



November 5, 2012

Mr. John Traversy
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Filed Electronically

Dear Mr. Traversy:

**Re: Broadcasting Notice of Consultation CRTC 2012-379 (“BNC 2012-379”)
Licence renewals for the Canadian Broadcasting Corporation’s French- and
English-language services
Update Regarding Terms of Trade Negotiations with the CBC**

******* ABRIDGED VERSION*******

Introduction

1. In Broadcasting Notice of Consultation CRTC 2011-379¹, the Commission stated that one of the issues of importance for the CBC’s licence renewals is “[t]he status of negotiations to develop appropriate frameworks from which to base individual negotiations respecting the ownership and exploitation of digital rights with the television production sectors in the French- and English- language markets and, as well, any Terms of Trade agreements that have been finalized.”
2. In that Notice, the Commission also mirrored the language it had used in 2010 when announcing the licence renewal proceeding for the major English-language broadcasters², stating that, “[i]n the event that a terms of trade agreement is not reached for each of the Corporation’s television services prior to the licence renewal hearing, the Commission will require the Corporation to file its substantive proposals as part of the record of the hearing and then will establish appropriate provisions for terms of trade as part of its determinations set out in the renewal decisions.”

¹ Broadcasting Notice of Consultation CRTC 2011-379, <http://www.crtc.gc.ca/eng/archive/2011/2011-379.htm>.

² Broadcasting Notice of Consultation CRTC 2010-952, *Group-based licence renewals for English-language television groups*, <http://www.crtc.gc.ca/eng/archive/2010/2010-952.htm>.

3. Subsequently, in announcing the new hearing date for this proceeding³, the Commission confirmed that one of the issues of importance continues to be “terms of trade agreements”.
4. As the Commission has repeatedly stated, terms of trade agreements provide stability and clarity for producers and broadcasters.⁴ Moreover, in last renewing the CBC’s licence for its English-language television network (in 2000), the Commission made a point of noting that the CBC and the CFTPA (now the Canadian Media Production Association, or the CMPA) had been working toward the formalization of a terms of trade agreement which would govern the relationship between the Corporation and independent producers. In that respect, the Commission stated that:

The public broadcaster should be a model for others in respect of its dealing with independent producers. Its plans should be transparent, in order to foster collaboration with the independent production industry. The Commission anticipates that this agreement will ensure a mutually satisfactory relationship between these two important sectors of Canadian cultural life.⁵

5. Twelve years later, there is still no model agreement between independent producers and the CBC.⁶ In fact, while the CMPA was able to finalize terms of trade with the major English-language private broadcasters in 2011, under an agreement requiring each side to make considerable concessions, the proposals presented by the CBC to date would, as further discussed below, effectively require the CMPA to make a series of concessions that would undermine the gains it has achieved through its deal with the private broadcasters. We suggest that that is not “the model for others” contemplated in the CBC’s last licence renewal decision.

³ Broadcasting Notice of Consultation CRTC 2011-379-3, <http://www.crtc.gc.ca/eng/archive/2011/2011-379-3.htm>.

⁴ See: Broadcasting Public Notice CRTC 2007-53, *Determinations regarding certain aspects of the regulatory framework for over-the-air television*, <http://www.crtc.gc.ca/eng/archive/2007/pb2007-53.htm>, at par. 99; Broadcasting Notice of Consultation CRTC 2010-952, *ibid*, above note 2; and Broadcasting Decision CRTC 2011-441, *Group-based licence renewals for English-language television groups – Introductory decision*, <http://www.crtc.gc.ca/eng/archive/2011/2011-441.htm>, at par. 119.

⁵ Decision CRTC 2000-1, *Licences for CBC English-language television and radio renewed for a seven-year term*, <http://www.crtc.gc.ca/eng/archive/2000/DB2000-1.HTM>, at par. 65 [emphasis added].

⁶ The CMPA notes that while an Independent Production Protocol was concluded between the CBC and the CFTPA in 2002, it was largely informational in nature and contained few prescriptive terms. The protocol was also signed prior to the wave of broadcaster consolidation and transition to multi-platform content distribution that has marked the past decade. Consequently, the protocol has, at best, marginal relevance to the key issues at play in the current negotiations between the CBC and the CMPA, and is rarely, if ever, referred to by the CBC or independent producers in their individual negotiations.

