



21 August 2015

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

Filed Electronically

**Re: Part 1 Application – Amendments to the nature of service definition (first-run Canadian programs) – Corus Entertainment Inc. – YTV
Application 2015-0726-1**

1. As part of the above-noted Part 1 application, Corus Entertainment Inc. (Corus) seeks to be relieved of the condition of licence (COL) which requires YTV to broadcast in each year a minimum of 90 hours of original, first-run Canadian programs that it has acquired from an independent production company, either through co-production or licensing arrangements (YTV's Original Independent Productions COL). Corus states that this relief would be "[c]onsistent with paragraphs 254-255"¹ of Broadcasting Regulatory Policy CRTC 2015-86 (BRP 2015-86).²
2. For the reasons set out below, the Canadian Media Production Association (CMPA)³ opposes this part of the application. While YTV originally asked for the Original Independent Productions COL, the Commission has since maintained it over the years 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

¹ Appendix, Corus Application.

² 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>.

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).

YTV of its Original Independent Productions COL, and Corus has offered no arguments or evidence to suggest that they do.

3. We take no position on the other aspects of the Corus application.

The History of YTV's Original Independent Productions COL

YTV's First Licensing Decision

4. When YTV was first licensed, the Commission accepted the applicant's proposal to broadcast a minimum number of hours per year of original first-run Canadian programming, which the Commission imposed as a COL on the new service:

Further, with respect to the applicant's commitment to provide a minimum of 40 hours of original, first-run Canadian programming in year one, increasing to 69 hours by year 5, the Commission requires YTV, as a condition of licence, to provide a minimum of 55 hours of original Canadian production and expects that a renewal application would include plans to increase substantially the amount of new Canadian material to be exhibited. The Commission expects that these hours of original, first-run Canadian programming will consist of material that has never before been distributed by any licensee of a broadcasting undertaking and which will be distributed for the first time by the licensee.⁵

5. YTV's original Nature of Service (NOS), as established in its original licensing decision, was as follows:

As described by the applicant and as set out as a condition of licence in the appendix to this decision, YTV's schedule shall consist of programming directed at the following target audiences: children up to 5 years of age for 30% of the program schedule, children and youth aged 6 to 17 (48%), with a maximum of 22% directed to a target audience of children and youth with their families. YTV described its alternative family programming in the hours from 10:00 p.m. to midnight as a mix of fine arts, drama, video art, music, lifestyle and health, science and technology, nature, discovery and public affairs programming.⁶

6. Notably, nothing in YTV's first licence decision or in the above NOS references or suggests any connection between YTV's genre or NOS and the COL establishing minimum hours of original, first-run Canadian programming which was established in the same decision.

⁵ Decision CRTC 87-903, <http://www.crtc.gc.ca/eng/archive/1987/DB87-903.HTM>. See also Appendix, COL #9.

⁶ *Ibid.* See Appendix, COL #1.

YTV's First Licence Renewal

7. The Commission issued YTV's first licence renewal decision in 1992.⁷ Once again, on its own initiative, YTV had proposed an obligation respecting minimum hours of original, first-run programming: namely to increase the amount of original, first-run Canadian programs to 60 hours in the first year of the new licence term, rising by five additional hours each year to a level of 90 hours in the seventh year.⁸
8. The 1992 renewal decision noted that, "[a]t the hearing, YTV made the further commitment that these amounts of original, first-run Canadian programming would be obtained entirely from the independent production sector, either through co-productions or through licensing arrangements."⁹
9. The Commission required YTV to adhere to these commitments by COL.¹⁰ Thus, this was the first iteration of YTV's Original Independent Productions COL.
10. Again, notably, nothing in this first YTV renewal decision referenced or suggested any connection between YTV's genre or NOS and YTV's Original Independent Productions COL. In fact, while one section of the 1992 decision was subtitled "YTV's Programming Orientation and the Protagonist Rule", the Commission did not address and announce its imposition of YTV's Original Independent Productions COL until two sections later, in a section with the separate and clearly distinct sub-title, "Hours of Original, First-run Canadian Programs".¹¹

YTV's Subsequent Licence Renewals

11. The Commission next renewed YTV's licence in 2000, with no change to or discussion respecting the Original Independent Productions COL.¹²
12. The Commission again renewed YTV's licence in 2006.¹³ In that case, there was substantial discussion regarding YTV's support of Canadian independent producers.¹⁴ Notably, YTV highlighted the existence of its Original Independent Productions COL to

⁷ Decision CRTC 92-571, <http://www.crtc.gc.ca/eng/archive/1992/DB92-571.HTM>. Note this does not include a preceding one-year administrative renewal issued in Decision CRTC 90-675, <http://www.crtc.gc.ca/eng/archive/1990/DB90-675.HTM>.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.* See Appendix, COL #8.

¹¹ *Ibid.*

¹² Decision CRTC 2000-140, <http://www.crtc.gc.ca/eng/archive/2000/DB2000-140.htm>.

¹³ Broadcasting Decision CRTC 2006-381, <http://www.crtc.gc.ca/eng/archive/2006/db2006-381.htm>.

