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December 10, 2012

Mr. Jay Thomson
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Dear Jay:

Re: CRTC jurisdiction to impose Terms of Trade on the Canadian Broadcasting Corporation

I. Introduction

At the hearing into the licence renewals for the French- and English-language services of the Canadian Broadcasting Corporation ("CBC" or "the Corporation"), the Canadian Media Production Association ("CMPA") and l'Association des producteurs de films et de télévision du Québec ("APFTQ") proposed that, if the CBC were unable to reach an agreement with them on the commercial terms for development and broadcast licence agreements ("Terms of Trade"), the Canadian Radio-television and Telecommunications Commission ("CRTC" or "Commission") should impose a condition of licence on the CBC requiring the Corporation to adhere to the Terms of Trade agreement that the CMPA and private broadcasters have concluded or, in the alternative, to adhere to this agreement until the CBC signs an agreement of its own with the CMPA and the APFTQ.¹

The CMPA and the APFTQ have already received a legal opinion² that the CRTC has the statutory authority to impose conditions of licence on private broadcasting undertakings that would require those undertakings to enter into an agreement on the Terms of Trade with the CMPA and APFTQ. We have been asked to update this opinion and to provide our views on whether the legal conclusions would apply as well to the CBC.

¹ The APFTQ asked that the CRTC impose a Terms of Trade agreement based on the Société Radio Canada ("SRC") and APFTQ propositions that will be filed but also submitted that, if the CRTC imposed on the CBC the CMPA's agreement with the private broadcasters, it should also impose the same agreement on the SRC with respect to the APFTQ.

² Letter from Fasken Martineau to the CMPA and APFTQ, dated 1 April 2011 ("the Fasken Martineau Opinion").

The short answer is that, for the same reasons set out in the Fasken Martineau Opinion, the CRTC has the jurisdiction to impose a condition of licence on the CBC requiring the Corporation to adhere to Terms of Trade.

II. Background

For some time, the CRTC has encouraged the development of Terms of Trade agreements between broadcasters and independent producers.³ Recently, in its Notice of Consultation on the group-based licence renewals for English-language television groups, the Commission reiterated its support for Terms of Trade agreements and indicated that it would establish appropriate provisions for Terms of Trade as part of its determinations in the licence renewal decisions, if agreements had not been reached before the licence renewal hearings.⁴

Prior to the hearing, a tentative agreement was filed with the Commission, followed by a final executed agreement on 29 April 2011. At the hearing, the Commission considered whether or not the agreement should be imposed as a condition of licence on all licensees and determined in its decision that it should be, on the grounds that the agreement would ensure stability and clarity for producers and broadcasters and was in the best interest of the Canadian broadcasting system.⁵

Similarly, in its Notice of Consultation announcing the hearing into the licence renewals for the CBC's French- and English-language services, the CRTC indicated that the issue of the CBC's Terms of Trade with independent producers was one of importance for the public hearing. The Commission noted that, if an agreement was not reached for each of the Corporation's television services prior to the licence renewal hearing, it would establish appropriate provisions for Terms of Trade as part of its determinations set out in the renewal decisions.⁶

³ See, for example, Determinations regarding certain aspects of the regulatory framework for over-the-air television, Broadcasting Public Notice 2007-53, dated 17 May 2007.

⁴ Group-based licence renewals for English-language television groups, Broadcasting Notice of Consultation CRTC 2010-952, 22 December 2010, at page 5.

⁵ Group-based licence renewals for English-language television groups – introductory decision, Broadcasting Decision CRTC 2011-441, 27 July 2011, at paragraph 119.

⁶ Licence renewals for the Canadian Broadcasting Corporation's French- and English-language services, Broadcasting Notice of Consultation CRTC 2011-379, at page 6.

At the hearing, the CBC submitted that the Commission does not have the jurisdiction to either impose a Terms of Trade agreement on the CBC or to require as a condition of licence that CBC negotiate and agree to a Terms of Trade agreement with the CMPA and the APFTQ.⁷

III. Legal issues

As noted in the Fasken Martineau Opinion, "[b]ased on the jurisprudence, it is clear that the Commission has broad powers to ... impose conditions of licence, as long as those powers are exercised in furtherance of the broadcasting policy objectives set out in section 3 of the [Broadcasting] Act."⁸ The jurisprudence cited in the Fasken Martineau Opinion continues to provide the correct framework for assessing the Commission's general jurisdiction, pursuant to section 9(1)(a) of the *Broadcasting Act* ("the Act"), to impose a condition of licence on any licensee, including the CBC.⁹

According to this jurisprudence,¹⁰ the key issue is whether a condition requiring adherence to Terms of Trade will further one or more of the broadcasting policy objectives set out in section 3 of the Act.

