



April 29, 2011

**Filed Electronically**

Mr. Robert A. Morin  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, Ontario  
K1A 0N2

Dear Mr. Morin:

**Re: Broadcasting Notice of Consultation CRTC 2010-952 – Group-based licence renewals for English-language television**

*“The very point of our existence is to make sure that there is maximum Canadian content, not to lower it. And we have identified PNI as the heart of Canadian content...”*

CRTC Chairman Konrad von Finckenstein<sup>1</sup>

1. Pursuant to the revised procedures set out in Broadcasting Notice of Consultation CRTC 2010-952-4, the Canadian Media Production Association (CMPA) provides the following final written submission and our responses to undertakings.<sup>2</sup>

**Introduction: Maintaining *First Principles***

2. As stated in the CMPA’s initial written submission and reinforced during our appearance at the oral hearing, the CMPA has supported the Commission’s new Group Licensing Policy (GLP) as set out in Broadcasting Regulatory Policy CRTC 2010-167 (BRP 2010-167). In BRP 2010-167, the Commission established the following four fundamental components of the GLP:
  - A *minimum* 30% CPE for all Broadcaster Groups<sup>3</sup>;
  - A minimum group-based PNI spending level *greater* than 5%<sup>4</sup>;

<sup>1</sup> Transcripts, CTV Abridged Version of *In-Camera* Session, 14 April 2011, line 1945.

<sup>2</sup> See the Appendix for the CMPA’s responses to undertakings.

<sup>3</sup> BRP 2010-167, par. 60.

<sup>4</sup> *Ibid.*, par. 75.

- Canadian content exhibition requirements applied by regulation to conventional TV stations<sup>5</sup> but tailored to reflect the character of each specialty service<sup>6</sup>; and
  - Requirements respecting independently-produced programs applied both at a group level and to individual services.<sup>7</sup>
3. The CMPA has actively participated in this Licence Renewal proceeding to ensure the GLP established in BRP 2010-167 is implemented so that it achieves its objective of providing “continued support for the creation of Canadian programming particularly in categories that continue to be under-represented in the Canadian broadcasting system, such as scripted drama and documentaries.”<sup>8</sup>
  4. However, it became apparent during the course of the Commission’s interaction with the applicants - and in particular from reviewing the transcripts, once available, of the substantive *policy* discussions that took place with the applicants only during the various *in-camera* sessions - that the GLP established in BRP 2010-167 may now be subject to substantial changes in response to broadcaster arguments and tactics. As a result, the CMPA can no longer say with any certainty that we support the Commission’s Group Licensing Policy *because we no longer know for certain what that Policy is, or may become.*
  5. In the face of the lack of certainty, transparency and predictability generated primarily by these closed door discussions, it is difficult for the CMPA to know where to focus our comments in this stage of the proceeding. There have now been so many possible permutations of the GLP advanced and considered during the *in-camera* sessions that we are no longer in a position to understand what is on the table, let alone respond to each and every possible change.
  6. Accordingly, the CMPA wishes to emphasize *First Principles* in these circumstances, namely that:
    - The Commission’s mandate is to regulate and supervise the Canadian broadcasting system so as to achieve Canada’s broadcasting policy objectives<sup>9</sup>;
    - The objective of the GLP is to ensure the broadcasters continue to support Canadian programming, particularly drama and documentaries;

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<sup>5</sup> *Ibid.*, par. 64.

<sup>6</sup> *Ibid.*, par. 65.

<sup>7</sup> *Ibid.*, par. 95.

<sup>8</sup> *Ibid.*, par. 27.

<sup>9</sup> *Broadcasting Act*, s. 5(1).

- The flexibility given to broadcasters in the GLP is a means to this end, not an end in itself; and
- Implementation of the GLR must not lead to reductions in support for Canadian programming: it should lead to *more* support, certainly not less.

7. Applying these *First Principles* when implementing the GLP, in whatever form it ultimately takes as a result of this proceeding, means that, at a minimum:

- The Group CPE can be no lower than 30%;
- 5% is *not* the minimum for PNI but is the starting point to get to the minimum amount, which is not to be less than actual historical spending;
- All appropriate revenues must be counted in the base, both for setting Y1 expenditure requirements and thereafter<sup>10</sup>;
- The broadcasters' proposed 3-year 'smoothing' to establish the revenue base for Y1 must be rejected as the broadcasters admit it would generate less spending<sup>11</sup>;
- Benefits in the system resulting from recent ownership transactions are irrelevant when establishing the appropriate CPE and PNI levels;
- Proposed reductions to service-specific CPEs must be rejected<sup>12</sup>;
- Proposed reductions to Canadian programming exhibition levels based on the notion of "parity" must be rejected<sup>13</sup>;
- PNI is to be commissioned from all regions of Canada<sup>14</sup>; and
- A diversity of programming voices for both PNI and non-PNI must be maintained.

