said it would “closely monitor Shaw’s performance with respect to compliance” with the CRTC’s regulations.³⁹

³⁹ *Complaint by 6166954 Canada Inc., licensee of OUTtv, against Shaw Cablesystems Ltd. pursuant to section 9 of the Broadcasting Distribution Regulations, [Broadcasting Decision CRTC 2008-299](#) (Ottawa, 4 November 2008), at para. 31.*

- 43 The CRTC also reviewed and updated its BDU policy, renaming Category 1 services as ‘Category A’ services but again granting these services access rights.⁴⁰ Yet, in a third complaint regarding undue disadvantage in marketing in 2012, the CRTC again upheld OUTtv, demonstrating that it continued to encounter difficulties in exercising the access the CRTC said it wanted to ensure.⁴¹
- 44 The CRTC renewed the licence of OUTtv and other Category A services in 2014, requiring licensed BDUs in English-language communities “to distribute this service to their subscribers according to the pricing and packaging arrangements agreed to with the licensee”: this was known as “must-offer” status.⁴² Yet by the next year, 2015, the Commission began to phase out access rights at the beginning of the next licence term of each Category A discretionary service, unless the service had been granted mandatory carriage under section 9(1)(h) of the 1991 *Broadcasting Act*.⁴³
- 45 OUTtv set out reasons that might have allowed the CRTC to grant it mandatory status when it next applied to renew its licence in September 2019⁴⁴ – two years after Parliament in 2017 added ‘gender identity or expression’ to other prohibited grounds of discrimination in Canada’s human-rights statute.⁴⁵
- 46 The first human cases of Covid-19 were identified in China three months after OUTtv filed its application⁴⁶ and much of Canada shut down for roughly two years once the Covid-19

⁴⁰ [Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services, Broadcasting Regulatory Policy CRTC 2008-100](#) (Ottawa, 30 October 2008)

...

68. In light of the above, the Commission considers that it would be appropriate to retain access rights, in the digital environment, for Canadian analog and Category 1 pay and specialty services. In the amended BDU Regulations, services with access rights will be referred to as Category A services.

⁴¹ [Complaint by OUTtv Network Inc. against TELUS Communications Company alleging undue preference and disadvantage, Broadcasting Decision CRTC 2012-672](#) (Ottawa, 10 December 2012).

⁴² [OUTtv – Licence renewal, and granting of must-offer status in English-language markets, Broadcasting Decision CRTC 2022-223](#) (Ottawa, 18 August 2022), at paragraphs 4-6.

⁴³ [Let’s Talk TV: A World of Choice – A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market, Broadcasting Regulatory Policy CRTC 2015-96](#) (Ottawa, 19 March 2015), paragraphs 120-121:

120 ... the Commission will phase out access privileges for Category A discretionary services-including third-language services, as discussed below-in a staged manner as their licences are renewed. The access privileges of Category A discretionary services belonging to the large English- and French-language private broadcasting groups will be removed as of the beginning of their next licence period on 1 September 2017, followed by the various independent Category A discretionary services at the beginning of their next licence period. The licences for these independent services are set to be renewed starting in September 2018.

121 ... beginning 1 September 2018, when some independent services’ access privileges will be removed, for every service owned by or related to itself that a vertically integrated BDU distributes, it will be required to offer an independent programming service in the same language, if available.

⁴⁴ [DM##3720980, Re: Licence Renewal Application for OUTtv](#), (Vancouver, 30 September 2019), at page 1.

⁴⁵ [Canadian Human Rights Act](#), s. 3(1):

... the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

⁴⁶ Wikipedia, [Timeline of the COVID-19 pandemic in February 2020](#) [accessed 17 November 2024].

pandemic was declared to be global. The CRTC subsequently renewed OUTtv's licence – now without Category A status – administratively in August 2020 to August 2021,⁴⁷ and again in August 2021 (to 31 August 2022).⁴⁸

E. 2022 – CRTC's unenforceable 'expectation' of carriage

47 In August 2022 the CRTC issued OUTtv's first 'non-administrative' renewal in 9 years. OUTtv had asked the CRTC for "must-offer" status.⁴⁹ The Commission recognized OUTtv's "important role" and granted the service' "request, on an exceptional basis, ... in English-language markets" from March 2023 until August 2026.⁵⁰ It wrote that

⁴⁷ *OUTtv – Administrative renewal*, [Broadcasting Decision CRTC 2020-242](#) (Ottawa, 6 August 2020). The decision granted OUTtv the same terms and conditions as its 2013 renewal decision: "The Commission renews the broadcasting licence for the national discretionary service OUTtv from 1 September 2020 to 31 August 2021, subject to the same terms and conditions as those in effect under the current licence."

