CMPA
Canadian Media Production Association
Screen-based entrepreneurs
ottawa | toronto | vancouver

April 27, 2011

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Filed Electronically

Dear Mr. Morin:

Re: Broadcasting Notice of Consultation CRTC 2010-783 – Review of the regulatory framework relating to vertical integration

The Canadian Media Production Association (the CMPA) welcomes the opportunity to provide the attached comments regarding the above-referenced Notice of Consultation.

The CMPA represents the interests of screen-based media companies engaged in the production and distribution of English-language television programs, feature films, and new media content in all regions of Canada. The CMPA's 400 member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.

Given the importance of this proceeding to our members, the CMPA requests the opportunity to appear at the public hearing scheduled to commence on 20 June 2011 in Gatineau, to elaborate on the views expressed in this intervention.

Yours truly,

[*original signed by Norm Bolen*]

Norm Bolen
President & CEO

Attach.

Intervention of the Canadian Media Production Association (CMPA)
Broadcasting Notice of Consultation CRTC 2010-783
Review of the regulatory framework relating to vertical integration

Executive Summary

The CMPA appreciates the concerns that independent broadcasters and others have regarding potential anti-competitive behaviour by vertically integrated distribution and programming undertakings. In this submission, however, the CMPA addresses the need to ensure that the diversity of programming voices in the Canadian broadcasting system is not jeopardized by the vertical integration of programming undertakings and production companies.

The CMPA also argues that access to taxpayer-funded Canadian programs should not be restricted by exclusive deals; that the Commission should continue to disclose financial data for individual specialty services; and that the benefits test should be re-applied to BDUs.

Maintaining Safeguards in Cases of Programmer-Production Company Vertical Integration

The Commission's new Group Licensing Policy (GLP) requires 75% of expenditures on programs of national interest (PNI) to be allocated to independently-produced programs, and the retention of service-specific independent production requirements. The former requirement addresses vertical integration concerns with respect to the PNI genres; the latter requirement addresses such concerns in certain cases with respect to the non-PNI genres. A better means to address non-PNI concerns, however, is the Shaw Media proposal to allocate 35% of expenditures on non-PNI programs to independently-produced programs.

No Program Exclusivity for Taxpayer-supported Programs

Canadian programs, particularly those which have been supported with public funds, should be made available to the widest number of Canadians, on whatever platform they choose to use.

Maintain Disclosure of Financial Information for Individual Specialty Services

The CMPA opposes any reductions to the amount of financial data disclosed for individual specialty services. Stakeholders need to maintain their access to such data to adequately assess the impact of the new GLP on Canadian expenditures by individual services, to identify any resulting unintended consequences should they arise, and to

compare the behaviour and results of the services subject to the GLP to those which are not so as to assess the success of the GLP.

Re-Apply the Benefits Policy to BDUs

The CMPA submits that the Commission's reasons for exempting BDUs from the benefits test in 1996 did not support its decision and that, even if they did, that earlier decision is no longer supportable in 2011 in light of growing industry consolidation and vertical integration.

Intervention of the Canadian Media Production Association (CMPA)
Broadcasting Notice of Consultation CRTC 2010-783
Review of the regulatory framework relating to vertical integration

Introduction

1. In the first of the series of Broadcasting Notices of Consultation issued in relation to this proceeding[1], the Commission states that, for the purposes of its regulatory framework, "vertical integration" refers to the ownership, by one entity, of both programming and distribution undertakings, or, both programming undertakings and production companies.

2. The CMPA recognizes that the focus of this proceeding appears to be on the vertical integration of distributors and programmers, and we understand and appreciate the concerns that many parties, including independent broadcasters, have regarding the potential for anti-competitive behaviour by such vertically integrated undertakings.

3. In this submission, however, the CMPA addresses, for the most part, the second identified form of vertical integration, namely the ownership, by one entity, of both programming undertakings and production companies.[2] In that respect, we wish to highlight that safeguards are still necessary to ensure that the diversity of programming voices in the Canadian broadcasting system is not jeopardized by broadcasters' reliance on their own affiliated production companies to produce programming for their services. The application of these safeguards can and should be addressed in the Commission's decisions flowing from the recent Group Licence Renewal proceeding.