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<sup>10</sup> Including revenues from the LPIF and the Olympics, particularly if past or future Canadian programming expenditures in these areas are to be factored into setting appropriate CPE levels.

<sup>11</sup> "[By not 'smoothing'...] It does result in a higher spend. We don't like that. You know, that is a bit of your objective. It is a bit of what we are resisting." Transcripts, CTV Abridged Version of *In-Camera* Session, 4 April 2011, line 216.

<sup>12</sup> Based on the GLP as established BRP 2010-167, which set a minimum Group CPE level of 30% and provided 100% spending flexibility for specialty services, service-specific CPE levels would have no practical significance. For this reason, the CMPA has to date chosen not to comment on the various service-specific CPE reductions proposed. However, if the GLP were to change in the manner discussed with Rogers during their 14 April 2011 *in-camera* session, it would appear service-specific CPE levels could be used to calculate each Group's overall CPE level, and thus would take on a practical significance. In such circumstances, reduced service-specific CPE levels would lead to, and lock in, reduced support for Canadian programming. The CMPA would oppose such a scenario.

<sup>13</sup> While the Commission did not discuss these proposals with the broadcasters during the hearing, the GLP confirmed that exhibition requirements would continue to be tailored to reflect the character of each service, thus rejecting the notion of Canadian content "parity" amongst specialty services or between those services and conventional television services: *ibid.*, above note 6.

<sup>14</sup> *Ibid.*, above note 3, par. 97.

## Maintaining a Diversity of Voices for PNI and non-PNI

8. By establishing that 75% of PNI spending is to be allocated to independently-produced programs, which no applicant challenged, the GLP will help ensure a diversity of voices and address concerns arising from programming undertaking-production company vertical integration with respect to programs in the PNI genres.
9. For those broadcasters currently subject to specific requirements relating to independent productions, the retention of those requirements pursuant to the GLP will help to ensure a diversity of voices and address concerns arising from programming undertaking-production company vertical integration with respect to programs in the non-PNI genres.
10. The CMPA submits, however, that the Shaw Media proposal advanced at the end of the hearing represents a much better means to achieve the goal of ensuring a diversity of voices in the non-PNI genres. The Shaw Media proposal is that no less than 35% of expenditures on non-PNI programs would be allocated to independently-produced programs.<sup>15</sup> The CMPA supports this proposal as it would ensure that *no* broadcaster could limit the diversity of non-PNI voices by, for example, relying on an affiliated production company<sup>16</sup> to produce all its non-PNI shows, like factual entertainment programming.
11. As the CMPA argued in our 27 April 2011 submission in respect of the Vertical Integration proceeding<sup>17</sup>, this Group Licence Renewal proceeding is the appropriate venue for applying safeguards as a means to address programming undertaking-production company vertical integration. This is because the Commission will be imposing conditions of licence and other service-specific obligations on the broadcasters in *this* Licence Renewal proceeding - something it will not have the power to do as part of the Vertical Integration policy proceeding.
12. Also, the CMPA wishes to point out that the recently-executed Terms of Trade Agreement provides that the broadcaster signatories will not count broadcaster-affiliated productions, in-house productions and service productions towards meeting the Commission's independent production expenditure requirements as established for them pursuant to the GLP.<sup>18</sup>

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<sup>15</sup> While Shaw Media submitted proposed language for this obligation, the CMPA submits that, for clarity, the obligation should read: "No less than 35% of all spending on Canadian programs broadcast by the licensee, other than Programs of National Interest (as defined in BRP CRTC 2010-167, as amended from time to time), news current affairs and sports [Categories 1, 2(a), 6(a) and 6(b)] shall be allocated to independently-produced programs."

<sup>16</sup> Either owned now or acquired during the licence term.

<sup>17</sup> Broadcasting Notice of Consultation CRTC 2010-783.

<sup>18</sup> See Articles 1(c) and 1(d) of the Terms of Trade Agreement.

13. To ensure consistency with this approach and to avoid confusion when tracking the broadcasters' adherence to their expenditure requirements, the CMPA therefore recommends that the Commission amend its proposed "Programming of National Interest Report" in the following ways:

- 1) On the "*Programs of National Interest by Region - Overview*" page,
  - i) replace the sub-title "Engaging Independent Producers" with "Supporting Independent Productions";
  - ii) delete the definition of "an independent production company" in footnote (2);
  - iii) change the reference to "Independent Producers" in the third box of the chart to "Independent Productions";
  - iv) change the reference to "Affiliated Producers" in the fourth box of the chart to "Affiliated Productions, In-House Productions and Service Productions"; and
- 2) On the "*Programs of National Interest Annual Report – Ownership Group – Year*" page, change the second box under "Producer Information" from "Ind., aff. or in-house" to "Ind., aff., in-house or service".

