



31 July 2015

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

Filed Electronically

**Re: Part 1 Applications – Amendments to nature of service – Bell Media Inc.
Book Television – Application 2015-0611-4
Fashion Television – Application 2015-0626-3
MTV2 – Application 2015-0630-5**

1. As part of the above-noted Part 1 applications, Bell Media Inc. (Bell) seeks to have Book Television, Fashion Television and MTV2 (the Bell Services) relieved of their condition of licence (COL) which requires each licensee to ensure that “[n]o less than 25% of all Canadian programs broadcasts by the licensee, other than news, sports and current affairs programming (categories 1, 2(a), 6(a) and 6(b)), shall be produced by independent production companies” (the 25% Independent Production COL). Bell seeks this relief “[t]o be consistent with BRP 2015-86¹, paragraphs 254-255.”²
2. For the reasons set out below, the Canadian Media Production Association (CMPA)³ opposes this part of each of the applications. The Commission established the 25% Independent Production COL – and has maintained it – as a means to meet the broadcasting policy objective established in the *Broadcasting Act* that “the programming provided by the Canadian broadcasting system should...include a significant contribution from the Canadian independent production sector.”⁴ Paragraphs 254-255 of BRP 2015-86 relate to the Commission’s decision to eliminate its Genre Exclusivity Policy: they provide no basis or justification for relieving the Bell

¹ Broadcasting Regulatory Policy CRTC 2015-86, *Let’s Talk TV: The way forward - Creating compelling and diverse Canadian programming*, <http://www.crtc.gc.ca/eng/archive/2015/2015-86.htm>.

² Appendices, Bell Supplementary Brief.

³ 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 member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing, producing and distributing original content for Canadian and international audiences.

⁴ *Broadcasting Act*, s. 3(1)(i)(v).

Services of the 25% Independent Production COL, and Bell has offered no arguments or evidence to suggest that they do.

3. We take no position on the other aspects of the Bell applications.

Background: The 25% Independent Production COL

4. Consistent with the broadcasting policy objective related to independent production noted above, part of the Commission's consideration in 2000 of applications for new digital specialty services included its examination of the appropriate contribution the newly-licensed services should make to independent production. After exploring with each applicant "whether it should continue to be concerned about commitments to independent production, and what, if any, specific rules should be set"⁵, the Commission imposed the 25% Independent Production COL as a standard COL on all the new "Category 1 digital specialty television services", including the Bell Services.⁶ It did so "to ensure that all Category 1 services make appropriate contributions to the independent production sector."⁷

The Group Licensing Framework

5. As the Commission pointed out in 2010 when it announced its new Group Licensing Framework (GLF), it has adopted several approaches over the years for encouraging a significant contribution from the independent production sector to the Canadian broadcasting system, including conditions of licence for the use of independent productions.⁸
6. The Commission also noted at that time that, as a means to continue such contributions in a balanced way in the evolving broadcasting environment, broadcasters had "generally proposed an obligation whereby a portion of all programming aired must be produced by independent producers".⁹
7. The Commission adopted an independent production expenditure obligation as part of its GLF, rather than a general exhibition obligation. In doing so, however, it also

⁵ Broadcasting Public Notice CRTC 2000-171, *Introductory statement - Licensing of new digital pay and specialty services*, <http://www.crtc.gc.ca/eng/archive/2000/PB2000-171.htm>.

⁶ Book Television: Decision CRTC 2000-451, <http://www.crtc.gc.ca/eng/archive/2000/DB2000-451.htm>; Fashion Television: Decision CRTC 2000-452, <http://www.crtc.gc.ca/eng/archive/2000/DB2000-452.htm>; MTV2 (originally licensed under the name "Connect"): Decision CRTC 2000-462, <http://www.crtc.gc.ca/eng/archive/2000/DB2000-462.htm>.

⁷ *Ibid.*, above Note 5.

⁸ Broadcasting Regulatory Policy CRTC 2010-167, *A group-based approach to the licensing of private television services*, <http://www.crtc.gc.ca/eng/archive/2010/2010-167.htm>, at par. 88.

⁹ *Ibid.*, at par 91.

determined that, as a further means to encourage a significant contribution from independent producers, “specialty services that currently have individual requirements relating to independent production will retain those requirements.”¹⁰

The 2011 Group Licence Renewals

8. CTV (Bell) and the other broadcasters sought the deletion of their individual requirements relating to independent production in the course of the Commission’s 2011 Group Licence Renewal (GLR) proceeding.
9. Nevertheless, the Commission decided to retain the broadcasters’ individual independent production obligations, stating in its introduction to its GLR decisions:

The Commission remains of the view that the individual obligations imposed on specialty services **are an important factor in supporting the independent production sector and that they will contribute to the ongoing support of independently produced content in categories other than drama, documentaries and award shows.** Consequently, and consistent with its determinations set out in the group-based policy, the Commission determines that it is appropriate to retain the existing requirements relating to independent production.¹¹ [Emphasis added]

10. While, in this statement, the Commission notes that the individual obligations will contribute to the ongoing support of independently produced content in categories other than drama, documentaries and award shows (i.e., categories other than Programs of National Interest, or PNI), this does not indicate that retention of the obligations is necessarily linked to certain categories of programming (i.e., non-PNI). It is clear that the primary objective of the individual obligations is to support the independent production sector generally; an additional benefit is that the obligations ensure support will also come from services which, like the Bell Services, may offer minimal PNI.
11. In this respect, it is notable that, while the Commission engaged in a lengthy consideration of Genre Exclusivity and related nature of service definitional issues in its introduction to its 2011 GLR decisions¹², it never made any connection between those issues and the 25% Independent Production COL or other service-specific obligations relating to the broadcast of independent productions.¹³

¹⁰ *Ibid.*, at par. 95.

