



December 11, 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: Final Comments

1. The Canadian Media Production Association (“the CMPA”) hereby submits these final comments in respect of the above-noted proceeding.

Terms of Trade

The Commission’s Jurisdiction to Impose a Terms of Trade Agreement

2. Contrary to the CBC’s view, the CMPA firmly believes the Commission has jurisdiction to impose a terms of trade agreement on the CBC in these circumstances. In support of that position, we have attached as Appendix A a legal opinion which the law firm Fasken Martineau provided to the CMPA and the APFTQ on 1 April 2011, on the eve of the Group Licence Renewal process. Given that the broadcasters involved in that process did not challenge the Commission’s jurisdiction in this area, it was unnecessary for the CMPA to file the legal opinion at that time. Nevertheless, its conclusions confirming the Commission’s jurisdiction in this matter remain apt and timely in this process.
3. In addition, we attach as Appendix B a further legal opinion which the CMPA and the APFTQ commissioned from the law firm Bennett Jones, dated 10 December 2012, which supplements the earlier opinion and specifically addresses the current circumstances respecting the CBC.¹
4. The CMPA submits that, taken together, these two legal opinions confirm the CRTC’s jurisdiction to apply all of its “regulatory tools” to require the CBC to adhere to a terms of trade agreement, including imposing a condition of licence (“COL”) requiring the CBC to adhere to the existing Agreement between the CMPA and the major English-language private broadcasters until such time as the CBC concludes its own agreement with us and, if necessary, ordering mediation or binding arbitration.
5. While, as raised during our appearance at the hearing, we also believe the CBC's refusal to sign a terms of trade deal could constitute an undue preference², we would prefer to pursue that regulatory option

¹ While we understand that the APFTQ is not filing a final submission in this process, they have advised us that they support our position on the jurisdictional question and the inclusion of the two legal opinions in our submission.

on behalf of our members³ only if necessary and as a last resort. It remains our view that this renewal process remains the most timely and effective forum for resolving this matter.

Status Reports

6. The CMPA wishes to advise that, due to good faith bargaining and further concessions on both sides, the parties are closer to reaching a deal. We believe that the just-concluded oral hearing acted as a catalyst to move these discussions along.
7. The CMPA appreciates that, pending the Commission's decision, the CBC has agreed to provide an update on the 15th of each month on the status of the terms of trade negotiations. However, we wish to reiterate that the Commission needs to ensure a deal is actually completed in the context of this proceeding – or impose such a deal; otherwise, we fear the CBC will lose its regulatory incentive to negotiate and finalize an agreement in a timely manner.
8. Nevertheless, it remains the CMPA's position that, if we cannot reach a deal by the time of the Commission's decision, the Commission should impose the private broadcasters' Agreement. To address any concerns that this approach may incent either party to "game" the negotiations, we would be willing to accept any modifications to that existing Agreement which both parties have agreed to as of 15 January 2013. We propose this date in light of the CBC's above-noted undertaking to provide the Commission with monthly status reports. This would also provide the parties with additional time to make meaningful progress in the negotiations and potentially be in a position to conclude a deal.

The 2002 Terms of Trade Protocol

9. In its 3 December 2012 submission, the CBC responded to the Commission's question as to whether the "existing CBC and CMPA terms of trade agreement [has] any commercial or legal value" by stating simply that "The existing terms of trade agreement has been used by the Corporation and independent producers since the conclusion of that agreement in 2002. There can be no doubt that it has been useful to the parties."
10. Given that the 2002 protocol was the first of any terms of trade-related document to be signed by any broadcaster, the CFTPA naturally celebrated its signing at the time (as the CBC has noted⁴). We wish to confirm, however, that, unlike the agreement we are now negotiating, the protocol has no prescriptive or legally binding terms - in fact, it contains no commercial terms whatsoever. Rather, as the protocol clearly states on its first page, it is meant simply to serve "as a starting point and reference guide for completing contracts." Contrary to the CBC's claims as to the protocol's usefulness, we understand that the CBC does not refer to the protocol in its licence agreements with independent producers.