These recommended changes would also promote consistency between the reporting forms and the terminology of the GLP, which establishes the associated spending requirement with respect to independent productions ("independently-produced programs"), not to independent producers.<sup>19</sup>

### **Ensuring Broadcaster Support for Canadian Feature Films**

14. In both our initial written submission and during our appearance at the oral hearing, the CMPA highlighted the fact that the Canadian feature film industry is facing a funding crisis because broadcasters in general no longer support Canadian feature films as they once did.
15. In light of this funding crisis, the CMPA reiterates our call for the Commission to initiate a separate policy proceeding to consider how the Canadian broadcasting system will continue to support Canadian feature films.
16. Pending that proceeding, the CMPA maintains that pay television services should be excluded from application of the GLP. Otherwise, we continue to fear that pay television licensees could use their spending flexibility under the GLP to shift a significant portion of their historical expenditures on Canadian feature films to other non-movie services or to other forms of PNI. As we emphasized during our appearance, now is the appropriate time to protect pay television's mandated role to support Canadian feature films: if the

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<sup>19</sup> *Ibid.*, above note 7.

Commission allows that role to erode as a result of this proceeding, it may become too late to reverse the impact later.

### **Adherence to Terms of Trade as a Condition of Licence**

17. The CMPA maintains our request that the Commission require the Broadcaster Groups to adhere to the Terms of Trade Agreement by condition of licence (COL).
18. In its decision approving the Shaw-Canwest transaction<sup>20</sup>, the Commission indicated that in the event that a terms of trade agreement was not reached prior to the Group Licence Renewal hearing, it would require Shaw to file substantive proposals as part of the record of the hearing and would then establish appropriate provisions for terms of trade as part of its determinations set out in Shaw's renewal decisions. The Commission then indicated it would follow the same approach with all the Broadcaster Groups participating in the Group Licence Renewal process.
19. In announcing the Group Licence Renewal process in BNOG 2010-952, the Commission reiterated its view, as expressed in a number of its policies and decisions since 2007, that the establishment of terms of trade agreements between independent Canadian television programming producers and broadcasters would provide stability and clarity for both producers and broadcasters and would be in the broadcasting system's interest as a whole.
20. Most recently, in approving the BCE-CTVgm transaction<sup>21</sup>, the Commission mirrored the same language it used in its Shaw-Canwest decision regarding its willingness to establish appropriate provisions for terms of trade as part of its determinations in CTV's (now Bell Media's) renewal decisions.
21. It is clear from these consistent and unambiguous statements that the Commission has always been fully prepared to require each of the broadcasters to adhere to a terms of trade agreement as a condition of renewing their respective licences.
22. The CMPA submits that making adherence to the recently-executed Terms of Trade Agreement as a condition of the broadcasters' licences is the only way to ensure the stability and clarity the Commission and the parties seek on this subject through the course of the broadcasters' next licence terms. While the Agreement establishes a self-contained dispute resolution process, that process may nevertheless not preclude a broadcaster from abandoning the Agreement altogether. Absent the requested COL, the Commission would have little recourse should this happen during the broadcaster's licence term.

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<sup>20</sup> Broadcasting Decision CRTC 2011-782, <http://www.crtc.gc.ca/eng/archive/2010/2010-782.htm>.

<sup>21</sup> Broadcasting Decision CRTC 2011-163, <http://www.crtc.gc.ca/eng/archive/2011/2011-163.htm>.

23. The COL will also ensure the Commission retains the jurisdiction to mediate or arbitrate disputes arising under the Agreement<sup>22</sup> (notwithstanding that, *in practice*, the Commission will rarely, if ever, have to do so).
24. To these ends, the CMPA has proposed a simple COL that would require each signatory broadcaster to adhere to the Terms of Trade Agreement. As the Chairman has observed, such a COL, while not burdensome, would fulfill “the very purpose underlying the seriousness that [the Commission] and everybody else attaches to the terms of [trade] agreement and the role it hopefully will play in [the broadcasters’] relationship with ... producers.”<sup>23</sup>

## Conclusion

25. Although the objective of this Licence Renewal process was to implement a policy already clearly established, the CMPA is concerned that the process has effectively morphed into a *policy review* proceeding. As a result, the CMPA and other interveners have been left scrambling to understand what is on the table and what is not. Most importantly, we are struggling to understand the implications of this proceeding now for the future of Canadian programming.
26. The CMPA supports the GLP established in BRP 2010-167. We count on the Commission to implement that policy. Above all, we count on the Commission to issue licence renewal decisions flowing from this process which honour the very core of the Commission’s existence, that is, “*to make sure that there is maximum Canadian content, not to lower it.*”

Yours truly,

[*original signed by Norm Bolen*]

Norm Bolen  
President & CEO

Attach.

cc: Bell Media Inc.; Shaw Media Inc.; Corus Entertainment Inc.; Shaw Cable Systems Limited; Rogers Broadcasting Limited.