⁴⁸ *Various discretionary services – Administrative renewals*, [Broadcasting Decision CRTC 2021-286](#) (Ottawa, 13 August 2021).

⁴⁹ *OUTtv – Licence renewal, and granting of must-offer status in English-language markets*, [Broadcasting Decision CRTC 2022-223 and Broadcasting Order CRTC 2022-224](#), (Ottawa, 18 August 2022), paragraphs 12-32; FRPC intervened in support of OUTtv's request (see paragraph 33).

The CRTC's practice under the 1968 *Broadcasting Act* was to issue unsigned decisions. Parliament's enactment of the 1982 *Constitution Act* and the *Charter of Rights and Freedoms* led Parliament, among other things, to amend the *Broadcasting Act* to provide that decisions on behalf of the CRTC could be made by a majority of the members of panel of CRTC Commissioners appointed by the CRTC's Chairperson to consider matters at public hearings. It is unclear why the CRTC did not at that time begin to require that its decisions be signed.

The 2023 *Broadcasting Act* maintains the power of a panel of CRTC Commissioners to make decisions on behalf of the CRTC, but now enables members of the Commission to appoint themselves to individual hearing panels provided no conflict of interest exists:

Panels of Commission

20 (1) The Chairperson of the Commission may establish panels, each consisting of not fewer than three members of the Commission, to deal with, hear and determine any matter on behalf of the Commission.

Appointments by Chairperson

(1.1) The Chairperson of the Commission may appoint members of the Commission to a panel if it is determined that the panel would otherwise have fewer than three members.

Exception — conflict of interest

(1.2) Members of the Commission may participate in any panel, unless this participation would place them in a conflict of interest.

Powers

(2) A panel that is established under subsection (1) has and may exercise all the powers and may perform all the duties and functions of the Commission in relation to any matter before the panel.

Decision

(3) A decision of a majority of the members of a panel established under subsection (1) is a decision of the panel.

....

⁵⁰ *OUTtv – Licence renewal, and granting of must-offer status in English-language markets*, [Broadcasting Decision CRTC 2022-223 and Broadcasting Order CRTC 2022-224](#), (Ottawa, 18 August 2022), "Summary". Commissioner Anderson dissented from the (unknown) majority, concluding that the Commission should have mandated BDUs' inclusion of OUTtv "in packages with the highest penetration rates."

[t]he Commission expects broadcasting distribution undertakings to include the OUTtv programming service in pre-assembled or thematic packages, consistent with its theme, programming and language and with the highest penetration rates.⁵¹

- 48 Neither the previous (1991) broadcast legislation nor the (2023) *Broadcasting Act* empowers the CRTC to enforce ‘expectations’ making their function unclear.⁵² Its enabling statutes only allow it to punish breaches of its regulations, its conditions of service and its orders: Table 3.

Table 3 CRTC has no legal authority regarding ‘expectations’

1991 <i>Broadcasting Act</i>	2023 <i>Broadcasting Act</i>
32(2), 33 – breach of regulation, order or condition of licence is punishable on summary conviction with fines	33 – breach of regulation or order is punishable on summary conviction with fines
[CRTC unable to impose administrative monetary penalties]	34.4 and 34.5 – breach of regulation or order constituting a violation establishes liability for administrative monetary penalties

- 49 Assuming – because the CRTC does not publish annual summaries of licensees’ adherence to its regulations, conditions of service and orders – that the Commission reviews licensees’ performance with respect to its expectations over the course of two or more licence terms and is disappointed, the CRTC may decide to transform unenforceable expectations into enforceable conditions of service. Some might interpret this transformation as a positive outcome: in reality, it formally acknowledges that for one or more licence terms Parliament’s broadcasting policy for Canada was not being implemented but was rather being undone.⁵³ Relying on expectations that cannot be enforced promises false hope, bringing the CRTC and its administration of its responsibilities into disrepute.
- 50 In the case of OUTtv, its evidence is that the CRTC’s expectation of carriage has enabled OUTtv to complete one (1) affiliation agreement with one (1) BDU which reflects its terms (DM#4732574, Supplementary Brief, page 6).
- 51 It is true that the CRTC’s expectation could be said to have improved OUTtv’s financial performance, provided one agrees that a 19th year of losses rather than actual profit– see

⁵¹ *Ibid.*, paragraph 51.

⁵² Expectations are the ‘Captain Dunsel’ of CRTC powers.

