Buyer Power in Canadian TV:
An Examination of the Domestic Market Structure for the Purchase and Sale of Canadian-produced English Language TV Programming

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Wall Communications Inc.

NOTE: The views expressed in this document are solely those of Wall Communications Inc. and do not necessarily represent the views of the Canadian Media Producers Association.

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Executive Summary

This study examines the market structure characterizing the sale and purchase of "distinctively Canadian" English-language TV programming. More specifically, it examines the relationship between Canadian English-language independent TV program producers (i.e. sellers) and the Canadian broadcasters who purchase those TV programs (i.e. buyers). In particular, we examine whether the Canadian industry is oligopsonistic and more broadly, whether the industry exhibits potentially harmful "buyer power".

While competition policy concerns in the past have largely focused on "oligopoly" – or seller market power – a new policy awareness centers on buyer power. We investigate the extent to which buyer power in the Canadian TV program supply market can adversely impact narrower competition policy goals as well as broader public policy goals related to the Broadcasting Act.

Drawing on the OECD and other relevant sources, we first define "buyer power". Buyer power is comprised of two elements: <u>oligopsony</u> and <u>bargaining power</u>. Each of these elements is defined and indicators are developed to gauge the magnitude of buyer power in the Canadian English-language independent production market. Key indicators include the number of buyers in the market, the concentration of buyers, the number of sellers, barriers to entry, alternatives for sellers, alternatives for buyers and the relative degree of "bargaining effectiveness" between buyers and sellers.

We find overwhelming evidence that the market exhibits inordinate buyer power in the hands of Canadian English-language broadcasters, stemming from the high market concentration of the "Big 3" broadcasters (Bell, Rogers and Corus/Shaw), the large number (and low concentration) of independent TV producers, the numerous alternative supply options for a given broadcaster, the very limited selling options for a given producer and the imbalance of power at the negotiating table in favour of broadcasters.

Canadian broadcasting policy has several objectives germane to the TV program buyer/seller market issue. The Broadcasting Act specifically notes the essential Canadian nature of TV programs in maintaining and enhancing national identity and cultural sovereignty. Programs need to be "uniquely Canadian" to meet this objective. While it may be possible to create content that is both distinct in its "Canadianness" and also highly attractive to non-Canadians, first policy priority is given to distinct Canadian content.

A second key objective explicitly requires a significant contribution from the Canadian independent production sector as a matter of Canadian public policy.

These core objectives of the Broadcasting Act are directly impacted by an inordinate amount of buyer power in the market. Inordinate buyer power implies that buyers gain unduly from market transactions relative to sellers. In other words, buyers gain at the expense of sellers, leaving sellers with less resources than if buyer power did not exist.

The existence of buyer power permits Canadian broadcasters to dictate transactions terms such as price, ownership of rights and creative decisions. This reduction in sellers' welfare is prima facie evidence that independent English-language TV producers must necessarily (and involuntarily) contribute less to the Canadian broadcasting system than they could – or should – contribute. Consequently, Canadian broadcasting policy objectives are de facto being harmed by the broadcasters' inordinate buyer power.

Finally, it is important to recognize the wide array of cultural and economic benefits that society derives from diversity in a wide range of independently produced content - benefits that are threatened by excessive buyer power. The inordinate buyer power exercised by a very few vertically integrated broadcasters necessarily limits the diversity of attitudes, opinions, ideas, values and artistic expression.

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Section 1. Study Objectives and Overview

This study examines the market structure characterizing the sale and purchase of Canadian-produced English-language TV programming. More specifically, it examines the relationship between Canadian English-language independent TV program producers and the Canadian broadcasters who purchase those TV programs. In particular, we examine whether the Canadian industry is oligopsonistic and more broadly, whether the industry exhibits potentially harmful "buyer power".

The report is structured as follows: Section 2 of the study sets out the terms and indicators used to assess the market relationship between independent Canadian English-language TV producers and Canadian broadcasters. Section 3 describes the basic players and conditions of the Canadian TV program buy/sell market. Section 4 then uses the indicators developed previously to analyze the market. The "Indicators" of the degree of *buyer power* are generally assessed using a "Low" to "High" ranking system. Section 5 examines the implications of our findings for the achievement of Canadian public policy goals.

Section 2. Concepts and Toolset

2.1 Oligopsony and Buyer Power: What do the Terms Mean and Why Should We Care?

The term "Oligopsony" is both difficult to pronounce and vaguely unfamiliar. "Oligo" refers to a "small number" and "opsony" comes from the Greek term for "to buy or purchase". Simply put, "Oligopsony" means a small number of buyers. While the term can be used as a simple mathematical description of relative number of buyers in a market, it is also a key element in determining the ability of buyers to use their purchasing power over sellers to extract more favorable commercial and other terms.

By way of background, it is useful to first consider the more familiar term of "monopoly" and its relationship with "oligopsony".

The concept of "monopoly" refers to an industry characterized by a single *supplier* or *seller* of goods or services. The term "monopsony" refers to the polar opposite market structure: an industry characterized by a single *purchaser* of all the goods and services produced in a market. Many of the concerns associated with a monopoly or monopsony market structure can also be present when there are only a few sellers or a few buyers in a market. These market structures are known respectively as oligopoly (i.e. a few sellers) and oligopsony (i.e. a few buyers).

While competition policy concerns in the past have largely focused on "oligopoly" – or seller market power – a new awareness centers on buyer power. "Conventional thinking about competition policy has emphasized the market distortion of seller power, resulting in harm to consumers and to the dynamics of markets. Less appreciated, but potentially even more harmful, is the exploitation of buyer power."[1]

Economists recognize that a limited number of buyers in a market can confer market power to downstream firms, allowing those firms to affect the terms of trade with upstream suppliers such that market prices can be distorted, industry output can be non-optimal and other market inefficiencies can be created. We believe that investigation of such potential economic impacts is relevant when examining buyer power.

We also note that these economic concerns are generally addressed as legal matters in the anti-trust or competition laws of many countries. Though we will draw on the insights and analysis underlying such laws, legal issues are not the

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[1] P. Carstensen, *Competition Policy and the Control of Buyer Power*, Edward Elgar Publishing, 2017. Pg. 1.

focus of this study.[2] Nor are we solely concerned with competition policy and the short-term economic welfare outcomes of the TV program market.[3] Rather, we investigate the extent to which buyer power in the Canadian TV program supply market can adversely impact broader public policy goals.[4]

In this section we examine the formal conditions for oligopsony as well as the definition (and relevance) of “bargaining power”. Both an oligopsonistic structure and the existence of bargaining power are elements of potentially undesirable “buyer power”. Our intent is to develop a set of criteria – or indicators – that can be used to test for the presence of substantial **buyer power**.

“Buyer power”, as noted, is comprised of two elements: oligopsony and bargaining power. (Buyer Power = Oligopsony + Bargaining Power).[5]

According to the Organization for Economic Co-operation and Development (OECD), “A distinction is made between monopsony (*sic oligopsony*) power and bargaining power. A buyer has monopsony (*sic oligopsony*) power if it can profitably reduce the price paid below competitive levels by withholding demand. Bargaining power refers to the bargaining strength that a buyer has with respect to suppliers with whom it trades.”[6]

The next sections discuss indicators of (first) oligopsony and then (second) bargaining power.[7]

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[2] Some academic observers note that competition law tends to focus on consumer welfare as the sole or primary economic consideration when examining monopsony – a notion that is misplaced or at least highly incomplete. See M. Stucke, ”Looking at the Monopsony in the Mirror”. TRACE, 2013. Pgs. 30 - 49.

[3] Competition policy typically is restricted to concerns of consumer welfare effects primarily within a legal context.

[4] Public policy goals (such as those enunciated in the *Broadcasting Act*) may go well beyond narrowly defined concerns of consumer welfare, short-term economic welfare transfers or similar “economic surplus-centric” outcomes. For example, a partial welfare effect that shifts economic gains to buyers from producers *but does not necessarily lead to higher prices for consumers* might not trigger competition policy concerns. However, there may be a substantial broader public policy concern with that wealth transfer.

[5] The equation is illustrative only; it does not convey a strict mathematical relationship.

[6] OECD, *Monopsony and Buyer Power* (December 10, 2009) and Background Note for the Roundtable prepared by J. Church, Pg. 21.

[7] We rely primarily on the OECD and Church to develop our indicators, but note that other researchers typically utilize highly similar indicators. See for example Oxera Consulting “Buyer Power and its Role in the Regulated Transport Sector” March 2012 and Lars-Hendrick Roller, “Buyer Power in the EU” 2004. Many of the suggested indicators can be traced back to Michael Porter’s discussion of buyer power in “Competitive Strategy” 1980.

2.2 Indicators of Oligopsony

"Oligopsony" is largely defined quantitatively, referring to the ability of buyers to exercise market power based on a limited number of buyers in a market and the level of difficulty that new firms face in entering the market. Monopsony and oligopsony each refer to the buyer's ability "to exercise market power, where the extent of buyer market power depends on the number and concentration of buyers."[8] Indicators (or measures) of oligopsony are largely developed by determining the number of buyers in a market, the market concentration of those buyers and entry barriers.