Current Negotiations Process

6. On 1 October 2012, the CMPA requested that the Commission amend its procedures for the upcoming 19 November 2012 hearing by permitting the CMPA and the CBC to update the Commission on the status of our terms of trade negotiations in either a joint submission or by way of individual submissions to be filed 14 November 2012.
7. In doing so, we submitted that, given the availability of dates for the CMPA and the CBC to meet to continue our negotiations prior to the hearing, a 14 November filing date presented the best possibility for the parties to be in a position to provide the Commission with a comprehensive - and hopefully positive - report.
8. On 5 October 2012, the Commission granted our procedural request, but set 5 November 2012 as the date for filing the proposed update.
9. Unfortunately, the CMPA and the CBC have not been able to finalize a mutually satisfactory terms of trade agreement in the time provided. The CMPA and the CBC have agreed to continue negotiations during the time remaining before commencement of the 19 November hearing. In the unfortunate event that we have still not reached a terms of trade agreement by that time, the CMPA undertakes to provide the Commission with a further update regarding the outstanding issues during our appearance at the hearing, currently scheduled for 22 November.

Negotiations Update

10. The CBC is seeking significantly different terms than those which their competitors, the major English-language private broadcasters, agreed to when they voluntarily signed a terms of trade agreement with the CMPA in April 2011 (the “Private Broadcaster Agreement” or the “Agreement”).⁷
11. While there are several key issues that remain unresolved, the central obstacle to the parties reaching agreement appears to be a differentiated view as to how much the Private Broadcaster Agreement should be materially changed in order to accommodate the CBC.
12. Throughout the negotiations, the CBC has insisted that significant amendments to the Agreement – including to its key terms – need to be made in order to conclude a deal. While the CMPA has offered to make adjustments to the Agreement to accommodate the CBC where the CBC has truly unique needs, we are strongly of the view that making

⁷ Please see the Appendix for a copy of the Private Broadcaster Agreement, as signed by Astral, Bell, Rogers and Shaw. The CMPA has a separate agreement with Corus containing the same substantive terms.

the wholesale changes to the Agreement that the CBC has been demanding is both unjustifiable and unnecessary for three reasons.

13. First, the Private Broadcaster Agreement was only arrived at as a result of a number of concessions that were made by the CMPA at the negotiating table. These concessions were all the more significant given that terms of trade only amounted, at best, to a claw back of some of the lost ground that the independent production sector had ceded in the face of the massive broadcaster consolidation of the past decade. To be expected by the CBC to cede yet more ground by, in effect, undoing many of the gains achieved in the Private Broadcaster Agreement would, in the CMPA's view, defeat the very purpose of terms of trade and leave independent producers in the same, if not worse, position than they were before the agreement was reached with the private broadcasters.
14. Second, the Private Broadcaster Agreement contains a Most Favoured Nations (MFN) clause, which entitles the broadcaster signatories to benefit from any more favourable terms that may be granted by the CMPA in subsequent terms of trade agreements with other broadcasters. While the CBC has expressed frustration with the constraints that this imposes on the ability of the CMPA to grant yet more additional concessions to the CBC, the CMPA regards the MFN clause as an important safeguard that effectively prevents negotiating away the gains achieved in the Private Broadcaster Agreement.
15. Finally, the CBC has not made a compelling case as to why it requires additional commercial advantages to those already granted under the Private Broadcaster Agreement. There is no evidence that the Corporation is under more constraints than commercial broadcasters when it comes to the licensing of Canadian programming. In fact, while commercial broadcasters are driven by the requirement to demonstrate tangible returns to shareholders, the Corporation is granted hundreds of millions of dollars under its parliamentary appropriation to fund such content.
16. On some issues, the CBC invokes its uniqueness as the nation's public broadcaster to justify its demands. On others, it relies upon arguments and reasoning that are not materially different from what the CMPA heard at the negotiating table from the private broadcasters. On yet others, it simultaneously attempts to wear both a public and private broadcaster hat. But in virtually every case, the CBC has not been able to explain how the terms of the Private Broadcaster Agreement materially impede it from achieving either its public broadcasting mandate or its commercial objectives.
17. One frequently invoked objection by the CBC is that the Private Broadcaster Agreement does not accommodate the fact that the CBC was never a major player in the consolidation game, and therefore does not have a large roster of affiliated programming services as compared to the private broadcaster signatories. Thus, for example, the CBC argues that, while the Private Broadcaster Agreement allows the

signatories to license a program for broadcast across all of the programming services within their respective corporate groups (while at the same time prohibiting, with a few exceptions, sub-licensing of programs by the signatories to each other or to third-party broadcasters), the CBC has virtually no similar internal capacity, given that with the exception of the Documentary Channel, it is essentially a stand-alone conventional broadcaster.