² Under s. 15 of the *Television Broadcasting Regulations, 1987*.

³ Without limiting our members' options, we are nevertheless concerned that requiring producers to submit their own undue preference complaints on a case-by-case basis and in the middle of their negotiations with the CBC would be overly burdensome and likely ineffective.

⁴ Note that, in its 3 December submission, the CBC mischaracterized the CFTPA's statement as having been presented "[a]t an appearance before the Commission in June 2003." Instead, the CFTPA made the statement in its 13 June 2003 written intervention in response to Broadcasting Public Notice CRTC 2003-26: see

http://crtc.gc.ca/Broadcast/eng/NOTICES/2003/2003-26/int_026.htm.

PNI

11. The CMPA appreciates that the CBC has now committed to nine hours of PNI in peak time, an increase of two hours over its original proposal. This commitment, however, still falls short of the CBC's current PNI hours. Given the CBC's role as the national public broadcaster and the Commission's historical expectation that the CBC should allocate its financial resources on a priority basis to programming, we continue to submit that the CBC should be required to maintain its current level of PNI. At a minimum, it should not be allowed to target its PNI hours to respond to its recent budget cuts to any greater extent that it targets other genres of programming.
12. Regardless of the number of PNI hours/week ultimately required, the CBC should be obliged to allocate at least 75% of them to independently-produced programs. The current commitment by Canada's national public broadcaster to only 5.3 hours/week of independently-produced PNI makes a mockery of the general broadcasting policy objective that the broadcasting system should "include a significant contribution from the Canadian independent production sector."
13. The CBC's argument that it needs flexibility to produce its additional hours of PNI in-house "based on the cost of those hours"⁵ rings hollow: it is demonstrably less expensive and more efficient for broadcasters to acquire independently-produced programs than to produce them in-house.

Children's Programming

14. The CBC clarified that it is prepared to accept a COL requiring it to broadcast a minimum of 15 hours/week of children's programming, 75% of which would be independently-produced, with a weekly minimum of 1 hour of original programming (i.e. 52 hours/year). It confirmed that this weekly hour of original programming would be independently-produced.⁶
15. The CMPA appreciates that the CBC has offered to convert a former expectation into a COL which will now also include the two noted obligations respecting independently-produced programming (75% overall plus the original hour). However, its overall commitment to children's programming represents only half of the roughly 28 hours/week it is currently broadcasting.
16. The CMPA submits that, as with PNI, the CBC should be obliged to maintain its historical level of children's programming, at least on a relative basis.
17. The CMPA also joins other interveners in pointing out that Canadian children – whose tastes, interests and knowledge-base are constantly changing and evolving – deserve more *original* programming from the CBC. The Commission should therefore require the CBC to broadcast more original children's programming than it has proposed.⁷

⁵ Transcript, vol. 10, line 19637.

⁶ *Ibid*, lines 19880 - 19885.

⁷ Using the definition of "original program" which we submitted in our 26 November 2012 response to an undertaking, namely "a program that is broadcast on a licensed CBC service and which has never previously been broadcast in Canada on any other licensed or exempt programming service or on any other platform."

Canadian Feature Films

18. The CMPA appreciates that the CBC has committed to continue broadcasting Canadian feature films in peak time on Saturday nights during the summer and will accept a COL to broadcast at least one Canadian feature film/month during the rest of the year.
19. The CMPA submits, however, that, in accepting the commitment and imposing the COL, the Commission must specify that the feature films to be broadcast must be “original”.⁸ Otherwise, the CBC could meet these obligations simply by repeating old (or very old) feature films, which would not properly serve the interests of Canadian audiences.
20. We also submit that the CRTC should hold the CBC to its summer Saturday night feature film commitment by requiring it to report annually, as addressed further below.