¹¹ 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 101.

¹² *Ibid.*, at pars 72- 92.

¹³ The full discussion regarding the service-specific obligations relating to the broadcast of independent productions is at *ibid.*, pars 93-101.

Let's Talk TV and the Elimination of Genre Exclusivity

12. Similarly, in announcing the Let's Talk TV process and the issues to be addressed in that proceeding, the Commission made no connection between its proposal to eliminate Genre Exclusivity and the 25% Independent Production COL or other service-specific obligations relating to the broadcast of independent productions.¹⁴
13. The Commission confirmed its decision to eliminate Genre Exclusivity in BRP 2015-86.¹⁵ Before doing so, however, it described its Genre Exclusivity Policy as follows:

The genre exclusivity policy is a key component of the current regulatory framework for the television system. Under this policy, select specialty and pay services, referred to as Category A services, are licensed on a one-per-genre basis. These Category A services are licensed to provide **programming of a specific type from specific program categories or relating to certain subjects**. The genres are intended to be defined in such a way that the Category A services **are complementary and do not compete head-to-head with one another**.¹⁶ [Emphasis added]

14. In describing the COLs that give effect to its Genre Exclusivity Policy, the Commission stated:

To ensure that a discretionary service remains distinct and adheres to the genre in which it was licensed to operate, the Commission imposes conditions of licence that define and limit the programs it can provide. These conditions of licence are collectively called its nature of service. The Commission's objectives with respect to its genre policy have been two-fold: to ensure a diversity of programming genres and to provide a measure of support to pay and specialty Category A services to enable them to meet their Canadian content and other programming obligations, which are generally higher than those for other types of specialty and pay services. **The nature of service also informs subscribers about the types of programming that they can expect to receive.**¹⁷ [Emphasis added]

¹⁴ Broadcasting Notice of Consultation CRTC 2014-190, *Let's Talk TV*, <http://www.crtc.gc.ca/eng/archive/2014/2014-190.htm>, at pars 104-112; and Broadcasting Notice of Consultation CRTC 2015-190-3, *Let's Talk TV - Working document for discussion*, <http://www.crtc.gc.ca/eng/archive/2014/2014-190-3.htm>, Appendix, Item 13.

¹⁵ *Ibid.*, above Note 1, at pars 232-256.

¹⁶ *Ibid.*, at par. 232.

¹⁷ *Ibid.*, at par. 233.

15. The Commission identified the problems in enforcing these COLs as one reason for deciding to eliminate the Genre Exclusivity Policy:

Further, the Commission is of the view that the policy has also had unintended negative consequences, such as **conditions of licence that are complicated and difficult to enforce given the subjective nature of genre.**¹⁸ [Emphasis added]

16. In paragraphs 254 and 255 of BRP 2015-86, the Commission invited existing discretionary services to apply to delete conditions *relating to their nature of service*, and stated that such COLs will be replaced with requirements to provide the Commission with the name and a brief description of the service. It did not invite services to apply to delete COLs which are intended to support the independent production sector.

No Connection

17. Nothing in BRP 2015-86 makes any connection between the Commission’s decision to eliminate Genre Exclusivity and the 25% Independent Production COL or other service-specific obligations relating to the broadcast of independent productions. Nothing suggests that the 25% Independent Production COL is included in the COLs “collectively called [the Bell Services’] nature of service.”

18. The reasons for this are clear: as a means to support the independent production sector, the 25% Independent Production COL establishes who must make a set percentage of the Bell Services’ Canadian programming (namely independent producers). It does not

- require the Bell Services to offer programming of a specific type from specific program categories or relating to certain subjects;
- ensure the Bell Services complement other programming services and do not compete head-to-head with them;
- ensure that the Bell Services remain distinct and adhere to the genre in which they were licensed to operate;
- define or limit the programs the Bell Services can provide;
- inform subscribers about the types of programming that they can expect to receive from the Bell Services;
- create complexity or enforcement difficulties given the subjective nature of genre.

19. As the applicant, Bell has the burden to prove its case which, in these circumstances, is to demonstrate *in its application* why relieving the Bell Services of the 25% Independent Production COL would be “consistent with” paragraphs 254-255 of BRP

¹⁸ *Ibid.*, at par. 245.

2015-86. It has failed to do so and cannot now “split its case” by attempting to advance new arguments in its Reply which interveners will have no opportunity to challenge.

20. This being said, it is not surprising that Bell advanced no reason for linking the 25% Independent Production COL with paragraphs 254-255 of BRP 2015-86 – because there is no reason. However, based on the Commission’s reason for establishing and maintaining the 25% Independent Production COL, granting Bell the relief it seeks would be inconsistent with the *Broadcasting Act’s* policy objective related to independent production. Accordingly, the Commission should deny this part of the current Bell applications.

Sincerely,

original signed by

Jay Thomson, LL.B, LL.M
Vice President, Broadcasting Policy & Regulatory Affairs

cc. David Spodek, david.spodek@bellmedia.ca

*****End of Document*****