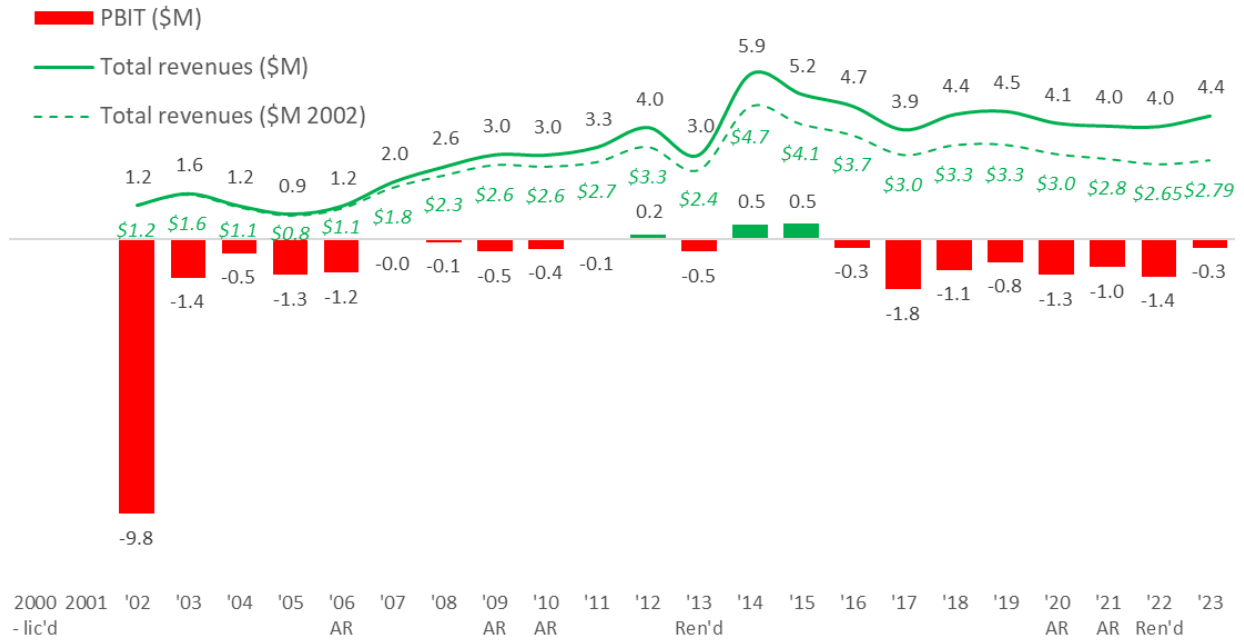
⁵³ The central issue is not whether many, some or merely a few licensees breach the Commission’s regulations, its orders or their conditions of service. The issue is that – as Parliament’s delegate – by forbearing from using its enforcement powers the CRTC condones broadcasting that not only fails to achieve Parliament’s broadcasting policy as required by section 3(2) but actually sets back the policy’s implementation. S. 3(2) imposes an ongoing duty on the CRTC to implement Parliament’s section 3(1) broadcasting policy, rather than a duty that is sporadic, expedient or convenient:

It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

Figure 8 – is an improvement. In fact, OUTtv last reported profits before interest and taxes 8 years ago (2015).

Figure 8 OUTtv revenues and PBIT, 2000-2023 (\$M current)

OUTtv revenues and profits before interest and taxes: 2000-2023 (\$M current)