As a first issue, we must therefore identify the appropriate "market". Definitions of a market entail both geographic and product characteristic dimensions. Thus, at its broadest level, the market for TV programming produced by Canadian producers could be the global market for TV programs of any type or genre. A more narrow definition would be the Canadian market for English-language programs with a distinct Canadian context or perspective.[9] We defer further discussions of market definition to Section 3 and provide a discussion of alternatives in Appendix 1.

A final consideration in examining oligopsony is the extent of *barriers to entry* – a consideration related to attaining or maintaining market power. The relevant barriers to entry are the barriers that make entry into purchasing an input either *not* timely, likely or sufficient.[10]

- Oligopsony Indicator 1: Number of Buyers in a Market

There is no specific number of buyers that can identify a market as "oligopsonistic" (since concentration of buyers will also be a factor in the determination). However, definitions of oligopsony typically refer to "a few" or "a small number" of buyers. While the literature therefore does not identify a specific number of firms, it is understood that the ability to strategically recognize how competitors will react to a price change or other competitive activity (and build that into a firm's profit maximizing behaviour) is a key part of oligopsonistic behaviour.[11]

[8] Church, Pg. 26.
[9] A more technical approach to defining "market" is the "relevant market for the purpose of identifying monopsony power is the smallest set of products in the smallest geographic area such that a hypothetical monopsonist of those products in that area would be able to depress prices by a small but significant and non-transitory amount." Church, Pg. 22.
[10] Church, Pg. 34.
[11] See Alan Devlin, "A Proposed Solution to the Problem of Parallel Pricing in Oligopolistic Markets", *Stanford Law Review*, 2007, Vol. 59, Issue 4.

Thus, the ability to foresee competitive responses and strategically behave with, for example, just two buyers in a market, is extremely high. Likewise, we can infer that markets with only three or four buyers would also be candidates for a high probability of interdependent market behaviour.

An informal review of judgments by US courts regarding oligopoly (or oligopoly-related conduct or concerns) reveals that affirmative findings in anti-trust often involve markets dominated by three or four firms but have also occurred in markets with twenty or more firms.[12] (Again, we note that the number of buyers in a market, by itself, is not sufficient evidence of market abuse or necessarily cause for policy concern).

- Oligopsony Indicator 2: Concentration of Buyers in a Market

High concentration in a market has long been recognized as a key element of market power. While it is equally well understood that high concentration is not necessarily proof of market power, measuring market shares is usually the first (and often most relied upon) consideration when evaluating market power as it provides a readily quantifiable relevant measure. It is unlikely that a firm (or firms) without a significant share would be in a dominant position. Consequently, "The standard method of proving market power in anti-trust cases involves first defining a relevant market in which to compute the defendant's market share, next computing that share, and then deciding whether it is large enough to support an inference of the required degree of market power".[13]

Market shares can be measured with various units of calculation. Units of measure might include volume of dollar sales, product or service unit sales or capacity, depending upon data availability. Where products are not homogeneous (such as is the case with TV productions), volume of sales provides a good metric.

Regulators or competition authorities typically set different thresholds to determine when a market share should raise concerns about market power issues. For example, the European Commission adheres to the following standard to assess market dominance: "a firm with a market share of no more than 25% is not likely to enjoy a dominant position; a firm with market shares of over 40% raises concerns, and over 50% is said to have a dominant position if its market share has remained stable for a long time."[14]

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[12] J. F. Brodley, "Oligopoly Under the Sherman and Clayton Acts – From Economic Theory to Legal Policy", *Stanford Law Review*, 1967, Vol. 19.
[13] W. Landes and R. Posner, "Market Power in Antitrust Cases", *Harvard Law Review,* 1980, Vol. 94, Pg. 938.
[14] Church, *op. cit*. Pg. 34.

The Canadian Competition Bureau, when examining mergers, will generally not challenge a merger when the post-merger market share of the merged firm would be less than 35 percent. Similarly, the Bureau will not challenge a merger based on a concern of coordinated exercise of market power when the post-merger market share accounted for by the four largest firms in the market (known as the four-firm concentration ratio or CR4) would be less than 65 percent.[15]

A widely accepted measure of concentration in a market is the Herfindahl-Hirschman Index (HHI). It is calculated by first "squaring" the market share of each firm in a market and then summing the squared shares. The HHI will range from 0 (in a perfectly competitive market) to 10,000 (in the case of a monopoly or monopsony).

This Study will use both the CR4/CR3 (concentration ratios for the largest four and three firms respectively) and the HHI to examine market concentration.

- Oligopsony Indicator 3: Barriers to Entry

"Barriers to Entry" (BTE) is a term describing how difficult it is for firms to enter into an industry. The concept is important because higher barriers to entry provide incumbent firms with greater leverage – or "market power".

There are numerous types of entry barriers. A recent study listed more than thirty types of entry barrier.[16] For our purposes, we identify four key barriers: government policy/regulation, economies of scale, vertical integration and technological change.[17]

BTE Indicator 1: Government Policy/Regulation
BTE Indicator 2: Economies of Scale
BTE Indicator 3: Vertical Integration
BTE Indicator 4: Technological Change

2.3 Indicators of Bargaining Power

A buyer's bargaining power is linked to multiple considerations. Notable indicators of bargaining power include whether the buyer can easily switch to

[15] Canadian Competition Bureau, "Merger Enforcement Guidelines", October 2011.
[16] "Barriers to Entry" by J. Blees *et. al*. SCALE, 2003.
[17] Although we focus on four key barriers, we note that Blees et. al. have identified numerous other barriers that are relevant to the TV broadcast industry, including Absolute Cost Advantages, Access to Distribution Channels, Brand Name, Capital Requirements, Transactions Costs, Experience Advantages, Information Asymmetry, Investment Risk, Know-how and Sunk Costs. Many of these same considerations are addressed as elements in our discussion of bargaining power.

alternative suppliers, sponsor new entry, or self-supply without incurring substantial sunk costs.[18]

A partially overlapping set of considerations includes the Buyer's outside option, the Seller's outside option, and relative bargaining effectiveness.[19]

Buyer's Outside Option
The larger the buyer's outside option the greater its bargaining power. The value of its outside option will depend on its ability and willingness to substitute to alternative suppliers. The following factors influence its ability and willingness to source from other suppliers, thereby raising the value of its outside option: Size of the Buyer[20], upstream competition[21], and the relative sizes of the buyer and seller.

Seller's Outside Option
The larger the seller's outside option the greater its bargaining power. The value of its outside option will depend on its ability and willingness to substitute to alternative buyers. The following factors limit the ability and willingness of a seller to substitute to other buyers, thereby reducing the value of its outside option: the relative sizes of the buyer and seller; downstream market competition and financial dependency.[22]

Bargaining Effectiveness
This consideration is related to the "patience" of each trading party and the ability to gather information on the other bargaining power. For example, if one trading partner is much larger and well capitalized it is likely to be more patient than the other trading partner. Regarding information asymmetry, a larger, more powerfully connected firm may be able to gain advantage by procuring information on the strengths and weaknesses of

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[18] See OECD Roundtable and Church, Pg. 42.
[19] These factors are noted in Church and the OECD. A more detailed description is provided in those references.
[20] According to Church (2009), "The size of a buyer may be an important determinant of the value of its outside option. In particular, the larger the buyer, the easier it may be for it to expand the pool of potential suppliers. The larger the buyer, the cheaper it is, on a per unit basis, to switch suppliers if there is a fixed cost required to switch. The fixed cost to find alternative sources of supply might be associated with vertically integrating upstream and producing the input itself, the costs of switching to an alternative supplier (i.e. identifying and negotiating supply from another supplier), or the costs of sponsoring entry of a new supplier by agreeing to underwrite some or all of its costs of entry. Finally, the larger the buyer is, the greater the incentive to invest in information regarding alternatives" (Pg. 39).
[21] "If there are lots of potential suppliers of similar quality inputs, then the outside option of the buyer will be relatively large." Church, Pg. 40.
[22] The seller's outside option is going to be reduced if it is difficult to replace the buyer. This will be the case if there is limited competition in the downstream market. Financial dependency is related to relative capitalization. "In the event of a breakdown in negotiations, if the supplier is not well capitalized (i.e. it is ―financially fragile‖) it may not have the resources to survive while it looks for alternative markets. Its outside option will therefore be relatively poor." Church, Pg. 41.

its trading partner.

Carstensen (2017) has described bargaining power in this way:

> The power of the buyer comes from a central economic fact of the market process: the buyer is the 'decider' with respect to whether and how much to purchase of any particular commodity or input. Moreover, the buyer also decides from whom to make the purchase. The resulting discretion is central to the potential for substantial buyer power. The potential seller must accept the offer or wait for another buyer to come along. As the costs and risks to the producer of delay and uncertainty increase, including whether other buyers exist, the buyer's leverage increases.[23]

Furthermore, Carstensen notes the first point of inquiry should be the number of significant buyers (a concern also associated with oligopsony). Accordingly, the fewer the number of potential buyers in a market, then the greater will be the power of those buyers. A second related question concerns the number of producers (i.e. sellers) serving the market - buyer power is prevalent in situations in which producers significantly outnumber buyers.