Condition of Licence Respecting a Balanced Schedule

21. While the CMPA supports the spirit of the Commission’s proposed COL respecting a balanced CBC programming schedule (which the CBC has accepted), we submit it does not go far enough to ensure the CBC meets its mandate to provide a diversity of programming, and fulfils its special role as the national public broadcaster.
22. Specifically, to ensure the CBC provides a balanced and diverse schedule and contributes in a manner commensurate with its special role to ensure that the programming provided by the Canadian broadcasting system includes “a significant contribution from the independent production sector”, we submit that this COL should also require the CBC to acquire at least 50% of its programming from independent sources.
23. Otherwise, based on the CBC's current commitments, only 9% of its schedule would consist of independently-produced programming⁹, which would place Canada's national public broadcaster far below numerous niche specialty services.¹⁰ It would also render somewhat meaningless the requirement in the Commission's proposed COL that “Of all the programming drawn from independent producers, a reasonable quantity will be drawn from producers in OLMC regions” – since, at only 9% of the CBC’s schedule “all the programs drawn from independent producers” would be a minimal number to begin with.
24. The COL should also add a reference to programming “drawn from the regions” and, as addressed below, the CBC should also be required to report annually on its compliance with this COL.

⁸ Again using the CMPA's definition of “original program”, *ibid*.

⁹ $(75\% \text{ of } 7 \text{ hours of PNI}) + (75\% \text{ of } 15 \text{ hours of children's programs}) / 168 \text{ hours} = (5.3 + 10) / 168 = 15.3 / 168 = 9\%$.

¹⁰ For example, the following specialty services are subject to a COL requiring that at least 75% of their Canadian programs are independently-produced: Food Network Canada; Showcase; and Slice. The following services are subject to a COL requiring that at least 25% of their Canadian programs are independently-produced: Book TV; Fashion TV; MTV2; IFC Canada; Mystery; Twist; Biography and G4TechTV. The following are subject to an expectation that 75% of their first-run Canadian programming will be independently-produced: Space; History; TVtropolis; OWN; Treehouse; YTV; and OLN.

Reporting Obligations

25. The CMPA appreciates that the CBC has agreed to file annual reports regarding its broadcasting of drama, documentaries and awards shows, based on the PNI reporting form applicable to the large private broadcasters.
26. We submit, however, that, to ensure proper accountability as the national public broadcaster, the CBC should also be required to report annually on how it has met or exceeded its other obligations and commitments, particularly those relating to its balanced schedule (including its level of independently-produced and regional programming), children's programming and Canadian feature films (including original programming in each of these genres).
27. The reason for this is quite simple: the CBC has proposed minimum obligations in those areas of programming which, in most cases, are well below what it is actually broadcasting today. Moreover, the CBC has done little to quantify its commitment to original programming versus merely filling its schedule by replaying old library stock. Only regular reporting will ensure that the Commission, the public and the CBC's industry partners will have insight as to how deeply the CBC is cutting its programming, including its original programming, in response to its financial pressures. Absent such transparency, the Commission will have no ability to identify, until too late, problems that may become a crisis.

Conclusion

28. The CMPA submits that the CBC's willingness to accept only a few programming-related COLs is a totally inadequate approach for Canada's national public broadcaster to take in this important licence renewal process. While we acknowledge that the CBC is under new budgetary constraints, we believe that, by granting the full regulatory flexibility it seeks, the Commission would allow it too much latitude to meet its special legislative mandate as it sees fit, through reliance on cheap repeats and with minimal obligations to key Canadian programming genres (PNI, children's, feature films), to the creation and presentation of original, independently-produced programs, and to public accountability.
29. While the CBC clearly has to make important financial decisions, the Commission must ensure that, to the greatest extent possible, the CBC maintains and even, where feasible, expands its contributions to Canadian programming and to meeting the broad and diverse interests of the Canadian audiences which support their national public broadcaster through their tax dollars.

Sincerely,

original signed by

Michael Hennessy
President & CEO

Attach.

cc RegulatoryAffairs@cbc.ca

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