¹⁴ *Ibid.*, pars 60-64 and 89-95.

demonstrate that it was “already required make a contribution to independent production”.¹⁵

13. Just as notable, YTV’s 2006 renewal decision included a 10-paragraph section entitled “Nature of service”¹⁶ in which the Commission specifically identified three YTV COLs which, if amended as YTV had proposed, would “have the potential to directly affect its nature of service and the type of programming broadcast by YTV”.¹⁷ These COLs had nothing to do with YTV’s obligations to contribute to independent production; instead, the Commission addressed that subject four sections later, under the title “Regional reflection and independent production.”¹⁸ In addition to addressing other related matters in that latter section, the Commission reiterated its objective of “ensuring that production companies unaffiliated with the licensees of specialty services have reasonable access to the licensees’ program schedules” and confirmed that this objective was unrelated to genre, including the children’s genre.¹⁹
14. We acknowledge that, in the “independent production” section of YTV’s 2006 renewal decision, the Commission also referred to its decision not to establish standard obligations with respect to the use of independent productions for the specialty services it renewed in 2004, as to have done so would not have permitted the Commission “to consider the inherent differences that exist between one genre of specialty programming and another”.²⁰ It is important to recognize, however, that, in those earlier renewal decisions, the Commission did not take genre into account in establishing independent production obligations, only in the specific *form* such obligations would take for each service. In any event, the Commission had established and renewed YTV’s Original Independent Productions COL well before the 2004 renewal decisions for other specialty services.

The Group Licensing Framework

15. 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.²¹

¹⁵ *Ibid.*, at par. 64.

¹⁶ *Ibid.*, pars 65-74.

¹⁷ *Ibid.*, at par. 65.

¹⁸ *Ibid.*, at pars 89-95.

¹⁹ *Ibid.*, at par. 91.

²⁰ *Ibid.*, at par. 90. The 2004 decision referenced was announced in Broadcasting Public Notice CRTC 2004-4, *Introduction to Broadcasting Decisions CRTC 2004-6 to 2004-27 renewing the licences of 22 specialty services*, <http://www.crtc.gc.ca/eng/archive/2004/pb2004-2.htm>.

²¹ 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.

16. 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”.²² Notably, Corus was one of the broadcasters who (albeit reluctantly and conditionally) had advocated for such an exhibition obligation, which it linked directly to “the fundamental objective in the Broadcasting Act that the programming provided by the Canadian broadcasting system should include a significant contribution from the Canadian independent production sector.”²³
17. 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 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.”²⁴

The 2011 Group Licence Renewals

18. Corus 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.
19. 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.²⁵ [Emphasis added]

20. While, in this statement, the Commission notes that the individual obligations will contribute to the ongoing support of independently produced content in categories

²² *Ibid.*, at par 91.

²³ Corus’s Intervention in response to Broadcasting Public Notice CRTC 2009-411, available at https://services.crtc.gc.ca/pub/ListeInterventionList/Documents.aspx?ID=105290&en=2009-411&dt=c&Lang=e&_ga=1.8153200.398507674.1431447620, at paras 63-64.

²⁴ *Ibid.*, above Note 21, at par. 95.

²⁵ 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.

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, unlike YTV, may offer minimal PNI.

21. In this respect, it is notable that, while the Commission engaged in a lengthy consideration of Genre Exclusivity and NOS definitional issues in its introduction to its 2011 GLR decisions²⁶, it never made any connection between those issues and YTV's Original Independent Productions COL or other service-specific obligations relating to the broadcast of independent productions.²⁷

Let's Talk TV and the Elimination of Genre Exclusivity

22. 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 YTV's Original Independent Productions COL or other service-specific obligations relating to the broadcast of independent productions.²⁸
23. The Commission confirmed its decision to eliminate Genre Exclusivity in BRP 2015-86.²⁹ 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**.³⁰ [Emphasis added]

²⁶ *Ibid.*, at pars 72- 92.

²⁷ The full discussion regarding the service-specific obligations relating to the broadcast of independent productions is at *ibid.*, pars 93-101.

²⁸ 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.

²⁹ *Ibid.*, above Note 2, at pars 232-256.

³⁰ *Ibid.*, at par. 232.

24. 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.**³¹ [Emphasis added]

25. 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.**³² [Emphasis added]

26. 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

27. Nothing in BRP 2015-86 makes any connection between the Commission’s decision to eliminate Genre Exclusivity and YTV’s Original Independent Productions COL or other service-specific obligations relating to the broadcast of independent productions. Nothing suggests that YTV’s Original Independent Productions COL is included in the COLs “collectively called [YTV’s] nature of service.”
28. The reasons for this are clear: as a means to support the independent production sector, YTV’s Original Independent Productions COL establishes 1) how many hours of original Canadian programming YTV must, at a minimum, broadcast each year; and

³¹ *Ibid.*, at par. 233.

³² *Ibid.*, at par. 245.

2) who must make those hours of programming (namely independent producers). It does not

- require YTV to offer programming of a specific type from specific program categories or relating to certain subjects;
- ensure YTV complements other programming services and does not compete head-to-head with them;
- ensure that YTV remains distinct and adheres to the genre in which it was licensed to operate;
- define or limit the programs YTV can provide;
- inform subscribers about the types of programming that they can expect to receive from YTV;
- create complexity or enforcement difficulties given the subjective nature of genre.

29. As the applicant, Corus has the burden to prove its case which, in these circumstances, is to demonstrate *in its application* why relieving YTV of its Original Independent Productions COL would be “consistent with” paragraphs 254-255 of BRP 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.

30. This being said, it is not surprising that Corus advanced no reason for linking YTV’s Original Independent Productions COL with paragraphs 254-255 of BRP 2015-86 – because there is no reason. However, based on the Commission’s reason for maintaining YTV’s Original Independent Productions COL over the years, granting Corus 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 Corus application.

Sincerely,

original signed by

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

cc. Sylvie Courtemanche, Corus Entertainment Inc., sylvie.courtemanche@corusent.com

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