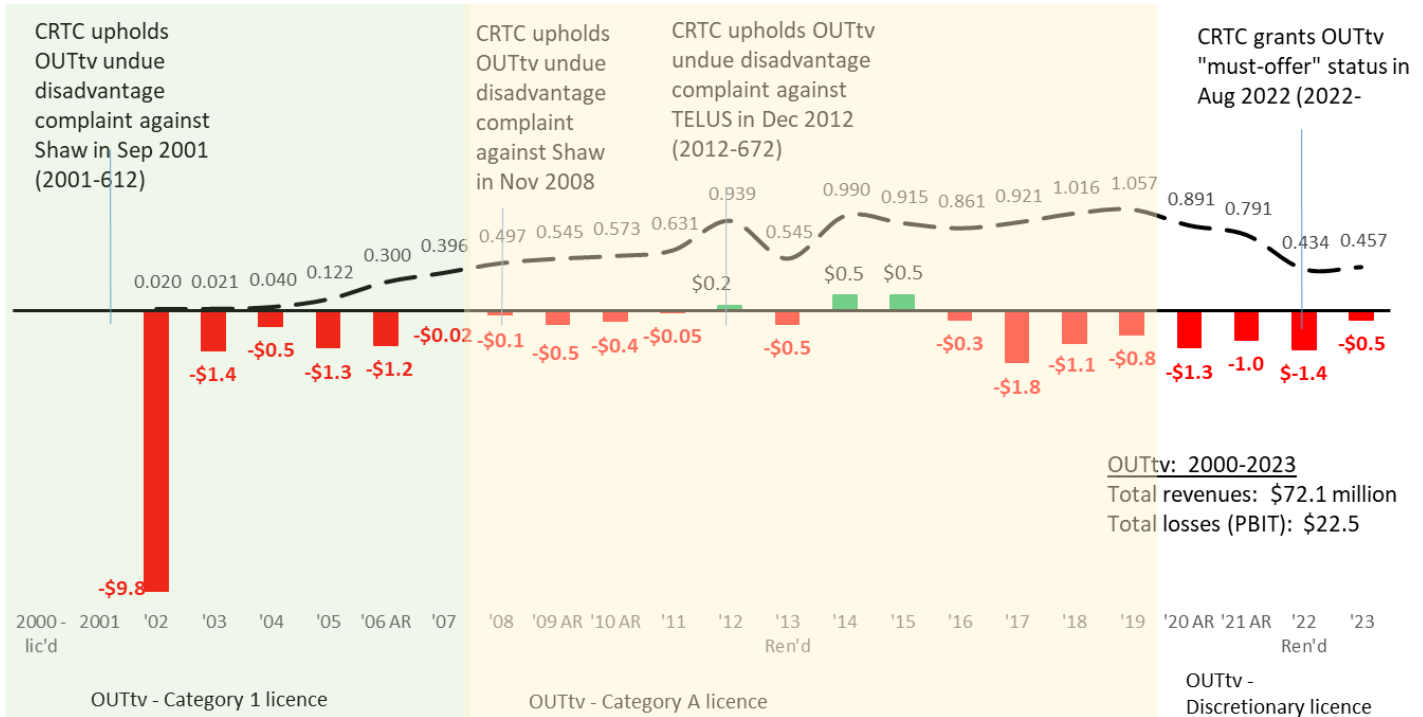
Source: CRTC, *Statistical and Financial Summaries*, Independent pay and specialty / discretionary services (various years); Statistics Canada deflator (2002=100)

52 FRPC’s review of the CRTC’s historical approach to licensing OUTtv leads it to conclude that it is unclear how the CRTC’s carriage policies for Category 1 and A specialty services have enabled services such as OUTtv to meet the potential to serve Canadians and the LGBTQ community. In particular, when the CRTC dropped the Category A licence OUTtv’s subscription levels declined: Figure 9.

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Figure 9 OUTtv subscribers, profits and losses under different CRTC policies: 2000-2023

OUTtv Subscribers (000,000s) and profits before interest and taxes (\$M): 2000 - 2023



Source: CRTC, *Statistical and Financial Summaries*, Individual pay and specialty (discretionary) services [various years]

53 Although OUTtv’s subscriber levels grew from 2001 to 2019, they have since decreased by more than half (from 1.06 million to 0.46 million or 56.7%).⁵⁴ Concentrated ownership may

⁵⁴ In a way, low carriage levels established by BDUs’ prior failure to provide reasonable carriage terms creates a self-fulfilling prophecy, as suggested by Blayne Haggart and Natasha Tusikov, *The New Knowledge: Information, Data and the Remaking of Global Power*, (Rowman & Littlefield, Maryland: 2023) at page 160 (references omitted):
 Dataism is a core element of private data power, particularly evident in companies’ claims of predictive accuracy. Businesses market their forecasts as having utility and certainty, while others accord those forecasts with social and economic legitimacy. In short, data-driven forecasting is powerful because businesses and governments act *as if* the predictions are valid, reliable representations of reality, which are core elements of dataism.

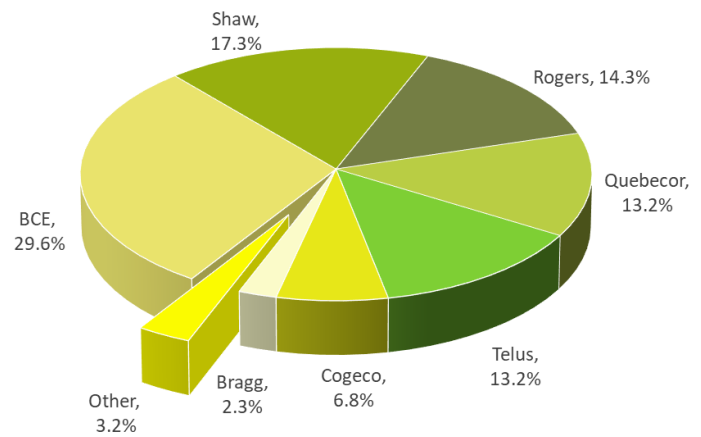
...