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<sup>22</sup> The Commission has previously confirmed that it retains ultimate jurisdiction in such cases: see for example, Broadcasting Decision CRTC 2009-162, at par. 7, where it stated with respect to requiring adherence to a self-regulatory Journalistic Independence Code: “The Commission further notes that the suspension of conditions of licence does not result in an elimination of a broadcasting licensee’s responsibilities. Self-regulation of the broadcasting industry corresponds to a delegation of power on the part of the Commission to the CBSC. However, this delegation of power is not total. The Commission legally maintains its prerogative to intervene in the case of a complaint or in the case of non-conformity on the part of a broadcasting licensee.”  
<http://www.crtc.gc.ca/eng/archive/2009/2009-162.htm>.

<sup>23</sup> Transcripts, Shaw Media Abridged Version of *In-Camera* Session, 15 April 2011, line 9877.

## APPENDIX

### CMPA Responses to Undertakings

**a. Provide data showing popularity of Canadian programming in various genres.**

CMPA Response: The CMPA refers the Commission to the Canada Media Fund's *CMF Audience Report*, which presents data on average minute audiences to individual programs funded. The first two editions of these reports feature results for programming supported by the Canadian Television Fund that aired during the 2007-2008 and 2008-2009 broadcast years.

The data in these reports have been published in an easy-to-use web interface. Users can view the full report, an overview of the top programs or, by using the arrows next to and below the menus, can filter and sort results, creating a customized report that can then be downloaded and printed.

See: <http://www.cmf-fmc.ca/publications/audience-reports-rapport-audioire.html>.

**b. How much Canadian programming is currently in the broadcast system vs. the amount 10 years ago?**

CMPA Response: The CMPA submits that the CRTC monthly logs submitted by each broadcaster contain the most accurate information detailing the Canadian content levels aired by each licensee. As the Commission has access to these logs for all Canadian broadcasters, it is in the best position to conduct the necessary analysis to measure the increased amount of Canadian programming in the system resulting from, amongst other things, the licensing of new Canadian programming services in the last ten years. Of note, while the amount of Canadian content will presumably have increased over the past 10 years, a significant portion of that is repeat programming. Again, that information is contained in the CRTC monthly program logs.

Put in the proper context, Canadian programming competes for viewers against a plethora of foreign and online programming. Many foreign services have become available within and around the broadcasting system over the past 10 years. That means that, while the amount of Canadian programming has presumably increased with more Canadian licensed services, the percentage of Canadian programming relative to the overall offering of programming options has not likely increased to the same extent if at all.

c. **Clarify what the confusion is between the CRTC and CMF definitions of documentary programming.**

CMPA Response: As Norm Bolen, the CMPA's President and CEO, stated during the CMPA's appearance at the hearing:

"The problem is -- we actually were against [the Commission's new definition of 'documentary'], along with most of the industry, and the reason we were against it is because it creates some confusion, because some of the programming that you now no longer qualify as documentary actually still does qualify as documentary under the CMF. That's the confusion that was created.

So not all reality programming is not considered documentary by the CMF. So now we have quite a bit of confusion."<sup>24</sup>

Accordingly, the CMPA's concern is that certain programs that no longer qualify as documentaries under the CRTC's new definition actually do qualify as documentaries through the CMF. Specifically, programs that qualify as eligible documentaries through the CMF include living histories, docusoaps, and point of view (POV) documentaries. We also note that the CAVCO definition of documentary also includes "docudramas".<sup>25</sup> The Commission's new definition, however, excludes docusoaps and would appear to exclude living histories and docudramas.

In the CMPA's view, these additional CMF and CAVCO elements allow for recognition of the evolution in documentary production and in viewing preferences by Canadian audiences. The CMPA wants to ensure that independent producers who focus on these areas continue to be supported by CRTC policy, either through PNI or non-PNI requirements.

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<sup>24</sup> Transcripts, 7 April 2011, lines 3731 - 3732.

<sup>25</sup> A "docudrama" is defined as "A type of documentary that deals with a subject by including fictional elements. Docudramas are usually made for television". See CPTC Guidelines, Part III at [http://www.pch.gc.ca/DAMAssetPub/DAM-filmVid-filmVid/STAGING/texte-text/cptc\\_guide\\_1272631234182\\_eng.pdf](http://www.pch.gc.ca/DAMAssetPub/DAM-filmVid-filmVid/STAGING/texte-text/cptc_guide_1272631234182_eng.pdf).