Carstensen also notes that (based on the observed cases), "an input buyer that takes 20% or more of a producer's output in direct purchases has the potential to wield significant buyer power over that producer."[24] In his view, "An important element in this power differential is direct purchase by the buyer. Whenever transactions are negotiated **directly** (*emphasis added*), every buyer who has any significant buying capacity has the ability to effect its suppliers."[25] As such we note that the existence of a direct buyer/seller relationship is related to relative bargaining effectiveness.

A final consideration is whether the buyer acts as a gateway to a downstream market. "To understand the buyer as a gatekeeper and the role of market power downstream, it is useful to recognize that the buyer is providing distribution services to the seller. The buyer is a gatekeeper when it has market power—as a seller— in the market for distribution in a geographic area. This will be the case, for instance, if upstream firms cannot access end customers efficiently without using the buyer (i.e., upstream firms have poor alternatives to the buyer to access the downstream distribution market)."[26]

Bargaining Power Indicator 1: Ease of Switching to Alternative Suppliers

Bargaining Power Indicator 2: Support of New Entry

[23] Peter Carstensen, *Competition Policy and Control of Buyer Power: A Global Issue* 2017 Edward Elgar Publishing.
[24] Ibid.
[25] *Ibid*.
[26] *Ibid.*

Bargaining Power Indicator 3: Self-Supply

Bargaining Power Indicator 4: Buyer’s Outside Options

Bargaining Power Indicator 5: Sellers’ Outside Options

Bargaining Power Indicator 6: Relative Bargaining Effectiveness

Bargaining Power Indicator 7: Buyer as Gateway to Downstream Market

Section 3: The Canadian Market

The Canadian television supply chain is comprised of 3 major industry segments: 1) Canadian TV program producers, 2) conventional, discretionary and on-demand TV broadcasters and 3) broadcast distribution undertakings.[27] This study primarily examines the relationship between the first two supply chain entities (i.e. program producers and broadcasters). The role of broadcast distribution undertakings is also considered to the extent that it impacts the program buyer/seller relationship.

3.1. Canadian English-language TV Program Producers Overview

TV programs watched by Canadian viewers are produced both domestically and non-domestically. Canadian produced TV programs that are directed primarily to Canadian audiences are produced by two major constituents: independent Canadian TV producers and in-house by conventional TV broadcasters. This study addresses English-language TV productions by independent Canadian producers.

The CMPA's *Profile 2017* reports that production of Canadian content TV programs by both French and English-language Canadian producers in 2016/17 was $2.99 B.[28] This total excludes any TV productions done in-house by broadcasters. The value of independent English-language Canadian TV production was $2.2B.[29]

There are numerous independent Canadian English-language TV producers. The CMPA (essentially an association of independent English-language producers) membership is in the order of 390 "production" members (i.e. members who carried out TV and film, interactive or "other" production in 2017/18), of which 193 members (or 61% of members engaged in production activities) list TV production as their primary activity.[30]

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[27] Program distributors that use the Internet to directly reach consumers (subscription-based services such as Netflix and Crave TV, movies and TV programs purchased or rented over the internet such as from iTunes, and advertising revenues earned by social media services such as YouTube and Facebook) are a growing addition to the last supply (distribution) segment. The CRTC estimates 2016 revenues as $2 B. See CRTC, (2017) *Communications Monitoring Report*. The majority of these revenues are related to non-Canadian content. Canadian conventional, pay and specialty TV program undertakings also purchase and air non-domestically produced programs; and Canadian BDUs also distribute "program channels" of primarily non-Canadian content.

[28] See CMPA, *Profile 2017: Economic Report on the Screen-based Media Production Industry in Canada*, Pg. 38.

[29] *Ibid*. Pg. 40.

[30] CMPA also has Associate members who don't carry out actual production.

The vast majority of TV production members (83%) produce programs intended solely or principally for the domestic market.

A 2018 industry survey of the 31 largest film and TV producers in Canada conducted by *Playback* reveals that producers tend to create primarily for either TV or film.[31] Of the 31 companies surveyed, 24 reported they did no or very little (i.e. less than 5%) feature film production. Two firms were solely or primarily (i.e. more than 95%) feature film producers. Only one firm reported that they did roughly equal (or relatively high percentages of both) film and TV production.

Five production companies did large volumes ($590M) of foreign location and service production relative to their productions for the domestic market.[32] Six other firms reported doing some service work - roughly $65M of additional service work (compared to their $385M in domestic TV production). Nineteen producers (62%) reported they did no service work at all.

The three largest companies (all TV production companies) reported total production "budgets" of: DHX Media ($207M), SEVEN24 ($107M) and Boat Rocker Media ($89M) for a total of $403M.[33] The next largest 10 independent TV production companies had total revenues of $458M (with individual annual budgets of between $25M and $74M).

TV production genres include fiction, children's, documentary, lifestyle and variety programming. The bulk of TV production occurs in the fiction genre. In some cases, specialization (such as animation) limits a producer's ability to shift across genres.

Table 1: English-language TV Productions by Genre

	Revenue	Percentage
Fiction	$1.3B	57%
Children's and Youth	$0.4B	17%
Documentary	$0.2B	9%

[31] *Playback*, 2018 Indie List, Jordan Pinto, June 4, 2018.
[32] "Service production" refers to productions that are not primarily targeted at the Canadian domestic market. The ownership of these programs filmed in Canada is primarily held by foreign producers.

[33] *Ibid.* We note that the *Playback* List reports eOne as the largest firm with $498M in annual TV production budgets but this appears most likely to be the global value of their production, not limited just to production in Canada. See https://s3.amazonaws.com/eonewebsiteprod/cmsasset/report/6404596204956549120/054960c14ad4.pdf where total TV revenues for eOne are reported at £328.2 for 2017 (including US, European and other non-Canadian production activities). We have excluded eOne in our analysis due to insufficient data. We also note that the 2017 List included Bron Studios with production of $130M although the company is not listed in 2018.

Lifestyle and Human Interest	$0.3B	13%
Variety and Performing Arts	$0.1B	4%
	$2.3B	100%

Source: CMPA Economic Profile 2017; Wall Communications Inc. 2018

- Key Industry Characteristics of English-Language TV Production:

- roughly two hundred active production companies in 2017
- $2.2 B annual output
- 83% of TV producers produce principally for the domestic market
- Industry structure has a handful of larger firms ($100M or more), roughly a dozen mid-sized firms (i.e. $25M to $90M) with the rest smaller in size
- There is some specialization (e.g. animation, variety and performing arts)
- Most firms either primarily produce original Canadian content or do service work (i.e. very few do a relatively equal mix of both)

3.2. Conventional and Discretionary TV Broadcasters Overview

All Canadian program undertakings (i.e. private and public; English, French and other language; and conventional and discretionary services) had revenues of about $7.4B in 2016.[34] The key broadcast categories considered in this Study are conventional broadcasters and discretionary broadcasters.[35]

Table 2: 2016 Total Industry TV Revenues by Program Undertaking Category

	Private Conventional TV	CBC (Public) Conventional TV	Discretionary and On-demand
Revenues	$1.7B	$1.2B	$4.4B
% of Revenues	23%	17%	60%

Source: CRTC Communications Monitoring Report 2017, Pg. 133

If we look only at the English content production segment, in Table 3, 2016 revenues were $5.2B (or $4.3B in private conventional TV and Discretionary Services). For purposes of examining the buyer/seller relationship between Canadian independent producers of English-language productions and English-language broadcasters, we only include Discretionary services since On-demand services (e.g. VOD and PPV) primarily broadcast non-Canadian productions.

[34] Data in this section comes from the CRTC's *Communications Monitoring Report 2017* unless otherwise indicated.
[35] In 2017, the CRTC amalgamated the former "pay" and "specialty" services into a single "discretionary" category. CRTC Broadcasting Regulatory Policy 2017-279.

Table 3: 2016 English-language TV Revenues by Program Undertaking Category

	Private Conventional TV	CBC (Public) Conventional TV	Discretionary (Pay and Specialty)[36]
Revenues	$1.4B	$0.9B (est.)	$2.9B
% of Revenues	27%	17%	56%

Source: CRTC Communications Monitoring Report 2017, Pg. 139, 140; Wall Communications Inc. 2018

There are 67 private English-language broadcasters licensed to provide commercial TV stations in Canada. There are 140 English-language Discretionary services (as well as 27 PPV and VOD services). There are 128 authorized non-Canadian Discretionary services. The vast majority of conventional TV stations and discretionary services are owned by three large firms ("the Big 3"): Bell Media[37], Shaw Media/Corus Entertainment[38] and Rogers Media.[39]

Program undertakings report to the CRTC their annual expenditures on Canadian produced TV programs (CPE). In 2016, $3B was spent on Canadian produced TV programs. Specialty and pay services spent $1.7B while private conventional TV spent $.63B. The remaining CPE was primarily accounted for by Canada's national public broadcaster, the CBC ($0.64B).[40]

Data from the CMPA's *Profile 2017* reports the value of total Canadian TV production of $2.99B for 2016/17. Of this, $2.2B is English-language content production.