4. The CMPA also argues below that Canadians' access to taxpayer-supported Canadian programming should not be restricted by exclusive programming deals; that, in the interest of regulatory transparency, the Commission should maintain its approach to the disclosure of financial information for individual specialty services[3]; and that the Commission should re-apply the benefits test in the case of transfers of ownership or changes in control of distribution undertakings (BDUs).[4]

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[1] Following the issuance of the original Broadcasting Notice of Consultation CRTC 2010-783, the Commission subsequently issued 783-1, 783-2 and 783-3 which identified further issues to be addressed in this proceeding.
[2] On a number of occasions in the past, the CMPA has expressed concern that the growing consolidation in the ownership of programming services poses a threat to the diversity of voices in the broadcasting system by decreasing competition amongst broadcasters and reducing the number of potential purchasers for independently-produced programs. The CMPA understands and appreciates, however, that this form of "*horizontal* integration" is not the subject of this proceeding.
[3] This issue was raised in BNOC 2010-783-2.
[4] This issue was raised in BNOC 2010-783-3.

Maintaining Safeguards in Cases of Programmer-Production Company Vertical Integration

5. As outlined in the first Notice[5], the Commission has historically examined issues arising from vertical integration on a case-by-case basis, and that, where required, has applied appropriate safeguards either broadly by regulation or on a case-by-case-basis in the form of conditions of licence or expectations. Indeed, this is the approach the Commission has taken to address issues arising from programming undertaking-production company vertical integration.

6. The Commission summarized this approach in issuing its Diversity of Voices Regulatory Policy in 2008.[6] It pointed out that the 1999 Television Policy[7] indicated that, where a broadcasting licensee owns or has acquired a production company, either in whole or in part, it would expect the licensee to address the issues arising from vertical integration at the time of licence renewal. Then, in decisions licensing the digital pay and specialty services in 2000, the Commission required each Category 1 licensee, by condition of licence, to ensure that at least 25% of its Canadian programming, other than news, sports, and current affairs, would be produced by non-related production companies.[8]

7. In the licence renewals for the major television groups in 2001 and 2002, the Commission stated that it expected licensees to ensure that at least 75% of all Canadian priority programming broadcast was produced by independent production companies. Subsequently, in 2004, the Commission determined that it would be appropriate to establish a similar expectation, measured against a 75% benchmark, in the licence renewal decisions for the specialty services originally licensed in 1996.[9] Notably, the Commission stated at the time that, because circumstances change, it also considered it reasonable that such obligations be identified for licensees who may not currently be related to any production company.

8. Most recently, the Commission's new Group Licensing Policy (GLP)[10] establishes that:

    - At least 75% of a Broadcaster Group's expenditures on programs of national interest (PNI) is to be allocated to independently-produced programs; and

[5] BNOC 2010-783.
[6] Broadcasting Public Notice CRTC 2008-4, http://www.crtc.gc.ca/eng/archive/2008/pb2008-4.htm. See paragraphs 137 - 150.
[7] Public Notice CRTC 1999-97, http://www.crtc.gc.ca/eng/archive/1999/PB99-97.HTM.
[8] See Broadcasting Public Notice CRTC 2000-171, http://www.crtc.gc.ca/eng/archive/2000/PB2000-171.htm.
[9] Broadcasting Public Notice CRTC 2004-2. See paragraphs 29 - 34.
[10] Broadcasting Regulatory Policy CRTC 2010-167, http://www.crtc.gc.ca/eng/archive/2010/2010-167.htm.

- Individual services are to retain their specific requirements relating to independent productions.

9. The CMPA submits that the first of these twin GLP requirements represents an important safeguard to address concerns arising from programming undertaking-production company vertical integration with respect to programs in the PNI genres.

10. For those broadcasters currently subject to specific requirements relating to independent productions, retention of those requirements pursuant to the GLP will address concerns arising from programming undertaking-production company vertical integration with respect to programs in the non-PNI genres. A better means to achieve the same goal, however, is the proposal which Shaw Media advanced during the Group Licensing hearing that no less than 35% of expenditures on non-PNI programs would be allocated to independently-produced programs.

11. The CMPA supports the Shaw Media proposal, as it would ensure that *no* broadcaster could rely on an affiliated production company to produce all the broadcaster's non-PNI shows, like factual entertainment programming, whether it currently owns a production company or acquires one (or more) during its next licence term.

12. The CMPA will be filing its final comments in the Group Licence Renewal proceeding on April 29. Amongst other things, those comments will reinforce the CMPA's support for requirements which ensure a diversity of voices in the production of both PNI and non-PNI programming. The CMPA will also reinforce that the Group Licence Renewal proceeding is the appropriate venue for applying these safeguards as a means to address programming undertaking-production company vertical integration. This is because the Commission will be imposing conditions of licence and other service-specific obligations on the broadcasters in *that* licence renewal proceeding - something it will not have the power to do as part of this vertical integration policy proceeding.