Yet, as Haggart and Tusikov go on to explain at page 168 (references omitted), data-driven forecasting can significantly harm society:

Profiling people using data analytics and automated tools may deliver some benefits, such as personalized services and better pricing, but the negative consequences can be significant, as profiling can exacerbate existing discriminatory practices and, in worst cases, rebrand pseudoscience as sound social policy. ...

Figure 10 BDU subscribers by ownership group, 2022-2023

CRTC - % of subscribers by BDU in 2022-23



Source: CRTC Open Data, "data-broadcasting-distribution-sector", Tables U-T1 and U-T8

in part explain this decrease, given that 7 companies served 96.8% of BDU subscribers in 2022-2023: Figure 10. A denial by two of these seven companies would seriously affect the business plans of any discretionary service operating in Canada.

54 The Forum’s concern is that BDUs’ reluctance to carry OUTtv currently may create a self-fulfilling prophecy – one or two large BDUs’ decisions not to carry the service may dissuade others (or themselves in the future) from carrying it. (Of course, this is the type of thinking and behaviour that – four decades after broadcasting began in Canada - led Parliament in 1968 to both establish objectives for Canadian broadcasting and establish the CRTC to ensure these objectives are met.)

55 It could be that all optional discretionary services are feeling the pinch of slow growth, not just OUTtv. This point was raised in May 2024 when the CRTC renewed APTN’s 9.1(1)(h) mandatory-carriage status and granted an increase in its monthly subscriber rate⁵⁵ despite the fact that, the CRTC wrote, APTN’s loss of subscribers was common to all 9.1(1)(h) services and BDUs:

40. ... the financial difficulty due to the loss of subscribers is not unique to APTN Inc. and that the losses are felt across all 9.1(1)(h) services, as well as by BDUs. As such, it would be inappropriate to approve a rate increase simply to protect a 9.1(1)(h) service from the impact of declining BDU subscribers. However, while the challenges the applicant faces are not unique, the Commission notes the contribution to the Canadian media landscape and the objectives of the applicant are unique and align with objectives in the Broadcasting Act.

56 The Forum studied the CRTC’s data for individual discretionary television programming services from 2019 to 2023, identifying the services’ ownership (BDU vs independent [non-BDU ownership]) and readily identifiable carriage status (mandatory 9(1)(h) vs optional to subscriber). We then separated OUTtv from the non-BDU, independent ownership group of services to determine whether changes in its subscriber levels paralleled changes in other independent services’ subscriber levels. (We had included Corus’ services in the dataset to

⁵⁵ *Aboriginal Peoples Television Network Incorporated – Licence amendment and mandatory distribution order of the service across Canada*, [Broadcasting Decision CRTC 2024-106 and Broadcasting Order CRTC 2024-107](#) (Ottawa, 14 May 2024).

reflect the impact of a change in ownership from BDU to independent but excluded these services as no subscriber information was provided for its services from 2020-23.) We then calculated the average subscriber figures for the different groups of services.

57 While all the services for which data are available lost subscribers from 2019 to 2023, reflecting Canadians’ gradual shift to online streaming, the average subscriptions to the optional services offered by BDUs and independent services other than OUTtv decreased by 19.5% and 9.4%, respectively – OUTtv’s subscription level fell by 56.8%: Table 4.

Table 4 Discretionary services’ subscribers, 2019-2023

Services, showing carriage status [and number]	Services’ average number of subscribers					% change,2019-2023
	2019	2020	2021	2022	2023	
BDU services						
9(1)(h) National [3]:	3.40	3.30	3.22	3.16	3.09	-8.9%
Optional [69]	2.04	2.06	1.80	1.75	1.64	-19.5%
Independent (non-BDU) services						
Independent 9(1)(h) Anglophone [2]	8.52	8.17	7.85	7.63	7.46	-12.4%
Independent 9(1)(h) Francophone [2]	5.96	5.77	5.67	5.46	5.27	-11.5%
Independent 9(1)(h) National [30]	10.17	10.01	9.74	9.49	9.28	-8.8%
Independent optional [56]	0.20	0.22	0.21	0.20	0.18	-9.4%
OUTtv	1.06	0.89	0.79	0.43	0.46	-56.8%
All services (excl'g Corus 2020-23) [136]	1.30	1.29	1.18	1.14	1.09	-16.8%

58 In fact, the 56.8% decrease in OUTtv subscriber levels was 2.9 times the decrease in subscribers to BDUs’ non-mandatory (or optional) discretionary services: Figure 11.