The CRTC's *Communications Monitoring Report 2017* notes that three vertically integrated companies (BCE, Shaw/Corus and Rogers) have 64% of all Canadian broadcast (i.e. radio, conventional TV, discretionary services, cable TV and IPTV) revenues, equating to roughly 85% of English-language broadcast revenues.

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[36] $3.6 B is overstated for English-language services since Pay, PPV and VOD services are only reported in All Languages.
[37] BCE Inc. is Bell Media's parent company.
[38] Corus Entertainment (which is wholly owned and controlled by the JR Shaw family) acquired the assets of its sister company Shaw Media Inc. ("Shaw Media") in 2016 creating a combined corporate portfolio of 45 specialty television services, 15 conventional television channels, 39 radio stations, a global distribution arm, and in-house TV and digital media production divisions. Shaw Communications operates the JR Shaw family's broadcast distribution (cable/DTH subscription) business.
[39] CRTC *Communications Monitoring Report 2017*.
[40] Expenditures on non-Canadian TV programs were $1.3 B.

Looking solely at English-language conventional TV and discretionary services (i.e. Pay and Specialty), the three large firms have total revenues of $1.3 B and $2.8B respectively.

Revenues earned by Bell, Shaw/Corus and Rogers in English-language conventional TV are reported at $1.3B. Bell had $0.7B, Shaw/Corus $0.4B and Rogers had $0.2B.[41] In total, this constitutes 94% of total English-language private conventional TV revenues.[42] If we add in public conventional TV revenues, the largest three private broadcasters have 61% of the conventional TV private and public industry revenue.

The CRTC reports that Bell had a controlling interest in $1.2B of English-language Discretionary services, Shaw/Corus had $0.8B and Rogers had $0.8B, for a total of $2.8B.[43] This is about 97% of all English-language Discretionary revenues.

Combining both private and public English-language conventional TV revenues with Pay and Specialty revenues results in Bell, Shaw/Corus and Rogers having a 79% market share. If only commercial revenues are examined, the large three have 95% of the revenues.

Table 4: Size of Canadian Broadcaster Market Segments

	Conventional TV	Discretionary (i.e. Pay/Specialty)	Combined Conventional TV and Discretionary
BCE, Shaw/Corus, Rogers	$1.3B	$2.8B	$4.1B
Total Private			$4.3B
Total Private and Public			$5.2B

CRTC Communications Monitoring Report 2017 and Wall Communications Inc. 2018

Key Industry Characteristics of English-Language TV Broadcasting (Conventional TV plus Pay and Specialty):

- $4.3 B annual private revenues; $5.2B in combined private and public broadcast revenues
- Industry structure is three very large firms (i.e. Bell at $1.9B, Shaw/Corus at $1.2B and Rogers at $1.0B)
- The Big Three have 95% of English-language private broadcast revenues and 79% of combined private and public English-language broadcast revenues

[41] CRTC *Communications Monitoring Report 2017*, Table 4.2.8.
[42] CRTC. *Ibid.* Pg. 145, Table 4.2.8.
[43] CRTC *Ibid.* Tables 4.2.35 to 4.2.42.

3.3 Broadcast Distribution Undertakings Overview

Broadcast Distribution Undertakings (BDUs) provide delivery to consumers of TV programs packaged in channels or stations. There are three primary technologies to deliver channels: cable TV, DTH and IPTV.

We only briefly note the distribution industry structure to highlight the significant vertical integration with the same entities that provide broadcast program services (e.g. conventional TV and discretionary channels).

BDUs generated $8.7B in revenue from 11.1M subscribers in 2017. While revenue attributable to English-language subscribers is not available, we note that Quebec-based Videotron had 1.7M subs while Cogeco (primarily in Quebec) had 0.7M subs. This suggests that English-language subs are in the order of 9M. We further note that Canada's three large distribution companies, Bell, Shaw and Rogers, had a combined sub count of 7M, or an English-language market share (by subscribers) of 78%.

Section 4: Buyer/Seller Relationship Indicators

In this section we apply the indicators and tests developed in Section 2 to the Canadian TV program market. We first note that many of our indicators require a definition of "market". The competition law literature informs us that the appropriate definition is:

> *The relevant market for the purpose of identifying monopsony power is the smallest set of products in the smallest geographic area such that a hypothetical monopsonist of those products in that area would be able to depress prices by a small but significant and non-transitory amount (OECD, Pg. 22).*

This definition provides a useful starting point. Key product and geographic characteristics to include are language and content orientation. We therefore propose our market be defined as the market to produce and purchase English-language TV productions with a distinct Canadian orientation in content. We discuss alternatives to this market definition in Appendix 1. We also discuss sub-market characteristics in the following analysis.

4.1 Oligopsony Indicator: Number of Buyers in a Market

As noted earlier, TV productions of original Canadian content are primarily shown on programming undertakings such as conventional TV and Canadian discretionary Services. Three large private buyers dominate the English-language market: Bell, Shaw/Corus and Rogers. While a handful of smaller private buyers exist (by way of small independent conventional TV stations or discretionary services), the 79% market share of the Big 3 is indicative of the buying strength of a very small number of buyers. If the public broadcaster is included, then four buyers dominate the market.

> **Finding: Degree of Oligopsony Indicator - HIGH**

4.2 Oligopsony Indicator: Concentration of Buyers in a Market

The Canadian Competition Bureau will generally not challenge a merger based on a concern of coordinated exercise of market power when the post-merger market share accounted for by the four largest firms in the market (known as the four-firm concentration ratio or CR4) would be less than 65 percent. Using 65% as a threshold of concern, we note that the CR4 (i.e. the concentration ratio of the four largest firms) is 96%. In fact, even the CR3 (i.e. the concentration ratio of the three largest private firms) is 79%.

CR3 = 96% > 65%

The Herfindahl-Hirschman Index provides an alternative means of calculating buyer concentration. It is calculated by squaring each market participant's share of the market and then summing the squared shares. Since the data does not capture the market share of smaller buyers, we simply square the market shares of the largest buyers and set the sum of squared shares of smaller buyers to zero.

For market definition, we will use the total public and private Canadian English-language conventional TV and Pay and Specialty services for our primary definition, but also examine the narrower "private" or commercial market definition by way of contrast.

Using public and private English-language TV broadcast market:

Bell = $1.9B/$5.2B = 36.54%; when squared = 1,335
Shaw/Corus = $1.2B/$5.2B = 23.08%; when squared = 533
Rogers = $1.0B/$5.2B = 19.23%; when squared = 370
CBC = $0.9B/$5.2B = 17.31%; when squared = 300

Sum of squared shares (broader market definition) = 1,335 + 533 + 370 + 300 = **2,538.**

Using a narrower market definition of just the private broadcast programming services market yields:

Bell = $1.9B/$4.3B = 44.2%; when squared = 1,952
Shaw/Corus = $1.2B/$4.3B = 27.9%; when squared = 779
Rogers = $1.0B/$4.3B = 23.3%; when squared = 541

Sum of squared shares (narrower market definition) = 1,952 + 779 + 541 = **6,003.**

Interpretations of the HHI have been provided by various competition authorities and agencies outside of Canada. For example, the US Department of Justice has stated: "The agencies generally consider markets in which the HHI is between 1,500 and 2,500 points to be moderately concentrated, and consider markets in which the HHI is in excess of 2,500 points to be highly concentrated."[44] The European Commission's Guidelines on Horizontal Mergers sets an HHI of 2,000 as the benchmark for high concentration.[45]

Finding: Degree of Oligopsony Indicator - HIGH

[44] US Department of Justice, https://www.justice.gov/atr/herfindahl-hirschman-index.
[45] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC0205%2802%29

4.3 Oligopsony Indicator: Barriers to Entry from Government Policy/Regulation

Broadcast programming undertakings must obtain a licence to operate from the CRTC. New conventional English-language TV licences are rarely issued. According to CRTC records, there have been no new English-language conventional TV licences issued in 2017. However, one English-language conventional TV licence was revoked (CRTC Decision 2017-47, CJBN in Kenora). It has been more than a decade since a new English-language conventional TV licence was issued for a major Canadian city.

The CRTC also issues licences to operate Specialty or Pay services (now renamed Discretionary Services by the CRTC).[46] Category A Specialty services did enjoy certain carriage rights (e.g. they had to be carried by BDUs). Category B Specialty services did not enjoy such rights - while such services may receive authorization from the CRTC to operate, they did not receive licences until they were granted carriage by a BDU. With CRTC Decision 2015-96 and CRTC Decision 2016-436, no Discretionary service (i.e. a Category A or B service) will have guaranteed access to a BDU upon licence renewal.