No Program Exclusivity for Taxpayer-supported Programs

13. The CMPA submits that Canadian programs, particularly those which have been supported with public funds - such as through the Canada Media Fund - should be made available to the widest number of Canadians, on whatever platform they choose to use. In other words, Canadians should have every reasonable opportunity to view the programs they help fund through their tax dollars.

Maintain Disclosure of Financial Information for Individual Specialty Services

14. The CMPA opposes any reductions to the amount or scope of the financial information for individual specialty television services which the Commission currently makes public. In 2006, the Commission rejected as contrary to the public interest a proposal

to change its approach to the publication of such financial information[11]; if anything, the public interest in maintaining this long-standing approach is now even greater than it was in 2006.

15. As set out in CRTC's 1998 Circular No. 429[12], the CRTC places on the public file the annual returns and financial statements of only those specialty services that have a regulated monthly subscriber fee or that are carried as part of the basic service package. For all other specialty services, the Commission only places on the public file that portion of the annual return and financial statements down to and including PBIT. The Commission treats on a confidential basis any portion of the annual return or financial statement that would lead to disclosure of an undertaking's net income or loss, such as information below PBIT, or detailed information on shareholders' equity.

16. The vast majority of Canadian specialty services fall into this second category, such that their financial information is only disclosed to the public on a very limited basis. It is likely that even more services will be added to this second category as of September 1, 2011 as result of the changes to the regulatory framework for discretionary services announced in Broadcasting Regulatory Policy CRTC 2008-100.[13]

17. According to BNOC 2010-783-2, High Fidelity HDTV Inc. has asserted that the Commission's practice of disclosing certain financial information for individual specialty services "creates an unfair and inequitable position for such services in the negotiation of price for the carriage of their content" by BDUs. This is the very same argument which CTV Inc. and the Canadian Association of Broadcasters (CAB) tried to advance in 2005[14] *and which the Commission rejected* in Broadcasting Public Notice CRTC 2006-19.[15] In rejecting this argument, the Commission found that, in an environment already subject to increased vertical and horizontal integration, disclosure of the disaggregated data contained in pay and specialty annual returns did not disadvantage the services in their negotiations with BDUs. Perhaps more importantly, the Commission concluded that many stakeholders, including individual subscribers and consumer groups, "have a legitimate interest in having access to information regarding the revenues of pay and specialty services, their revenue-based programming expenditures and the sufficiency of those expenditures."

18. The need for stakeholders to maintain their access, albeit limited, to specialty services' disaggregated financial data has only become more pronounced as a result of the Commission's new GLP. The GLP introduces substantial new spending flexibility for specialty services, granting them the ability to allocate up to 100% of their required

[11] Broadcasting Public Notice CRTC 2006-19, http://www.crtc.gc.ca/eng/archive/2006/pb2006-19.htm.
[12] http://www.crtc.gc.ca/eng/archive/1998/C98-429.HTM.
[13] http://www.crtc.gc.ca/eng/archive/2008/pb2008-100.htm.
[14] Broadcasting Public Notice CRTC 2005-42, http://www.crtc.gc.ca/eng/archive/2005/pb2005-42.htm.
[15] *Ibid*., above note 11.

annual revenue-based Canadian programming expenditures to one or more other services owned by the same Broadcaster Group. While the CMPA supported the new GLP, no-one knows how the Broadcaster Groups will utilize their new spending flexibility and, in particular, what impact such flexibility will have on the programming mandates of individual specialty services and what unintended consequences it might generate for Canadian programming generally going forward.[16] For this reason, stakeholders now more than ever need the ability to review the revenues of *individual* specialty services, their *individual* revenue-based programming expenditures and the sufficiency of those expenditures. Otherwise, stakeholders will not be able to adequately assess the impact of the new GLP on Canadian expenditures by individual services or identify any resulting unintended consequences, should they arise.

19. Moreover, the existence of the new GLP justifies maintaining the current disclosure practices not only for services currently subject to the GLP, but for those that are currently not subject to it, including smaller and independent specialty services. First, the CMPA notes that a number of smaller and independent broadcasters not currently subject to the GLP have indicated their wish to share in its benefits, including the new spending flexibility, which stakeholders will also wish to track. Second, absent the same access to the financial data of services falling outside the GLP, stakeholders will be unable to compare the behaviour and results of the services subject to the GLP to those which are not. The ability to make this comparison will be critical to assessing the success of the GLP.