Figure 11 Average subscribers by type of carriage, 2019-2023

Average subscribers (millions) per year, by type of carriage: 2019-2023



Source of subscriber data: CRTC, *Statistical and Financial Summaries*, Discretionary services [various years]

59 The Forum also considered the revenue impact of the difference in loss of subscribers between OUTtv and BDUs’ own, optional discretionary services. As Table 5 shows, if OUTtv had had the same level of subscriber-revenue growth or decrease as BDUs’ optional-carry services, its subscriber revenues from 2019-2020 to 2022-2023 would have been \$2.7 million (almost 10%) higher.

Table 5 Impact on OUTtv if it had experienced BDUs’ optional-services’ subscriber revenue growth rate

OUTtv at optional-carry BDU growth rate	2018-19	2019-20	2020-21	2021-22	2022-23	Total, 2020 - 23
BDU: Optional-carry services’ annual % change in subscriber revenues		-3.6%	-5.7%	4.7%	-4.1%	-8.7%
OUTtv: actual subscriber revenues	\$4.4	\$4.0	\$3.6	\$2.9	\$3.3	\$ 18.2
OUTtv: % change		-10.0%	-10.4%	-17.8%	13.5%	-24.8%
OUTtv subscriber revenues at BDU-optional subscriber-revenue growth rate	\$4.4	\$4.3	\$4.0	\$4.2	\$4.0	\$ 20.9
Difference between OUTtv actual and	\$-	\$0.3	\$0.5	\$1.3	\$0.7	\$2.7

60 These results have led FRPC to conclude that OUTtv is not facing the same but worse treatment than BDUs accord to other independent discretionary services, and that BDUs’ optional discretionary services receive treatment from BDUs which is unavailable to OUTtv.

III. OUTtv’s application

61 OUTtv is asking the CRTC to amend three aspects of its licence: the order governing how BDUs distribute its service; its expenditures on Canadian and independent programming, and its exhibition of Canadian programming: see Table 6.

62 In 2022 the CRTC ordered BDUs in Anglophone markets with more than 2,000 subscribers to make OUTtv available to subscribers. OUTtv is asking the CRTC instead to order all BDUs (in Anglophone markets) to distribute the service as part of the digital basic service – unless OUTtv agrees otherwise and in writing – for a monthly rate of \$0.12 per subscriber. OUTtv was subject to the same requirements for Canadian programming expenditures as other discretionary services and did not have specific requirements for the level of Canadian programming it broadcast.

Table 6 OUTtv’s current and proposed distribution, expenditure and exhibition requirements

Enforceable CRTC requirements for OUTtv	Current conditions of service	Proposed conditions of service
Carriage (access)	1: Effective 1 March 2023, licensed BDUs to distribute OUTtv in Anglophone markets except for exempted systems of 2,000 subscribers or more	Effective 1 September 2025, licensed BDUs to distribute OUTtv in Anglophone markets as part of their digital basic service for a wholesale rate of \$0.12/subscriber, unless OUTtv agrees in writing to distribution on a discretionary basis

Enforceable CRTC requirements for OUTtv	Current conditions of service	Proposed conditions of service
Canadian programming	35% (<i>Discretionary Service Regulations</i>)	55% of programming
Canadian programming – evening broadcast period	No requirements	55% of programming
Canadian programming expenditures	2: 25% (including credits)	55% of previous year’s revenues
Programming of national interest	No requirement	10% of revenues
Independent production	No requirement	75% of expenditures on Canadian programs other than news and information to independent producers

63 FRPC supports OUTtv’s application for four reasons.

64 First, the CRTC’s approval of OUTtv’s carriage request would not force BDUs to carry the service unless they choose not to negotiate on reasonable terms (possibly providing a model for other independent discretionary services unable to obtain fair and reasonable carriage terms). The automatic default to must-carry would eliminate potentially long delays in negotiations⁵⁶ or in the CRTC’s alternative dispute resolution system (see Table 7 at page 24).