18. The CMPA does not dispute this reality, and it is why we have offered to make modifications to the Private Broadcaster Agreement that would accommodate the CBC's unique carriage mix. While the CBC has indicated that the CMPA's proposed adjustments are not satisfactory, we are hopeful that we can still find a middle ground that meets the CBC's needs, while at the same time ensuring that, when a program reverts back to the independent producer at the end of CBC's licence term, some after-sale value remains.
19. That being said, it is equally indisputable that the CBC has also benefited from broadcaster consolidation, given that this has resulted in a significantly reduced number of buyers with which the CBC has to compete for Canadian programming. Thus, for years now, the CBC has exercised enormous leverage in the Canadian programming rights marketplace, with it being a matter of routine for it to impose its business affairs practices, and dictate licensing deals, to independent producers. Terms of trade would – and should – fundamentally constrain the CBC's freedom to maneuver in these areas and limit its ability to unilaterally determine the terms and conditions of its business relationship with its production partners.
20. The CMPA has therefore concluded that much of CBC's objection to terms of trade is that, fundamentally, it does not want to have to change how it does business. This is understandable. Undoubtedly, the CBC regards its current business affairs practices and licensing deals as "fair" to independent producers. However, if this perception were shared by independent producers, there would be no need for Terms of Trade in the first place.
21. In this regard, the CMPA notes that, throughout the negotiations that led to the Private Broadcaster Agreement, the CMPA was repeatedly informed by the private broadcasters about how it was impossible for them, for any number of practical or financial reasons, to make modifications to either their business affairs practices or deal terms. Nevertheless, after considerable compromises on all sides, a deal was reached. And while implementation of the Private Broadcaster Agreement has brought with it its own challenges, the broadcaster signatories have made a number of adaptations to how they do business in order to conform to their new obligations. So too, for that matter, have independent producers.

22. The CMPA remains confident that the CBC could also, if it were sufficiently motivated, make the necessary changes to how it does business in order to foster a more balanced and healthy relationship with the independent production sector. In our view, the time for this to occur is **now**. We regard it as essential that a terms of trade agreement be concluded in time for the commencement of the licence renewal hearing, and we are committed to working with CBC in the final stretch in order to achieve this goal.

Confidentiality Designation

23. Pursuant to s. 31(1) of the *CRTC Rules of Practice and Procedure* (“the CRTC Rules”)⁸ and Broadcasting and Telecom Information Bulletin CRTC 2010-961 (“Bulletin 2010-961”)⁹, the CMPA hereby **designates as confidential** the following list and accompanying descriptions of the terms which remain contentious in our terms of trade negotiations with the CBC. Such information falls within the category of “information the disclosure of which could reasonably be expected...to affect contractual or other negotiations of any person.”¹⁰
24. As previously noted, the Commission has on different occasions stated that terms of trade agreements are in the best interest of the Canadian broadcasting system because they ensure stability and clarity for producers and broadcasters. The Commission has thus encouraged the development of such agreements between independent producers and broadcasters - including the CBC. However, the premature public disclosure of the terms which the CMPA is currently negotiating with the CBC would make those terms known to broadcasters with whom the CMPA has negotiated¹¹ or will be negotiating¹² terms of trade agreements, and so would not only prejudice the potential success of the CBC negotiations but also impact on our negotiations and/or business relationships with those other parties. Therefore, in accordance with s. 32(1) of the CRTC Rules, the CMPA submits that such disclosure would not be in the public interest.
25. Accordingly, pursuant to s. 32(2) of the CRTC Rules, the CMPA is filing a confidential version of this submission, which identifies the terms currently in dispute with the CBC, as well as an abridged version, to be made available to the public, which does not include such information.

⁸ <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2010-277/index.html>.

⁹ Broadcasting and Telecom Information Bulletin CRTC 2010-961, *Procedures for filing confidential information and requesting its disclosure in Commission proceedings*, <http://www.crtc.gc.ca/eng/archive/2010/2010-961.htm>.

¹⁰ As referred to in s. 39(1)(c)(iii) of the *Telecommunications Act* and paragraph 4 of Bulletin 2010-961.

¹¹ The major English-language broadcaster groups.

¹² The English-language independent broadcasters.

Key Issues to be Resolved Between the CBC and the CMPA

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Next Steps

39. While formal talks are not scheduled, the CMPA indicated several weeks ago to the CBC that our negotiating team is prepared to meet for the entirety of the week prior to the licence renewal hearing in order to secure an agreement. The chief negotiators for both sides are also in regular communication with each other and have made constructive efforts to overcome some of the remaining obstacles to a deal.

40. In addition, the CMPA has undertaken to the CBC to provide it with a full redline document outlining our positions on all of the issues that remain unresolved between the parties. We expect to be able to table this redline document with the CBC by 9 November 2012.

41. As previously indicated, in the unfortunate event that the CMPA and the CBC are not able to conclude an agreement in time for the commencement of the hearing, the CMPA would be pleased to provide the Commission with an update on the unresolved issues between the parties. This could include, if necessary, a request that the Commission impose the Private Broadcaster Agreement on the CBC.

Sincerely,

original signed by

Michael Hennessy
President & CEO

Attach.

cc. RegulatoryAffairs@cbc.ca

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