

**Sheridan Scott**  
Partner  
Direct Line: 613.683.2302  
e-mail: scotts@bennettjones.com

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Mr. Jay Thomson  
Vice President, Broadcasting Policy and Regulatory Affairs  
Canadian Media Production Association  
601 Bank Street  
Ottawa ON K1S 3T4

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 Corporation provided its views on the jurisdiction of the Canadian Radio-television and Telecommunications Commission ("CRTC" or "Commission") to either "impose a terms of trade agreement on CBC Television or Télévision de Radio-Canada, or; ... require as a condition of licence that CBC Television and Télévision de Radio-Canada negotiate and agree to a terms of trade agreement with the CMPA and APFTQ respectively."<sup>1</sup> The Canadian Media Production Association ("CMPA") responded to the CBC's submissions in its final comments and also submitted two legal opinions regarding the Commission's statutory authority to impose a condition of licence on the CBC that would require it to enter into an agreement on the terms for program development and broadcast licence agreements ("Terms of Trade") with the CMPA. The CBC subsequently submitted a formal legal opinion (the "Trudel Opinion") regarding the Commission's authority to impose a condition of licence on the CBC regarding the contractual terms between the Corporation and independent Canadian producers or their representative.

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<sup>1</sup> Undertakings from CBC from Reply phase dated 3 Dec. 2012 (1\_5) ("Undertakings"), response to Question 5.

The Trudel Opinion elaborated on several of the points that had been included in the CBC's Undertakings and also raised new issues that had not been identified or discussed. In addition, the Trudel Opinion dealt with the Supreme Court of Canada's judgment in the *Reference Re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-16* ("CRTC Reference Decision").<sup>2</sup> This decision was issued following the CMPA's submission of its final comments but prior to the CBC's final reply. In accordance with the process established by the CRTC in a letter dated 24 December 2012,<sup>3</sup> you have asked us to comment on the Trudel Opinion and in particular to update our opinion to address the CRTC Reference Decision as well as the new matters raised in the Trudel Opinion. For the reasons outlined below, we continue to submit that the CRTC has the jurisdiction to impose a condition of licence on the CBC with respect to Terms of Trade with independent Canadian producers.

## II. Legal Issues

The Trudel Opinion relies on Rothstein, J.'s majority opinion in the CRTC Reference Decision to stress the importance of considering the global context of the CRTC's power to attach conditions of licence. In particular, Professor Trudel points out<sup>4</sup> that part of this context must include a consideration of sub-section 2(3) of the *Broadcasting Act* ("the Act") which was introduced in 1991 and was not part of the legislation considered by the Supreme Court in *CKOY Ltd. v. The Queen*.<sup>5</sup> This sub-section states: "This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings."

In addition, the Trudel Opinion also relies on Rothstein, J.'s judgment to argue that the CRTC's power to impose a condition of licence does not extend so far as to allow the Commission to impose specific contractual provisions.<sup>6</sup>

In assessing the implications of the CRTC Reference Decision for the CRTC's ability to impose on the CBC a condition of licence relating to Terms of Trade, there are several key features to recall from Rothstein, J.'s opinion. First, the Court clearly states that the CRTC continues to have broad powers to regulate and

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<sup>2</sup> 2012 SCC 68.

<sup>3</sup> Letter to Jay Thomson from John Traversy re Broadcasting Notice of Consultation CRTC 2011-379 ("BNC 2011-379") Licence renewals for the Canadian Broadcasting Corporation's French- and English-language services – Procedural Complaint re CBC's Final Submission, 24 December 2012.

<sup>4</sup> See Trudel Opinion at pages 3-4.

<sup>5</sup> [1979] 1 S.C.R. 2 ("CKOY case").

<sup>6</sup> See Trudel Opinion at pages 5-6.



supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in sub-section 3(1) of the Act.<sup>7</sup> Second, Rothstein, J. states that Parliament must be presumed to have empowered the CRTC to work towards implementing objectives that target the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse; in his view, the declarations in section 3 relating to such cultural imperatives should be given due weight in interpreting specific provisions of the Act.<sup>8</sup>

There is no doubt that encouraging a healthy independent Canadian production sector lies at the heart of the CRTC's cultural mandate. Over the years, both the government and the CRTC have characterized this sector as being key to the promotion of Canadian content, the creation of diverse content and the production of high quality content. For example, the Honourable Josée Verner, then Minister of Canadian Heritage, Status of Women and Official Languages and Minister for La Francophonie stated the following at the annual conference of the Canadian Film and Television Production Association ("CFTPA"):

There is much to celebrate about the Canadian production scene. Your productions are nominated for awards and are earning accolades here and around the world. ..Your industry is important to Canada and to Canadians. It contributes to our rich cultural life, helps craft our national identity, and is a valuable driver for our economy.<sup>9</sup>

At another CFTPA conference the previous CRTC Chair, Konrad von Finckenstein, stated: 'On the cultural side, your business –the production of content for film and video – goes to the heart of the objectives of the Canadian broadcasting system described in the Broadcasting Act.'<sup>10</sup> He also opined that

[t]he members of the CFTPA make up a key element of the broadcasting industry. Without the creativity and entrepreneurship of independent producers, Canadian television as we know it could not exist...You form a productive and vibrant part of the picture and we want to make sure that this can continue.<sup>11</sup>

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<sup>7</sup> CRTC Reference Decision, para 15.