In 2017, no new Category A licences were issued by the CRTC. One Category A service had its licence revoked (CRTC Decision 2917-283). Similarly, no new Category B licences were issued in 2017, although two Category B services had their licences revoked (CRTC Decision 2017-29 and 2017-463).

The regulatory application cost of attempting to obtain a conventional TV licence (if in fact such an opportunity was available – as noted, they rarely become available, particularly in larger markets) could potentially run into several million dollars. The regulatory application cost and the cost and challenge of negotiating with a BDU for carriage are likewise substantial and may in part explain the lack of new independent broadcast discretionary programming entrants. Regulatory entry barriers to entering the market as a programming undertaking, while historically substantial, appear to have increased even more so in the last few years.

Finding: Degree of Oligopsony Indicator - HIGH

4.4 Oligopsony Indicator: Barriers to Entry from Economies of Scale

[46] See Broadcasting Regulatory Policy CRTC 2016-436 and Broadcasting Regulatory Policy CRTC 2017-279.

Economies of scale arise when a company can reduce its per unit costs of production from expanding output. Economies can result from the spreading of high fixed costs over many units of output, specialization, input purchasing advantages and core managerial expertise.

The Canadian English-language private conventional TV landscape is essentially owned and controlled by three large operators: Bell (CTV), Corus (Global Television Network)[47] and Rogers (City formerly CityTV). They respectively generated revenues of $700M, $400M and $200M from their English-language conventional TV operations last year. The three large operators combine for a 94% share of English-language conventional TV commercial revenues. Bell's CTV network has 27 TV stations, Corus' Global TV network has 13 TV stations and Rogers' City network has 6 TV stations.

Bell's CTV network has two affiliate stations that are independently owned but air Bell's programming. The affiliate stations serve Lloydminster, Saskatchewan and Thunder Bay, Ontario. Bell's affiliate stations also have sister stations (same studio location) that are affiliates of Corus' Global TV. The Lloydminster sister stations are owned by Newcap Radio while the Thunder Bay stations are owned by Dougall Media. Corus/Shaw also has an affiliate station in St. Johns, Nfld. that is owned by Stirling Communications. Rogers' City has three affiliate stations in Kamloops and Prince George, BC, and Medicine Hat, Alberta. Those affiliate stations are owned by the Jim Pattison Group.

We note that the high fixed costs of multiple stations operated by Bell, Corus/Shaw and Rogers suggest that economies of scale exist. Economies likely exist both for the technical side of operations as well as in the purchasing of programming (including US based popular programs). Even the affiliate stations – which serve relatively small audiences – are owned by companies that also operate either multiple TV stations or radio stations in the same territory. It should also be noted that the affiliate stations rely on the three large networks for their programming.

The English-language Discretionary Service landscape is likewise dominated by Bell, Corus/Shaw and Rogers, who earned a combined 97% share of English-language Discretionary service revenues in 2016. Economies of scale may not be as important in Discretionary services as they are in conventional TV since high fixed costs are not obviously present. However, managerial and purchasing economies and the ability to share programs across multiple services and channels likely provide some degree of scale economies.

Finding: Degree of Oligopsony Indicator – MODERATE to HIGH

[47] Global TV is owned by Corus Entertainment, which is in turn owned by the Shaw family.

4.5 Oligopsony Indicator: Barriers to Entry from Vertical Integration

Vertical integration can potentially create entry barriers. This will most likely occur when market power is present at one or more stages of the vertically related production chain.[48] An entry barrier arises if potential entrants are disadvantaged relative to vertically integrated incumbent firms.

As noted earlier, the Canadian broadcasting landscape is profoundly characterized by vertical integration. The three largest BDUs in Canada (Bell, Shaw and Rogers) are also the three largest owners of discretionary services and conventional TV stations, which package programs for distribution by BDUs. All three entities also have their own production facilities and resources.

The Canadian Competition Bureau has described its vertical integration concerns:

> "The potential for vertically integrated firms in the broadcasting industry to use their market power to engage in anticompetitive acts or to lessen or prevent competition substantially is a concern for the Bureau. In particular, the Bureau is concerned that vertically integrated firms may have the incentive to disadvantage rival downstream BDUs to the benefit of their own distribution offerings in a number of ways, including raising rivals' costs, limiting rivals' consumer offerings and stifling innovation. Of particular concern is the potential for vertically integrated firms to use their market power from the "must have" discretionary services they own to disadvantage downstream rivals by (i) negotiating higher fees from BDUs for the right to resell their discretionary services; or (ii) imposing contractual terms on BDUs that limit choice and flexibility in their offerings to consumers".[49]

There are very few firms in Canadian broadcasting that have the potential to compete across all industry segments with the established English-language vertically integrated companies. One potential candidate is TELUS, which has a major western presence as a BDU (as well as an Internet Service Provider, mobile wireless operator and landline telecom provider). However TELUS has also expressed their concerns regarding the vertically integrated companies.[50] To date, TELUS has not entered the conventional or discretionary programming broadcast market. Moreover, it is hard to conceive of any economically sound

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[48] Roger Blair and David Kaserman, *Law and Economics of Vertical Integration and Control* 1983, Academic Press, Pg. 42

[49] Submission to the Broadcasting Notice of Consultation CRTC 2014-190 Let's Talk TV, June 27, 2014.

[50] Similar sentiments are expressed by TELUS. See https://blog.telus.com/public-policy/why-vertical-integration-in-canadas-communications-market-should-be-a-concern-to-canadians/

entry strategy for TELUS (or any other traditional Canadian broadcast entity) at this point – certainly within the near term (i.e. 1 to 3 years).

Finding: Degree of Oligopsony Indicator - HIGH

4.6 Oligopsony Indicator: Barriers to Entry and Technological Change

Technology can be used to reinforce entry barriers (by those holding superior technology)[51] or it can offer new means of entry into industries that were previously protected from entry. In the broadcasting world, recent technological change has tended to offer more opportunity for entry than creating additional or reinforcing existing barriers. According to the OECD (2013):

> "Technological developments affect the conditions of competition as they alter: the range and quality of services; the underlying costs; the extent of barriers to entry (new technologies provide new means by which the market is contested); the ability of customers to switch suppliers; and pricing mechanisms (technological developments allow for provision of pay per view services). Therefore, digitisation generally reduces barriers to entry".[52]

The creation of entry opportunities in broadcasting is most clearly seen with the advent of alternative distributors utilizing the internet. These services provide an alternative to traditional cable TV, DTH and IPTV services. They include internet-delivered subscription services (SVOD) such as Netflix, ad-based video (AVOD) websites (YouTube but also note their new subscription service YouTube TV), subscription based VOD services from original programmers (e.g. HBO), broadband delivered TV program transactional rental and purchase services (TVOD) (e.g. Apple iTunes) and other broadband enabled digital media video program services.

The CRTC has reported estimates of the revenues of SVOD, TVOD and AVOD services operating in Canada in 2016 at almost $2 Billion. While this represents a sizable revenue (and therefore market opportunity for producers), it should be noted that the largest portion is derived from major US-based services such as

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[51] R.C. Levin, "Technical Change, Barriers to Entry and Market Structure", *Economica*, 1978.

[52] "Competition Issues in Television and Broadcasting" (OECD 2013) Pg. 4. Also see S. Globerman, "Technological Change and its Implications for Regulating Canada's Television Broadcasting Sector", May 2016, Fraser Institute. While Globerman's primary point is that new "omniplatforms" will create more competition for broadcasters, he also notes that they also create new opportunities for producers.

Netflix ($766 M), iTunes ($268 M), Microsoft ($49 M), YouTube ($119 M) and Facebook ($66 M).[53]

It is unclear to what extent Canadian companies generate a portion of these revenues. With the exception of Netflix (see later discussion), an examination of the US-based SVOD, TVOD and AVOD services indicates original Canadian programming is present but is relatively uncommon.

The largest Canadian-owned player in this segment is Bell's Crave TV. The service is priced at $8 per month and has a reported subscriber base of 1.3 million – potentially generating $125 million annually.[54] The Crave website lists their shows which are primarily drawn from US providers HBO, Showtime and Starz. The Canadian produced *Letterkenny* (New Metric Media) is one of the few Canadian original productions on Crave.

Estimating the revenues flowing to Canadian producers from the alternative TV distribution services is challenging. It has been reported that Netflix plans to spend $500M over the next five years on original Canadian English- and French-language movie and TV programming.[55] Assuming that this production expenditure does occur, and that 75% of the expenditure is solely on English-language TV (i.e. no movie) programming, it would mean at most an average annual English-language TV production boost of $75 M. It should also be noted that the ownership of some of those productions would likely not be Canadian.[56]

Revenue of $75M on industry base annual revenues of $2.2B equates to 3.5% of total industry English-language TV production revenues. This percentage, while not inconsequential, is relatively small compared to the annual expenditures of the three major Canadian broadcasters and in that sense represents a somewhat limited opportunity for Canadian English-language TV producers in the near term. However, the alternative TV distribution market nonetheless provides a new market opportunity for Canadian English-language TV producers – one that is likely to grow over time. As noted above, the lack of rights ownership by Canadian producers (e.g. in Netflix program investment) diminishes the commercial opportunity for Canadian producers.