65 Second, approval of OUTtv’s expenditure and exhibition proposals would increase financial support for Canadian programming and for programming directed towards people in Canada who otherwise lack access to such programming (contrary to the intent underlying the *Canadian Human Rights Act*). The Forum notes the CRTC’s comments when it renewed APTN’s licence in May 2024:

41. ... the benefits of an increase to the broadcasting system, and in particular the greater availability and production of Indigenous-language programming, are enough to justify the proposed increase.⁵⁷

...

66 OUTtv estimates that approval of the changes it has requested would enable it to increase its annual Canadian programming expenditures by more than double (236%).⁵⁸ OUTtv’s evidence is that it currently helps to finance “3-5 documentary productions, 2-3 documentary series and 2-3 dramatic series” (DM#4732574, Supplementary Brief, page 11) with an average yearly expenditure (from 2018/19 to 2022/23) on Canadian programming of

⁵⁶ DM#4732574, *Supplementary Brief*, page 6: “Even where **negotiations** have shown the *possibility* of some headway – there has been no resolution” [bold font and italics added].

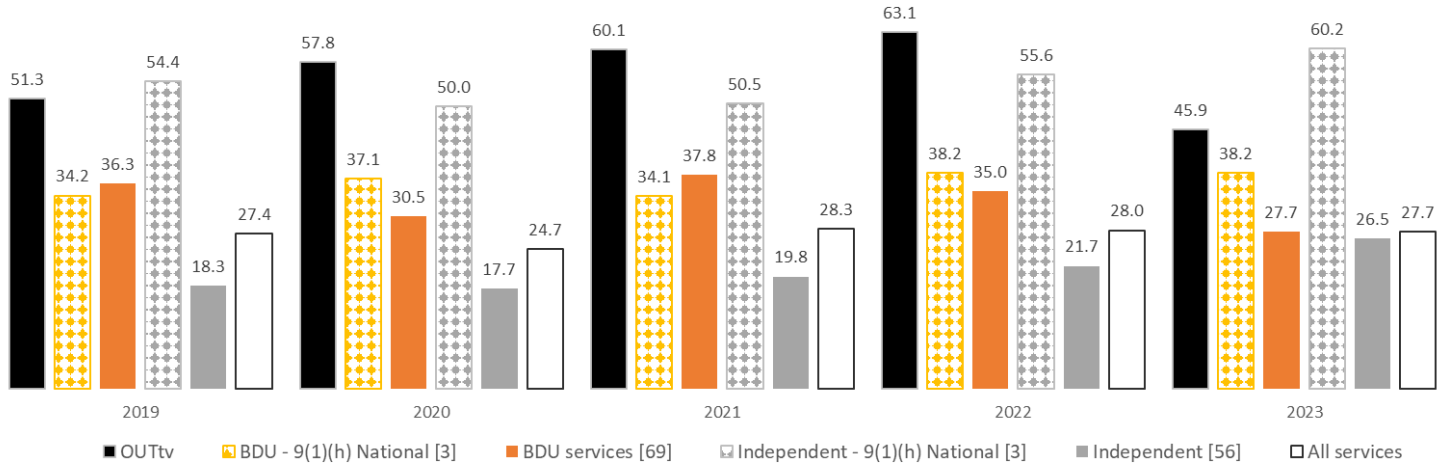
⁵⁷ *Aboriginal Peoples Television Network Incorporated – Licence amendment and mandatory distribution order of the service across Canada*, [Broadcasting Decision CRTC 2024-106 and Broadcasting Order CRTC 2024-107](#) (Ottawa, 14 May 2024).

⁵⁸ From 2018/19 to 2022/23 OUTtv expended an average of \$2.3 million on Canadian; it proposes at page 12 of DM#4732574, *Supplementary Brief* that if the CRTC approves its must-carry-or-negotiate-fairly request these expenditures would increase “to approximately \$5.5 million annually”.

\$2.3 million.⁵⁹ The Forum notes that in four of the past five broadcast years OUTtv already devoted the highest percentage of (previous-year’s) revenues to expenditures on Canadian programming of any of its peers: Figure 12.

Figure 12 Canadian programming expenditures as % of revenues, 2019-2023

Canadian programming expenditures as % of revenues, by type of carriage: 2019-2023



Source: CRTC, *Statistical and Financial Summaries*, Individual discretionary (pay and specialty) services [various years]

67 While data from the past are not fully determinative of the future,⁶⁰ OUTtv’s historical approach to Canadian programming expenditures suggests that its commitments to Canadian programming and exhibition have been made in good faith and kept. Consequently, if its must-carry-or-negotiate amendment is approved and its distribution (and potentially, its advertising) revenues increase, the broadcasting system and Canadians will again benefit from more new, innovative and unique programming.