20. Lastly, the CMPA notes that, in the interests of regulatory transparency, the Commission has taken steps in recent years to provide *more* financial data on the public record, not less. In this respect, and notwithstanding broadcasters' objections, the Commission in 2009 determined it would place on the public record the aggregate financial data for owners of large BDUs, multi-system operators and conventional television and radio ownership groups.[17] In doing so, the Commission highlighted that its objective with respect to the disclosure of financial information is to make available sufficient data "so that the public can participate in the Commission's public proceedings and decision-making in a better informed and more meaningful manner", because submissions based on more complete disclosure "will result in better and more informed Commission decisions and will ultimately benefit the Canadian broadcasting system."

[16] It is because of this concern about unknown and unintended consequences that the CMPA has recommended that the GLP not be applied to pay TV services: the CMPA is concerned that pay TV services could use the new spending flexibility to reduce their historical support for Canadian feature films.
[17] Broadcasting Regulatory Policy CRTC 2009-560, http://www.crtc.gc.ca/eng/archive/2009/2009-560.htm.

21. While, in 2009, the Commission moved to disclose more information about BDUs and conventional broadcasters in aggregate form, the new GLP reinforces the need to maintain the disclosure of data for specialty services on a *service-by-service* basis in order to continue to meet the Commission's above-noted objectives.

Re-Apply the Benefits Policy to BDUs

22. The CMPA submits that the Commission's reasons for exempting BDUs from the benefits test in 1996 did not support its decision at the time and that, even if they did, the Commission's earlier decision is no longer supportable in 2011 in light of the growing trend of industry consolidation and vertical integration.

i. The Rationale for the Benefits Test

23. The CRTC has set out the rationale for its policy on tangible benefits in transactions involving a transfer of ownership or control of broadcasting undertakings in various documents over the years. In 1989, it stated:

> The Commission has stated on numerous occasions in public notices and decisions involving applications for authority to transfer the ownership or effective control of broadcasting undertakings that because the Commission does not solicit such applications and because there is, thus, only one proposal presented to the Commission, the onus is on the applicant to demonstrate to the Commission that the application filed is the best possible proposal under the circumstances, taking into account the Commission's general concerns with respect to transactions of this nature. [18]

24. In its Diversity of Voices decision[19], the Commission stated:

> 121. The benefits policy was created in 1989 in Public Notice 1989-109. Its purpose was to allow the market to govern the transfer of broadcasting licences as part of ownership transactions while still recognizing that the Canadian airwaves belong to the people of Canada.
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> 122. Broadcasting licences are public property. As such, a proposed change in effective control resulting from an acquisition of assets would theoretically require that licences revert to the Commission. The Commission would then determine, on behalf of the Canadian public, which applicant best serves the public interest.

[18] Public Notice CRTC 1989-109, http://www.crtc.gc.ca/eng/archive/1989/PB89-109.HTM.
[19] *Ibid*., above note 6.

123. However, the benefits policy makes it possible for the market to govern changes in effective control of broadcasting licences while simultaneously ensuring that the public interest is still served through the allocation of a percentage of the value of the transaction to incremental spending that will benefit audiences in the market(s) served and the Canadian broadcasting system as a whole.

25. Accordingly, if not for the benefits policy, a licensee wishing to transfer ownership or control of its licensed undertaking would have to return its licence to the Commission. The Commission would then issue a call for applications for that licence, review the applications submitted in response to the call, determine which applicant has submitted the best possible proposal under the circumstances, and grant the licence to that applicant. The purpose of the benefits test is to stand in for this lengthy and complicated regulatory process, so that the Commission, the vender and the vender's chosen purchaser may achieve the same end result - the transfer of an existing licence - in a more timely and efficient manner while ensuring the public interest is still served.[20]

ii. The Commission's Reasoning for its 1996 Decision

26. In 1996, the Commission reasoned that the underlying rationale for applying the benefits test, as summarized above, disappeared for BDUs with its introduction and promotion of competition in the BDU sector.

27. The CMPA submits, however, that this reasoning confused the notion of opening up competition in the cable market generally with the competitive process for determining who should be granted a specific and existing cable licence. The former represents competition in the marketplace for customers; the latter represents competition in a regulatory process for the regulator's blessing to acquire an existing business. The fact that many parties may (almost) freely enter a market with their own new undertakings is not a substitute for a regulatory process designed to ensure that transferring ownership of an undertaking already operating in that market to a particular person is in the best interest of the Canadian broadcasting system as a whole.