On a final note, we reiterate the caution of the OECD in relying too heavily on technological change to eliminate or radically reduce barriers to entry in the TV broadcasting market:

[53] CRTC *op. cit.* Pgs. 146-148.
[54] https://mobilesyrup.com/2018/02/08/bell-cravetv-1-3-million-subscribers/
[55] https://media.netflix.com/en/company-blog/what-netflixs-half-a-billion-cad-investment-in-canada-is-really-about
[56] *Ibid.* While Netflix has stated productions would be "made in Canada", such productions would include foreign location productions. The CPE expenditures by Canadian broadcasters, in contrast, are certified Canadian content.

Even though convergence and technological changes have lowered barriers to entry, there are still significant challenges that may restrict market access. The doctrine gives a non-exhaustive list of examples: governmental policy, the presence of dominant broadcasters, access to content, audience behaviour, consumer costs or capital requirements.[57]

Finding: Degree of Oligopsony Indicator – LOW and likely an eliminator of Entry Barriers

4.7 Bargaining Power Indicator: Ease of Switching to Alternative Supplier

The first consideration in this bargaining power indicator is whether there are few or many supplier options for the Big 3 buyers. We note that there are at least two dozen Canadian producers of significant size (i.e. annual English-language TV revenues of $10 M or more) that can supply Canadian broadcasters.[58]

The average cost of a TV production varies considerably by genre. The average (and median) budget for an hour of English-language TV in the Fiction genre was about $1.5M in 2016/17.[59] However, the average/median hourly budget for Variety and Performing Arts was $0.7M/$0.3M. The median average hourly budget for English-language TV across all genres was $1.1M.[60]

Data for just English-language productions is not separately available for number of projects. However, there were 723 TV series produced (both languages) last year with total budgets of $2.4B.

The numbers suggest that a Canadian broadcaster would be able to pick and choose among a significant number of English-language TV producers who would be capable of producing a TV series or TV program of average budget size.[61]

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[57] OECD, *Competition Issues in Television and Broadcasting* (2013). Pg. 6.

[58] The *Playback* Indie List identifies almost 30 companies with annual revenues of at least $5M, although roughly a dozen of these primarily do service work or feature film productions. Two dozen companies are listed at $10M or more in revenue per year. The CMPA has suggested that there are several sizeable English-language TV producers that do not appear on the *Playback* List.

[59] CMPA. *Profile 2017*, Pg. 45.

[60] Calculated by weighting median hourly budget for each genre by share of production volume.

[61] For TV series with particularly large budgets, the number of producers capable of taking on larger productions would of course be more limited. It should also be noted that it may be less easy to substitute between some genre types – e.g. animated productions versus non-animated productions.

Broadcasters receive a high volume of "pitch ideas" from producers each year. Very few are selected to move to the development stage.[62] Accordingly, Canadian broadcasters appear to have numerous options available to them prior to deciding which specific productions to actually licence.

It should be noted that regulatory requirements on spending by Canadian broadcasters imply that while broadcasters may have significant power to choose among Canadian producers, they must meet certain spending levels overall for Canadian productions. For our purposes, it is the bargaining power of broadcasters with respect to an individual producer that is most germane.

Finding: Degree of Bargaining Power Indicator - HIGH

4.8 Bargaining Power Indicator: Support of New Entry

This type of bargaining power arises from a buyer's ability to sponsor new entrants as a means of creating more supply options, or as a bargaining threat when negotiating with existing suppliers. Given that the start up costs of forming a new production company that is capable of quickly supplying to Canadian broadcasters would be relatively high, we expect that this type of bargaining power would be limited.[63] However, it may be possible to exert this type of support (or threat) by selecting smaller producers for projects that are larger than those (smaller) producers typically undertake.

Finding: Degree of Bargaining Power Indicator - LOW

4.9 Bargaining Power Indicator: Self-Supply

Canadian broadcasters have a significant in-house production capability. Last year, broadcasters had an in-house production volume of $1.3 B.[64] Broadcaster in-house productions tend to be in the sports, news and current affairs areas. As such, we expect that a broadcaster's ability to switch to other genres of programming is limited in the short run. Over a longer term, conversion of facilities and development of in-house staff capabilities is certainly possible.

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[62] Rogers' submission guide notes "due to limited development and production resources, and a high volume of submissions, the process of commissioning new projects is a very selective one" (http://www.rogersmediatv.ca/submission/submit_process.php). Similar observations are made in the Bell Media producer submission guidelines (http://www.bellmedia.ca/producer-guidelines/).

[63] There is a considerable amount of knowledge that must be acquired in order to form a successful production company – typically taking several years of training/experience across multiple skill sets. This requirement is also a significant barrier to entry.

[64] CMPA. *Profile 2017*, Pg. 83.

Recently, Bell Media purchased a majority stake in one of Canada's largest purpose-built production studios (Pinewood Toronto Studios), signaling a move towards greater production involvement outside of sports and news.[65] Corus has also stated their intent to increase in-house production "Our strategy to own more of the content we produce remains an important part of Corus' future . . . in fiscal 2017, we more than doubled the production of original kids content through our globally renowned Nelvana animation studio".[66]

It also appears that Canadian broadcasters are voicing their support for greater involvement in productions that have traditionally been the purview of independent producers. A recent paper from the C.D. Howe Institute co-authored by former executives at Bell and Rogers makes the following arguments:[67]

- Broadcasters need "more skin in the game" of TV production;
- Broadcasters should be allowed greater access to production funds;
- Broadcasters should be allowed to acquire more rights from independent producers; and
- Broadcasters should have a greater role in the production and exploitation of drama.

We take these comments as indications of broadcaster consideration of, if not the outright intent, to at least partially supplant independent producers.

Finding: Degree of Bargaining Power Indicator - MODERATE

4.10 Bargaining Power Indicator: Buyer's Outside Options

While Canadian broadcasters have a plethora of non-domestic supply options for TV programs, regulatory requirements stipulating the dollars that must be spent on Canadian produced programs (and programs of national interest) as well as the daily hours dedicated to certain types of programs imply that "outside options" for Canadian broadcasters are limited with regard to their Canadian program requirements. As long as these regulatory requirements remain, the bargaining power of broadcasters as concerns the total amount of Canadian programs purchased in respect of this particular bargaining element is constrained.

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[65] http://markets.businessinsider.com/news/stocks/bell-media-buys-majority-interest-in-pinewood-toronto-studios-1019839891.

[66] Corus 2017 Annual Report page 7: https://assets.corusent.com/wpcontent/uploads/2017/12/corus_annual_report_2017.pdf.

[67] "Strengthening Canadian Television Content". L. Hunter, K. Engelhart and P. Miller. C. D. Howe Institute, 2017.

We do note that the above referenced C. D. Howe Study does call for a lowering of quotas on the hours of Canadian drama programming.[68]

Finding: Degree of Bargaining Power Indicator - LOW

4.11 Bargaining Power Indicator: Seller's Outside Options

Independent TV producers of distinctly Canadian content rely on the domestic Canadian market for their economic well-being. Such reliance is not unique to Canadian TV producers since "Virtually all countries produce TV first and foremost for their domestic market, and make the majority of their revenues from that market." [69] As noted, that market is largely defined as the conventional TV and discretionary broadcasters that purchase Canadian TV programs for Canadian audiences.

"Seller's outside options" for English-language TV producers is therefore largely limited to export opportunities.[70] Co-productions provide one means of extending the market for Canadian content TV productions. Canada currently has audiovisual coproduction treaties with fifty-five countries. These treaties allow for the joint production between partners in different countries to produce programs that can enjoy national production status in each partners' country.

Foreign coproduction partners contributed $216 M to English-language TV productions in 2016.[71] While last year's contribution is the highest in a decade, the annual contribution has vacillated, peaking in other years at $182 M (2009) and bottoming at $118 M (2013). Thus there is no clear trend that this market opportunity is trending higher.

As noted earlier, alternative distributors such as Netflix offer another market opportunity, particularly for the distributor's programming for Canadian audiences.[72] While the Netflix announcement to invest an estimated $75 M in each of the next five years into Canadian English-language TV production, this expenditure is relatively small compared to the Big 3 Canadian English-language broadcasters ($4.1 B).

Finding: Degree of Bargaining Power Indicator - HIGH

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[68] *Ibid.* Pg. 16.
[69] *Ibid*. Pg. 18.
[70] Our Study focus is solely on TV programs. Canadian TV producers have pursued growing business opportunities in the broader digital interactive media market, both domestically and internationally.
[71] CMPA *2017 Economic Profile*, Pg. 69.
[72] The only major Canadian-owned alternative distributor, Crave TV, is owned by Bell and is therefore affiliated with Bell's broadcaster buyer power. Moreover, Crave has to date relied heavily on US programming for its content.