Section 3(1)(i)(v) of the Act stipulates that ... "the programming provided by the Canadian broadcasting system should...include a significant contribution from the Canadian independent production sector." As noted in the Fasken Martineau Opinion, the specific mention of the contribution of independent producers should be sufficient to establish the Commission's jurisdiction to exercise its powers in order to regulate and supervise the relationship between broadcasters and independent producers. In addition, section 3(1)(e) requires that "each element of the Canadian broadcast system shall contribute in an appropriate manner to the creation and presentation of Canadian programming." As stated in section 3(1)(b), the Canadian broadcasting system comprises public, private and community elements; it is therefore clear that sections 3(1)(i)(v) and 3(1)(e) of the Act contemplate the CBC as well as private broadcasters. There is simply nothing in the language of section 3(1)(i)(v) to suggest that this policy objective can only be accomplished by requiring specified amounts of programming to be acquired by programming undertakings from independent producers,

⁷ Undertakings from CBC from Reply phase dated 3 Dec. 2012 (1_5) ("Undertakings"), response to Question 5.

⁸ Fasken Martineau Opinion, page 7

⁹ Since April 2011 there have been no decisions by the Federal Court or the Supreme Court of Canada altering this framework. Meanwhile, it is interesting to note, in the case of *Canada (Commissioner of Official Languages) v. CBC/Radio Canada* [2012] F.C.J. No. 681, that the Federal Court continues to recognize the expansive jurisdiction of the CRTC, declining to hear a case under the *Official Languages Act* in favour of the CRTC's determining the matter in the context of the CBC's licence renewals.

¹⁰ See *Capital Cities Communications Inc. v. C.R.T.C.*, [1987] 2 S.C.R. 141; *Canadian Broadcasting Corp. v. Metromedia CMR Montreal Inc.* [1999] F.C.J. No. 1637 (FCA); *Association for Public Broadcasting in British Columbia v. CRTC et al.*, [1981] 1 F.C. 524 (FCA); *The Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission* [1983] 1 F.C. 182, affirmed [1985] 1 S.C.R. 174; *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, 233 D.L.R. (4th) 298.

as suggested by the CBC in its Undertakings.¹¹ To the contrary, over the years the CRTC has relied on its broad jurisdiction to create a number of different tools to implement its various objectives, sometimes addressing specific contractual matters through conditions or regulations¹² and the Federal Court has upheld its jurisdiction to do so, even where the contract was between a licensee and a non-licensee.

Specifically, in Decision CRTC 95-904, the Commission attached conditions of licence that regulated certain contractual terms and conditions as amongst the licensed direct-to-home pay-per-view ("DTH PPV") programming undertaking (Viewer's Choice), the programming distribution undertaking, and the programming rights holder and as between DTH PPV programming undertakings and Canadian film distributors.¹³ The conditions stated:

"The [DTH PPV] licensee shall ensure that the gross PPV revenues earned by any feature film are equally split three ways among itself, the licensee of the DTH distribution undertaking, and the rights holder."

"The [DTH PPV] licensee shall purchase non-proprietary distribution rights for feature films from Canadian distributors..."¹⁴

The parties affected by these conditions included both licensees and non-licensees; in neither case had the parties voluntarily agreed to these commercial arrangements.

The conditions of licence were challenged on the grounds that the Commission had exceeded its statutory mandate. The Federal Court of Appeal disagreed. In *Canadian Motion Picture Distributors Assn. v. Partners of Viewer's Choice Canada*, Hugessen J., writing for the court, cited the CRTC's view that the "1/3 split serves to promote market stability by ensuring that no licensee is unduly pressured to accept escalating programming costs" and noted that, in its licensing decisions, the Commission had identified Canada's film distribution industry as "an important element of the broadcasting system [thus providing] a clear link to the Commission's objects in subsection 5(1) of the Act and the broadcasting policy in subsection 3(1)".¹⁵ In

¹¹ *Supra*, at footnote 6.

¹² For example, the CRTC regulated the terms and conditions regarding the commercial relations of broadcasting distribution undertakings and the owners and managers of multi-unit dwellings in *Complaint by Cablevision TRP-SDM Inc. against Cogeco Cable Inc. alleging contraventions of section 9 of the Broadcasting Distribution Regulations*, Broadcasting Decision CRTC 2004-4, 14 January 2004. The Supreme Court of Canada upheld the CRTC's jurisdiction to intervene in the commercial contract between cable companies and subscribers, in the absence of a specific statutory power to do so, in the Canadian Broadcasting League case, *supra*, note 9.