28. Even in an open entry BDU market, a licensee wishing to transfer ownership or control of its licensed undertaking would still be required, absent the Commission's benefits test, to return the licence to the Commission, and the Commission would still not grant the licence to operate the undertaking to someone else without first issuing a call for

[20] The Commission most recently reaffirmed this underlying rationale for the benefits policy in paragraph 18 of Broadcasting Decision CRTC 2011-163, *Change in effective control of CTVglobemedia Inc.'s licensed broadcasting subsidiaries*, http://www.crtc.gc.ca/eng/archive/2011/2011-163.htm: "The purpose of the policy is to ensure the applicant has filed the best overall proposal under the circumstances to compensate for the absence of a public call for applications."

competing applications. Even in an open entry BDU market, applicants wishing to acquire that licence (e.g. so as to operate the associated undertaking with its existing infrastructure and customer base) would still have to convince the Commission that their application was the best for the system, and the Commission would still base its decision on a benefits analysis.

29. Accordingly, the rationale for the benefits test to address the transfer of a specific and existing licensed undertaking exists in its entirety whether or not entry by new entrants into the market in which that undertaking operates is otherwise open or the market is competitive. For this reason, the CMPA submits the Commission should not have relied on its new approach to competition in the BDU market as a rationale for removing BDUs from its benefits test.

iii. The 1996 Decision and the Importance of Incrementality

30. The CMPA also submits the Commission should not have supported its decision to exempt BDUs from the benefits test by reasoning that substitutes had emerged for previously-accepted benefits in BDU transactions. Specifically, the Commission reasoned that previously-accepted benefits related to technical upgrades to a cable licensee's infrastructure would be offset by the fact BDUs would be incented to invest in their technical infrastructure to prepare for a competitive environment. It also reasoned that previously-accepted benefits related to financial contributions to various programming initiatives would be offset by the fact that, as proposed at the time (and since implemented), BDUs would be required to contribute a percentage of their revenues to an independently-administered production fund.

31. This "substitutability" rationale, however, was inconsistent with the requirement in the benefits policy that benefits must be incremental ("that is to say not part of the normal responsibilities of the existing licensee"[21]) and represent more than normal expenditures that would be incurred in the ordinary course of doing business. Expenditures required to meet regulatory obligations are not incremental because they are the normal responsibilities of existing licensees. Moreover, capital investments deemed necessary to respond to marketplace competition constitute normal expenditures required to be incurred in the normal course of business.

32. As stated in PN 1989-109, only those initiatives that would not be realized without approval of the proposed transfer are viewed as benefits: since neither generally-applicable expenditure requirements established by regulation nor capital investments deemed by a licensee as necessary to respond to competition are dependent on approval of a particular ownership transaction, they do not qualify as benefits under

[21] *Ibid*., above note 18.

the benefits policy.[22] For that reason, and contrary to the Commission's reasoning in 1996, they therefore cannot qualify as substitutes for such benefits. It follows, then, that the Commission's earlier reasoning should not have supported exempting BDUs from the benefits test.

iv. 2011: It is Time to Re-Apply the Benefits Test to BDUs

33. The CMPA notes that the vertically integrated broadcasters and supporters of vertical integration highlight the synergies achieved by combining distribution and programming functions and argue that the value of combining the two functions is greater than the sum of their parts. Based on these arguments, the CMPA submits that, in the event a vertically integrated broadcaster is purchased in the future, it will be difficult to separate the value of the BDU component of the undertaking from the programming component. As a result, and consistent with the rationale advanced for vertical integration, the value of the integrated undertaking in the event of a change of its ownership or control should be considered and measured as a whole, and the benefits policy should be applied according to that "whole" value. Otherwise, in the event of such a transaction, the parties will be motivated to "game" the system by attributing the highest value possible to the BDU component of the undertaking so as to reduce the benefits payable on the programming component.

34. Lastly, the CMPA recognizes that possible changes to the existing foreign ownership rules for telecommunications and broadcasting undertakings are currently being considered. The CMPA opposes any changes that would permit foreign entities to obtain majority ownership or control of broadcasting undertakings. However, should the rules change to allow such possibilities, foreign entities could become purchasers of Canadian BDUs. Absent application of the benefits test in such circumstances, a foreign company could take control of a Canadian BDU without any obligation to ensure such a transaction results in incremental benefits to the Canadian broadcasting system. Re-application of the benefits test, while by no means a cure-all for the problems which the CMPA submits would arise with the foreign takeover of Canadian BDUs, would at least ensure some incremental benefits for the system (even if only on a short-term basis).

35. For all the above reasons, the CMPA submits it is now appropriate and timely to re-apply the benefits test to BDUs.

All of which is respectfully submitted.

[22] For this reason, for example, specialty services' CPE requirements, imposed by conditions of licence, do not qualify as benefits; accordingly, BDUs' CPE requirements, imposed by regulation, should neither qualify as benefits nor as substitutes for benefits.