4.12 Bargaining Power Indicator: Relative Bargaining Effectiveness

Relative bargaining effectiveness is related to the "patience" of each trading party and the ability to gather information on the other bargaining partner. For example, if one trading partner is much larger and well capitalized it is likely to be more patient than the other trading partner. Regarding information asymmetry, a larger, more powerfully connected firm may be able to gain advantage by procuring information on the strengths and weaknesses of its trading partner.

Any of the Big 3 English-language private broadcasters is substantially larger than any independent Canadian English-language TV producer. The substantial size differential is further exaggerated when account is taken of the vertical relationships that each of the Big 3 has with cable, DTH and/or IPTV operations.

The broadcaster's access to detailed viewership data and advertising spending provides the broadcaster with important information that offers them an advantage in negotiating with producers.

It should be noted that producers typically approach broadcasters with a request for pitching TV program concepts, not the reverse. Broadcasters are generally in the proverbial "cat seat" when pitch meetings occur. In such negotiations, the broadcaster will generally have access to the producers' detailed financial information regarding proposed budget and financing sources. The producer, however, will have virtually no inside knowledge of the broadcasters' priorities or willingness to spend on any given project.

We note this is related to Carstensen's point that "whenever transactions are negotiated directly, every buyer who has any significant buying capacity has the ability to affect its suppliers".[73]

Finally we note that producers gain access to CPTC production tax credits only if they have received confirmation in writing from a Canadian distributor or a CRTC licensed broadcaster that the production will be shown within the two year period following its completion. CMF funding (e.g. the Performance Envelope Program) is allocated to broadcasters, who decide which TV production projects will get funding. Producers are highly dependent on broadcaster approval for tax credit and funding support.

Finding: Degree of Bargaining Power Indicator - HIGH

[73] Carstensen, *op. cit.*

4.13 Bargaining Power Indicator: Buyer as Gateway to Downstream Market

According to the OECD, "The buyer is a gatekeeper when it has market power—as a seller— in the market for distribution in a geographic area. This will be the case, for instance, if upstream firms cannot access end customers efficiently without using the buyer (i.e., upstream firms have poor alternatives to the buyer to access the downstream distribution market)."[74]

The relevance of vertical integration has already been discussed in part. However, the key issue here is access to the end customer. Producers do not have direct access to end customers in an economical basis. They rely on broadcasters to sell channels and discretionary services to cable, DTH and IPTV distributors – which are affiliated with the Big 3 English-language broadcasters. The cable, DTH and IPTV companies – with sophisticated billing systems, widespread retail presence and customer relations staff - own and manage the relationship with consumers of TV programs.

Finding: Degree of Bargaining Power Indicator - HIGH

4.14 Bargaining Power Indicator: Direct Buyer/Seller Relationship

Whenever transactions are negotiated directly, every buyer who has any significant buying capacity has the ability to affect its suppliers. Producer's programs are typically "one-off" products – they are not available "off-the-shelf".[75] TV programs are pitched to a broadcaster by an individual producer (or possibly a group of producers) with the hope that the project will get a "greenlight" to proceed to the production stage. In the best of outcomes, a successful series will be renewed for one or more seasons by the broadcaster.

The buyer is acutely aware of who is selling the product in the Canadian TV production market.

We also note "an input buyer that takes 20% or more of a producer's output in direct purchases has the potential to wield significant buyer power over that producer".[76] Since most producers are doing actual production business with just one or two broadcasters at any point in time, they are highly dependent on those one or two broadcaster clients.

[74] Church, *op. cit.*

[75] After market sales are an exception, but form a relatively small part of purchases by Canadian broadcasters. In any event, negotiations are still one-on-one between the buyer and the rights-holder.

[76] Carstensen, *op. cit.*

Finding: Degree of Bargaining Power Indicator - HIGH

4.15 Discussion of Findings Regarding Buyer/Seller Relationship Indicators

There is no established weighting or ranking of which indicators are most important when gauging buyer power. The weighting might very well change depending on the particular industry circumstances.

However, even without applying any weighting to our indicators, the majority of indicators reveal a "HIGH" level of buyer power. Nine out of fourteen indicators are uniquely "HIGH".

Table 5: Summary Assessment of Canadian Broadcaster *Buyer Power*

BUYER POWER RELATED TO:	LOW	MODERATE	HIGH
Number of Buyers in a Market			
Concentration of Buyers in a Market			
Barriers to Entry from Government Policy/Regulation			
Barriers to Entry from Economies of Scale			
Barriers to Entry from Vertical Integration			
Barriers to Entry and Technological Change			
Ease of Switching to Alternative Supplier			
Support of New Entry			

Self-Supply			
Buyer's Outside Options			
Seller's Outside Options			
Relative Bargaining Effectiveness			
Buyer as Gateway to Downstream Market			
Direct Buyer/Seller Relationship			

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While we don't apply a definitive ranking to the importance of each indicator, we would note that the Number of Buyers in the Market, the Concentration of Buyers, Barriers to Entry and Relative Bargaining Effectiveness – the key indicators in our view – by themselves provide a clear indication of inordinate buyer power in the English-language TV program market.

Section 5: Overview and Examination of Public Policy Goals Related to the Production of TV Programming

5.1 Background: Content Diversity and Independent Production

The objective of diversity in broadcast programming has been pursued in many countries through legislative, policy and regulatory means.[77] Each country has taken its own approach depending on industry characteristics and underlying political foundations. Independent production has been one key avenue for achieving program diversity.

In the UK, the evolution of independent TV production "has been supported by successive governments and regulators from the establishment of Channel 4 in 1982 (with its policy of external programme sourcing), through the introduction of production quotas in the 1990s to the development of production terms of trade between independent producers and UK broadcasters in 2004."[78] The independent production sector rules are designed to "promote cultural diversity and to open up the production sector to new energies and voices; to stimulate the growth of small and medium sized enterprises (SMEs); promoting creativity and fostering new talent; and to tackle vertical integration within the UK programme supply market".[79]

France instituted a requirement in 1989 that terrestrial broadcasters invest 10% of revenues in independent production and strengthened rights protection for independent producers in 2001.[80] Ireland, Denmark and Australia all have broadcaster quota requirements from independent producers. Other countries (e.g. Italy, Austria and Switzerland) focus on supporting independent producers through funding mechanisms.

Even the US, which has been characterized by vertical integration between large broadcasters and producers (i.e. dependent production), has grappled with ways

[77] For a general overview of the European experience, see *Media Freedom and Pluralism*. B. Klimkiewicz (ed.) Central European University Press, 2010.

[78] "The Role of Terms of Trade in the Development of the Independent Production Sector", Oliver and Ohlbaum (2011). Pg. 4

[79] "TV Production Sector Review" Ofcom (2015). Quote attributed to the Secretary of State. Pg. 4.

[80] "Independent Production Obligations of TV Channels in France and the UK", Analysis-Mason, 2015. See also http://www.cnc.fr/web/en/regulation-of-film-television-relations for a more comprehensive list of obligations.

to ensure diversity through independent production.[81] As far back as the 1950s, a proposal to separate TV program ownership from network broadcast ownership was voiced in Senate House Committee hearings.[82] The US in fact moved in the 1970s to restrict TV network ownership of prime-time programs (the Financial Interest and Syndication Rules or "Fyn-Syn" rules). The Fyn-Syn rules were repealed in 1995 by the FCC, but concerns about the ownership of TV production by broadcasters continue to be a part of the US media policy debate. A recent FCC decision to remove a 42 year-old restriction on TV station same-market ownership was met with criticism for its potential harm on diversity as well as competition.[83] Other commentators (such as the Public Interest, Public Airwaves Coalition) have urged the FCC to require broadcasters to air independently produced TV programs in a minimum of 25 percent of their most-watched channel's prime-time schedule.[84]

Like the UK and other European countries, Canada has taken a prominent role in ensuring independence between broadcasters and TV producers. As early as the 1980s, the Canadian government took steps to encourage and establish an independent production sector as a key element of the broadcasting system.[85]

The basis for the regulatory and policy measures underlying current Canadian government efforts to support independent production can be found in the 1991 *Broadcasting Act*. Each of the relevant policy objectives is described and discussed below.

Per the Broadcasting Act,

> *3. (1) It is hereby declared as the broadcasting policy for Canada that*
>
> *(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;*
>
> *(b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property **and***

[81] While US broadcasters have been integrated with production companies, there has been limited integration with cable and other distribution companies. In Canada, vertical integration is most prominent between the broadcast and distribution functions.

[82] Statement of Richard Moore before Senate Subcommittee of Interstate Commerce, March 26, 1956, reported in *Monopoly Problems in Regulated Industries* (US Congress Hearings, 1956). Pg. 5555.

[83] See https://www.washingtonpost.com/news/the-switch/wp/2017/11/16/the-fcc-just-repealed-decades-old-rules-blocking-broadcast-media-mergers/?utm_term=.f14cd4ffb6bc

[84] See https://www.benton.org/public_interest_obligations_of_dtv_broadcasters_guide/public_standard

[85] D. Skinner, "Television in Canada: Continuity or Change?" in *Television and Public Policy,* (D. Ward, ed.). 2009. Taylor and Francis Group. The Broadcast Fund to support independent production was later renamed Telefilm.