<sup>8</sup> CRTC Reference Decision, para 32.

<sup>9</sup> Address by the Honourable Josée Verner to the Prime Time in Ottawa conference of the CFTPA, Ottawa, Ontario, 2008.

<sup>10</sup> Address by the Honourable Konrad von Finckenstein, Q.C. to the Prime Time in Ottawa conference of the CFTPA, Ottawa, Ontario, 2007.

<sup>11</sup> Address by the Honourable Konrad von Finckenstein, Q.C. to the Prime Time in Ottawa conference of the CFTPA, Ottawa, Ontario 2009.



Finally, with respect to Terms of Trade in particular, the CRTC has already noted that the existence of such commercial terms are conducive to stability and are in the best interests of the broadcasting system.<sup>12</sup>

In addition, other stakeholders in the broadcasting industry have underlined the cultural significance of the independent Canadian production sector and the role of Terms of Trade in that context. For example, Bell Canada and Bell Aliant noted specifically that the development of effective terms of trade agreements between broadcasters and independent producers would help to ensure a continued diversity of programming.<sup>13</sup>

This is the context within which the CRTC's jurisdiction to regulate and supervise the CBC pursuant to the Act should be considered. How far the Commission can go will depend on the extent to which it is satisfied that the measures are required to attain the cultural objectives of the Act, including the specific declaration in sub-paragraph 3(1)(i)(v) that the programming provided by the Canadian broadcasting system should include a significant contribution from the Canadian independent production sector. In these circumstances, the situation can be distinguished from the one before the Supreme Court of Canada in the CRTC Reference Case, where, according to Rothstein, J., the purpose of the value for signal regime was to regulate the economic relationships between Broadcasting Distribution Undertakings ("BDUs") and broadcasters.<sup>14</sup>

The Trudel Opinion suggests that the precise mechanisms that can be used to supervise and regulate broadcasting undertakings cannot in any way interfere in the contractual negotiations of the Corporation, particularly in light of sub-section 2(3) of the Act. However, it is not clear from the wording of the Act that this section relates to the freedom to contract. It seems more likely that this provision seeks to safeguard the freedom for broadcasters to determine the content of their programming and, pursuant to sub-sections 35(2), 46(5) and 52(1) in the case of the CBC, to ensure its arm's length relationship with the government.<sup>15</sup> Moreover, there are multiple instances of CRTC decisions that will necessarily impact a licensee's ability to contract with non-licensees with respect to certain matters.

For example, the program distribution and linkage requirements imposed on BDUs are necessarily reflected in the agreements they have with subscribers, as were the regulated rates that used to be contained in a standard

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<sup>12</sup> See Group-based licence renewals for English-language television groups – introductory decision, Broadcasting Decision CRTC 2011-441, 27 July 2011, at paragraph 119 and Licence renewals for the Canadian Broadcasting Corporation's French- and English-language services, Broadcasting Notice of Consultation CRTC 2011-379, at page 6.

<sup>13</sup> Bell Canada and Bell Aliant, Comments in response to Broadcasting Notice of Consultation CRTC 2009-411, September 14, 2009 at paras 82-84.

<sup>14</sup> CRTC Reference Decision, para 19.

<sup>15</sup> See, for example, the reference to the arm's length principle in Communications Canada (1988), *Canadian Voices Canadian Choices: A Broadcasting Policy for Canada* (Ottawa: Minister of Supply and Services Canada), at page 59.

condition of licence and were found to be within the CRTC's jurisdiction to impose in the case of *The Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*.<sup>16</sup> Similarly, a Canadian BDU's contractual arrangements with foreign broadcasting undertakings that are not licensed under the Act are also directly affected by CRTC regulations or by conditions imposed on a licensee. Meanwhile, the CRTC's jurisdiction to impose a condition of licence relating to contractual matters was directly before the Federal Court of Appeal in the case of *Canadian Motion Picture Distributors Assn. v. Partners of Viewer's Choice Canada*.<sup>17</sup> While the Trudel Opinion seeks to distinguish this case on the grounds that there was no contractual relationship between the licensee and a film distribution company, this was likely a reflection of the fact that Viewers Choice did not yet hold a licence and a contractual relationship would have been premature; indeed, the conditions of licence imposed in that decision would have inevitably been included in any legally enforceable agreements that might have been concluded amongst the parties. In any event, Hugessen, J.'s reference to the absence of contractual relations was relevant to issues of legal standing and not the jurisdiction of the CRTC to impose the conditions.