¹³ The Partners of Viewer's Choice Canada, Decision CRTC 95-904, 20 December 1995.

¹⁴ *Ibid.*, Conditions 11 and 12. Similar conditions were added to the licences of other DTH PPV undertakings. See Decisions CRTC 95-905 and 906.

¹⁵ 137 D.L.R. (4th) 561.

Hugessen J's view, the conditions were clearly related to the circumstances of the licensee, as required by the Act, and attaching them was within the purview of the CRTC since they furthered the objectives of the Act.¹⁶

Meanwhile, the fact that section 3(1)(t)(iii) of the Act specifically mentions contractual terms between distribution undertakings and programming undertakings does not, as the CBC tries to argue¹⁷, limit the CRTC's jurisdiction to address contractual arrangements between programming undertakings and independent producers, where to do so would further the Act's objectives. As discussed in the Fasken Martineau Opinion, the CRTC enjoys broad jurisdiction to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in section 3(1). Indeed, the presence of section 3(1)(t)(iii) amongst the Act's policy objectives did not inhibit the CRTC from regulating contractual terms in the case of Viewer's Choice and other DTH PPV licensees and, as noted earlier, the Federal Court of Appeal upheld its jurisdiction to do so.

Similarly, the fact that section 9(1)(f) grants the CRTC the specific power to require a licensee to obtain its approval before entering into any contract with a telecommunications common carrier, for the distribution of programming directly to the public using the facilities of that common carrier, in no way limits the expansive reading that the courts have given to section 9(1)(b), again as the CBC has tried to argue in its Undertakings.¹⁸ Section 9(1)(f) relates to entirely separate matters, namely the desire of the government to ensure that changes in distribution technology would not preclude the CRTC from requiring that priority be given to the distribution of Canadian broadcasting services.¹⁹ It can in no way be construed as limiting the scope of the power to attach conditions of licence pursuant to section 9(1)(b).

Meanwhile, the wording of section 10 cited by the CBC²⁰ has no relevance in the exercise of the Commission's power to attach a condition of licence pursuant to section 9, which will be at the centre of the CRTC's deliberations in this case.

Finally, contrary to the CBC's suggestion²¹, this construction of the legislation remains fully consistent with the Corporation's freedom of expression and journalistic, creative and programming independence. It in no

¹⁶ Notwithstanding the fact that, in contrast to the case of Canada's independent production sector, Canada's film distribution industry is not directly referenced anywhere in the Act.

¹⁷ *Supra*, at footnote 6.

¹⁸ *Supra*, at footnote 6.

¹⁹ See the Department of Communication's clause-by-clause analysis of Bill C-136, dated August 1988.

²⁰ *Supra*, at footnote 6.

²¹ *Supra*, at footnote 6.

way inhibits its ability to determine which programming content will be aired nor does it affect the CBC's arm's length relationship with the government.

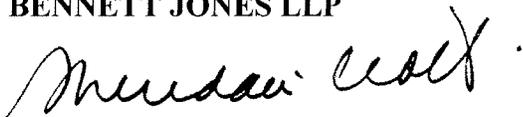
One additional factor must also be considered in the case of the CBA: section 9(1)(b) requires that the condition be deemed by the CRTC to be consistent with section 3(1)(l) and (m) of the Act. Clearly, the proposed condition is consistent with these provisions. As noted in the CMPA's opening remarks at the hearing, such a condition is aimed at encouraging the production of more and better Canadian shows and increasing the quality and diversity of the programming available to Canadian audiences.

IV. Conclusion

The courts have consistently given a wide interpretation to the power of the CRTC to impose conditions of licence. The key issue is whether a condition requiring adherence to Terms of Trade would further one or more of the broadcasting policy objectives set out in section 3 of the Act. Section 3(1)(i)(v) of the Act stipulates that ..."the programming provided by the Canadian broadcasting system should...include a significant contribution from the Canadian independent production sector." In addition section 3(1)(e) requires that "each element of the Canadian broadcast system (of which public broadcasters are one) shall contribute in an appropriate manner to the creation and presentation of Canadian programming." The CRTC has already recognized that the imposition of a condition of licence requiring adherence to Terms of Trade will ensure stability and clarity for producers and broadcasters and is in the best interest of the Canadian broadcasting system. In these circumstances, the Commission's power to do so in the case of the CBC is well founded.

Yours truly,

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