> ***provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty****; (emphasis added)*

This policy objective specifically notes the essential Canadian nature of TV programs in maintaining and enhancing national identity and cultural sovereignty. Programs need to be "uniquely Canadian" to meet this objective.[86] While it may be possible to create content that is both distinct in its "Canadianness" and also highly attractive to non-Canadians, first priority is given to distinct Canadian content.

The Act also states that:

> *3. (1)(d) the Canadian broadcasting system should*
>
> *(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,*
>
> *(ii)* ***encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view****,* (emphasis added)

This objective provides further context to understand Canadian content. Perhaps the most helpful way to understand this passage is to recognize that this objective cannot be met by the broadcast of "Hollywood shows" or literally any other programs that are produced primarily for audiences in other countries.

An additional objective speaks to the need to employ (and to generate meaningful opportunities for) Canadians in the creation of the aforementioned content:

> *3. (1) (d) (iii) through its* ***programming*** *and the* ***employment opportunities arising out of its operations****, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children* (emphasis added)

Finally, the Act also asserts that the Canadian broadcasting system should:

> *3. (1)(v)* ***include a significant contribution from the Canadian independent production sector****;* (emphasis added)

[86] In addition to being uniquely Canadian, such programs may also have broader context and attractiveness to audiences outside of Canada.

This objective is extremely salient for our purposes in that it explicitly requires a significant contribution from the Canadian independent production sector as a matter of Canadian public policy.

6. Conclusion: The Implications of the Inordinate Buyer Power on Policy Objectives in the Canadian Domestic Broadcasting Market

These core objectives of the Broadcasting Act are directly impacted by an inordinate amount of buyer power on the part of private broadcasters in the English-language TV program market. The broadcasters' inordinate buyer power implies that these buyers (i.e. broadcasters) gain more from market transactions relative to the sellers (i.e. independent producers) than would otherwise occur. In other words, buyers gain at the expense of sellers, leaving producers with less resources than if buyer power did not exist.

To be clear, Canadian independent producers suffer commercially as a result of broadcaster buyer power.

This reduction in sellers' welfare is *prima facie* evidence that independent English-language TV producers must necessarily (and involuntarily) contribute less to the Canadian broadcasting system than they could – or should – contribute. Consequently, Canadian broadcasting policy objectives are *de facto* being harmed by the broadcasters' inordinate buyer power.

Quantifying the magnitude of the harm caused by broadcaster buyer power goes beyond the scope of this Study. However, specific examples of harm can be identified. Direct implications for the achievement of Canadian broadcast policy goals include the following:

- The ability of any individual independent producer to significantly contribute is diminished (i.e. less resources decreases contribution);
- A lower production output of distinctly Canadian TV programs (i.e. less resources);
- Less program diversity (i.e. less resources); and
- Diminished employment opportunities in the creation of distinctive Canadian programs (i.e. less resources).

Canadian policy objectives may also be impacted in indirect ways. As noted, the existence of buyer power permits buyers to dictate transactions terms – including price of course – but also terms such as ownership of rights, production schedule, and even creative decisions. Regarding the latter, specific reference can be made to Clause 3 ()(d) (ii):

> *by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity.*

TV production is generally both a commercial venture and an artistic endeavor – a mix of business and art.[87] To the extent that broadcasters have more of a commercial orientation than a creative focus, the "high" bargaining power of broadcasters inevitably leads to less creative diversity in TV programs.[88] It can also result in less diversity of opinion, ideas and values being expressed in those programs if the broadcaster seeks to impose greater commercially-oriented "values" on the production.

Finally, it is important to recognize the wide array of cultural and economic benefits derived from a diverse range of independently produced content - benefits that are threatened by excessive buyer power. While an examination of the role of cultural products and services – and diversity in those products and services and in the entities that create them - in enhancing societal welfare (including economic, social and health benefits) goes beyond the scope of this study[89], we note that the enshrined role of independent production in the *Broadcasting Act* intrinsically acknowledges and supports the value of production diversity.

[87] "Television producers coordinate and supervise all aspects of a production, from the creative to the administrative. Producers also make the financial decisions and handle contracts, talent and bargaining agreements, and other administrative details." https://www.nyfa.edu/student-resources/what-does-a-tv-producer-do/. "Film is an economic commodity as well as a cultural good". A. Moran "Terms for a Reader" in *Film Policy: International, National and Regional Perspectives*, (A. Moran ed.) 1996, Rutledge.

[88] Our assumption is that a broadcaster will care more about the "popularity" – or audience draw – of a program relative to the producer, who may be willing to sacrifice some popularity for the sake of telling a particular story or pursuing individual artistic expression. Both the producer and broadcaster will be behaving with self-interest, but the producer is more likely to trade off a degree of economic self-interest for the sake of non-economic objectives.

[89] See, for example, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* by S. Page (Princeton University Press, 2007); *The Nature of Economies*, J. Jacobs (Random House, 2000); *The Death and Life of Great American Cities* by J. Jacobs (Vintage Press, 1961); *Gifts of the Muse: Reframing the Debate About the Benefits of the Arts* by K. McCarthy, E; Ondaatje, L. Zakaras and A. Brooks (Rand, 2004); "Entrepreneurship, Creativity, and Regional Economic Growth" by R. Florida in *The Emergence of Entrepreneurship Policy* (ed. D. Hart) Cambridge Press 2003; and "The Economic Value of Cultural Diversity" by G. Ottaviano, and G. Perry in *Journal of Economic Geography* (2006).

APPENDIX 1: Defining the Market

As noted the starting point for defining the relevant market is:

The relevant market for the purpose of identifying monopsony power is the smallest set of products in the smallest geographic area such that a hypothetical monopsonist of those products in that area would be able to depress prices by a small but significant and non-transitory amount (OECD, Pg. 22).

Since observations on price changes (i.e. lower prices) that may have been induced by the oligopsony are not readily available, we don't pursue this aspect of the definition. Instead, we assume that if there is evidence of significant buyer power, then buyers have the ability to impose self-favoring terms of trade on transactions (including, but not limited, to lower prices).

As noted, the two dimensions of geography and product are key to defining the appropriate market. What are the smallest geographic and product definitions that would allow buyers to impose inordinately favorable terms of trade?

For Canadian English-language TV program producers of distinctively Canadian content, the appropriate *geographic* market is the domestic Canadian market. While there are examples of distinctively Canadian programs being successfully exported to other countries, the vast majority of distinctively Canadian programs are intended for, and exhibited in, the Canadian market. Similarly, the *product* definition from the producers' perspective is indelibly related to the "Canadianness" of a production[90]. Again, the primary market of buyers for such programs is properly defined as Canadian broadcasters.

A key aspect of defining the market is the degree to which suppliers and buyers can substitute products.[91] For some Canadian producers, the need to produce distinctive Canadian content for the Canadian market limits their ability to produce programming targeted at non-Canadian markets. As noted, there are examples of successful sales of uniquely Canadian programs to other countries, but the vast majority of original Canadian productions are sold in Canada.

Barriers to entry into the Canadian broadcast market also limit the ability of sellers to substitute between the existing handful of large buyers.

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[90] In order to be certified as Canadian content – and therefore gain access to both essential funding and favorable exhibition rules - a program must meet specific criteria related to its Canadian content.

[91] See J. Baker and T. Bresnahan, "Economic Evidence in Antitrust: Defining Markets and Measuring Market Power", in *Handbook of Antitrust Economics* (P. Buccirossi editor). MIT Press, 2008.

For international buyers, Canadian programs may provide a degree of substitutability with programs produced by foreign "in-country" producers, but foreign broadcasters will also have heavy incentives to exhibit programs most attractive to their local audiences (i.e. programs reflective of local circumstances and interests). For Canadian buyers, due to Canadian content regulations, Canadian broadcasters are not able to substitute foreign programs for regulatory-mandated Canadian program requirements. However, given the direct buyer/seller relationship and the limited number of purchasers relative to sellers, Canadian broadcasters can more readily substitute programs of one Canadian producer for programs from another Canadian producer. The limited number of Canadian buyers (i.e. the Big 3 plus the CBC) enables such substitutability when sellers (i.e. Canadian original program producers) number in the hundreds. In addition, buyers have an option to self-supply.

Our definitions have to this point been restricted to traditional buyers and sellers of Canadian TV programs (i.e. traditional broadcasters). It is important to note that the emergence of non-traditional program exhibitors (SVOD, TVOD and AVOD) provides another potential selling option for Canadian TV producers. However, as discussed earlier, the immediate market opportunity for producers of distinct Canadian content is limited – possibly in the range of 5% or less of the traditional market over the next five years.[92]

[92] Speculating on future markets is fraught with uncertainty. The evolution of non-traditional program exhibitors should be monitored by policy makers carefully over the next several years to provide a better understanding of the opportunity for Canadian independent producers.

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