In the case of contractual matters, the Commission could of course consider significantly less intrusive regulatory mechanisms than conditions of licence to attain its cultural goals relating to Canadian independent production, such as acting as a mediator between the parties in their negotiations over Terms of Trade or renewing the CBC's licences for a short period, providing sufficient time for the negotiation of an agreement. However, the Act also provides for greater intrusion in the activities of broadcasters through a condition of licence, as long as it withstands the scrutiny of the framework found in the CRTC Reference Case.

The Trudel Opinion raises the new objection that, in the case of the CBC, the CRTC's jurisdiction is limited to imposing a condition of licence that is in furtherance only of the policy objectives found in paragraphs 3(1)(l) and (m) of the Act. The context within which these provisions are found does not appear to support this argument. First, section 3 clearly states that the Canadian broadcasting system constitutes a single system and that the system comprises public, private and community elements, thereby contemplating public broadcasters such as the CBC.<sup>18</sup> Many of the policy objectives found in section 3 apply explicitly to the broadcasting system. For example, the policy objectives found in paragraphs 3(1)(a), (b), (d), (e), and (i) make specific mention of the broadcasting system and, in the case of paragraph 3(1)(e) contemplate the separate elements. There is nothing in the language to suggest the inapplicability of these provisions to any particular participant in the system. Second, section 3 singles out a number of actors for additional treatment, with no suggestion

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<sup>16</sup> [1983] 1 F.C. 182, affirmed [1985] 1 S.C.R. 174.

<sup>17</sup> 137 D.L.R. (4<sup>th</sup>) 561 (VCC Decision).

<sup>18</sup> See paragraph 3(1)(b) and sub-section 3(2).

that this specific mention exempts these participants in the broadcasting system from the application of the other objectives. For example, additional objectives are set out with respect to educational programming,<sup>19</sup> alternative programming services,<sup>20</sup> private networks and programming undertakings,<sup>21</sup> and distribution undertakings.<sup>22</sup> In these circumstances, the policy objectives in paragraphs 3(1)(l) and (m) should be seen as additional, not limiting, considerations that apply only in the case of the CBC.

Furthermore, even if the CRTC's jurisdiction with respect to the CBC were limited to implementing the objectives set out in paragraphs 3(1)(l) and (m), a condition aimed at supporting the creation of independent Canadian productions for distribution on the national public broadcaster would be consistent with those provisions. As already noted, the CMPA stated in its opening remarks at the hearing that 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 and the CRTC's public statements referenced earlier with regard to Terms of Trade are certainly consistent with this view.

The Trudel Opinion also raises the new objection that the CRTC cannot regulate contracts since this would be tantamount to regulating non-licensees who are also parties to the contract. Professor Trudel relies on the decision of the Federal Court of Appeal, confirmed by the Supreme Court of Canada, in *Reference re Broadcasting Act*;<sup>23</sup> however, that case does not support the proposition that the CRTC cannot impose a condition of licence that would affect contractual terms between a licensee and a non-licensee. The issue in the *Broadcasting Act Reference* case was whether the Act applied to Internet service providers. The Court concluded that it did not. In the present case, the CRTC seeks to impose a condition of licence on the CBC, which is clearly captured by the Act. Again, as noted earlier, it is always possible that a CRTC decision affecting a licensee can have an impact on a non-licensee with which a licensee is negotiating.

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<sup>19</sup> See paragraph 3(1)(j).

<sup>20</sup> See paragraph 3(1)(r).

<sup>21</sup> See paragraph 3(1)(s).

<sup>22</sup> See paragraph 3(1)(t).

<sup>23</sup> 2010 FCA 178, confirmed by the Supreme Court of Canada, [2012] 1 S.C.R. ("the *Broadcasting Act Reference* case").

### III. Conclusion

The Supreme Court of Canada's CRTC Reference Decision has reinforced the need for the CRTC to exercise its discretion clearly with a view to working towards the implementation of the cultural objectives of the Act.<sup>24</sup> There is no doubt that a healthy independent Canadian production sector lies at the heart of the CRTC's cultural mandate. Attaching a condition of licence that is aimed at this goal therefore falls well within the framework set out by Rothstein, J. The fact that such a condition may also affect the contractual relations of the CBC does not preclude such a condition; indeed there are many instances of Commission decisions affecting the contractual relations between a licensee and a non-licensee, including one condition that the Federal Court of Appeal found to be within the CRTC's jurisdiction.<sup>25</sup> In these circumstances, the CRTC has the jurisdiction to impose obligations relating to the CBC's Terms of Trade with independent Canadian producers.

Yours truly,

*Original signed by*

Sheridan Scott

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<sup>24</sup> CRTC Reference Decision, para 15.

<sup>25</sup> The VCC Decision, *supra*, note 17.