68 Third, if approved, the changes OUTtv proposes would enable it to ensure that Canadian programming predominates in its schedule as Parliament’s broadcasting policy requires:

3 (1) It is hereby declared as the broadcasting policy for Canada that

...

(f) each Canadian broadcasting undertaking shall employ and make maximum use, and in no case less than predominant use, of Canadian creative and other human resources in the creation, production and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use

⁵⁹ Source: CRTC, *Statistical and Financial Summaries 2019-2023* for independent discretionary programming services.

⁶⁰ Blayne Haggart and Natasha Tusikov, *The New Knowledge: Information, Data and the Remaking of Global Power*, (Rowman & Littlefield, Maryland: 2023) at page 159:

... The past, simply put, is understood as inherently useful to predict the future. Algorithms identify correlations within datasets, often based on past behaviour, but they may not establish the reason for those correlations or related causal factors. Human behaviour is complex. Past behaviour is not always a reliable indicator of future actions. ...

of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

....

- 69 Last, the Forum notes that OUTtv is offering the CRTC and Canadians certainty by asking the CRTC to impose its higher and/or new Canadian-content requirements by conditions of service. This approach is rare and very welcome.
- 70 FRPC believes approving OUTtv’s proposal is an elegant and efficient solution to the dilemma created by excessively concentrated BDU ownership. While nearly always allowed on the theory that bigger BDUs would yield bigger benefits to Canada’s broadcasting system, the reality is that these bigger broadcasters have gained a bigger share of decision-making power in the broadcasting system, to the point that just a few entities – say, just three, the same minimum number of Commissioners sitting on a CRTC broadcast hearing panel – can hinder or even halt successful implementation of carefully designed CRTC policies. For example, the CRTC’s 2022-2023 BDU data show that BCE and Québecor, along with Rogers and Shaw [now owned by Rogers], obtained \$5.3 billion in revenue from BDU subscribers in Canada, or 74.5% of total BDU subscriber revenues.⁶¹
- 71 Access to billions of dollars of income easily enables BDUs to wait out far tinier programming services who are not endowed with the same balance sheet. While the CRTC publishes very little information about the alternative-dispute resolution (ADR) processes it has established to facilitate the resolution of disputes between BDUs and programming services, FRPC obtained information about these processes from the CRTC through Access-to-Information requests A-2021-00078 and A-2024-00011. Although much of the detail about individual cases was redacted, sufficient information remained to show that the processes took an average, overall, of 7.6 months to conclude – with one staff-assisted mediation case taking 40.2 months and a final-offer arbitration’s taking 14.2 months: Table 7.

Table 7 Average and maximum duration of CRTC ADR processes, 2015-2021

Type of CRTC ADR process, 2015-2021	Number of cases	Average time from opening to closing of process		Maximum time from the opening to the closing of a process	
		Days	Months	Days	Months
Informal	49	191.7	6.3	576.0	18.9
Informal/ NOD	15	85.8	2.8	226.0	7.4
MAP/SAM	28	481.9	15.9	868.0	28.6
SAM	46	279.7	9.2	1222.0	40.2
MM	8	116.8	3.8	211.0	6.9
NOD	22	167.1	5.5	343.0	11.3
Standstill	10	124.6	4.1	203.0	6.7
Part 1	21	253.7	8.3	643.0	21.2
FOA	16	229.6	7.6	431.0	14.2
Total	215	232.2	7.6	1222.0	40.2

61

72 Approving OUTtv’s application is a rational regulatory response to oligopolistic intransigence that harms and negates, rather than implements, Parliament’s legislation.

Recommendation 3 The CRTC should approve OUTtv’s application.

IV. Conclusions and recommendations

73 In light of the evidence and commitments set out by OUTtv in its application, and as provided by section 11 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*,⁶² **FRPC recommends that the Commission approve the applicant’s proposed amendments to amend its existing conditions of service.**

74 FRPC has two other recommendations:

Recommendation 2 The CRTC should publish all Statistical and Financial Summary information that it holds for individual broadcast media (television, radio as well as BDUs) and individual discretionary services, beginning in the report it publishes to include licensees’ 2023-2024 broadcast year, and

Recommendation 3 The CRTC should convene and host an annual meeting of parties interested in improving the quality of broadcast data published by the CRTC.

* * * End of document * * *

⁶² S. 11: “In broadcasting matters, the Commission may approve the whole or any part of an application or grant any relief in addition to or in substitution for the relief applied for.”