



Review of the regulatory frameworks for
broadcasting distribution undertakings and
discretionary programming services

CRTC 2007-10

Presentation by Ian Morrison, Spokesperson

April 8, 2008

“Most importantly, we wish to thank Robert Buchan for his guidance throughout the project, the contributions he made to the report and for sharing his knowledge of the Canadian broadcasting sector with us. Bob is one of the leaders of the Canadian communications bar. He was indispensable to this project and worked tirelessly to help see the report to fruition.”

*Laurence Dunbar & Christian Leblanc
August 31, 2007*

“On my left is Robert Buchan of Fasken Martineau DuMoulin, lifelong counsel to Rogers.”

*Phil Lind
Vice Chairman
Rogers Communications
September 20, 2007*

“The CRTC’s role in content regulation will be reduced to eliminate duplication where other legislation exists.”

Conservative Party of Canada

January 3, 2006

Mr. Chair and Commissioners: thanks for inviting Friends of Canadian Broadcasting to participate in this afternoon's panel. Your decisions can enhance or reduce Canadian choices in our broadcast system. They will also affect the infrastructure of Canadian democracy. Not a small responsibility!

Pollara Study

Yesterday, in collaboration with ACTRA, CEP, Stornoway and the Writers Guild, Friends placed in the public domain research we commissioned from Pollara, Canada's largest public opinion and marketing research firm, about Canadians' views on de-regulating cable and other TV distributors.¹ In order to bring the opinions of Canadian subscribers to this hearing, I want to share a few highlights with you:

- 82% of Canadian subscribers feel strongly about their unique values and identity.
- 87% think that Canadian TV production is important to the economy
- 55% believe that the Canadian television production industry will not be able to survive and succeed in an unregulated cable and satellite environment.
- Overwhelmingly, Canadians view television as a CULTURAL TRUST, not just an economic or a business issue. Your Commission and the federal government – and not the service providers – are considered the guardians of Canadian culture on TV.
- Almost seven in 10 Canadian subscribers place the most trust in the CRTC and the federal government to protect and promote Canadian content on TV.
- 74% of subscribers believe that less regulation is likely to have a negative impact on Canadian TV, by reducing choices of Canadian programming.
- Nine in ten think it is important to have regulations and incentives to ensure the continued presence of independently-owned Canadian broadcasters on their cable and satellite line-ups.

¹ Pollara conducted a survey amongst cable and satellite subscribers across Canada, interviewing by telephone a random sample of 1,200 Canadians between March 14 and 19 who currently subscribe or have subscribed to a cable or satellite TV service in the past five years. The data were weighted by region and by age to be representative of the general population, and are accurate to within +/- 3% nineteen times out of twenty.

- Nearly six in ten subscribers believe that it would be detrimental to Canadian content to allow cable/satellite providers to decide which channels to make available.
- More than half of Canadian subscribers would support paying \$3 more per month on their cable/satellite bill to protect Canadian content. Four in ten would pay \$6 monthly and a third would pay as much as \$10 monthly.
- Pollara also tested two specific fee-for-carriage options, and I quote:
- “Proposal 1: CRTC has been asked to consider adding a \$4 to \$5 fee to monthly cable or satellite television subscriptions, and this revenue would be distributed to local, privately owned Canadian channels like CTV, Global and CityTV (TVA, etc.), which are currently funded exclusively by advertising revenues. This money would be used to support and enhance Canadian programming. These channels would still be available at no cost for those who use an antenna.”
- 50% of subscribers support this proposal.
- “Proposal 2: CRTC has been asked to consider adding a \$1 fee to monthly cable or satellite television subscriptions, and this revenue would be distributed to the main CBC/SRC (Radio-Canada) channel, which is currently funded exclusively through tax revenues and advertising. The additional fee would be used to enhance Canadian content on CBC television. This channel would still be available at no cost for those who use an antenna.”
- This second proposal received an even higher approval rating of 57%.
- Very few subscribers have cancelled their subscriptions as a result of past fee increases.
- Replacing Canadian programming with foreign programming is unpopular in all the main program types.
- A majority do not trust their cable and satellite companies to promote and deliver Canadian channels and content.
- Three-quarters of Canadian subscribers believe that less regulation is likely to have a negative impact on Canadian TV, by reducing choices of Canadian programs.
- While Canadian cable and satellite subscribers are satisfied with their price 58%, program packages 62%, reliability 83% and picture and sound quality 90% – they do not trust their suppliers to make decisions on programming choices.

- Finally, Pollara found that only 15% of Canadians are aware that your Commission is considering proposals to reduce regulation of cable and satellite services.

“Market Forces”

Mr. Chair and Commissioners: our broadcasting system is respected worldwide in large measure because of steps taken by your Commission over several decades to ensure the quantity and diversity of Canadian programming. These steps have created a balance among programming undertakings, pay and specialty services, and broadcasting distribution undertakings (BDUs). The result: harmony among the interests of all stakeholders resulting in the maximum overall contribution by each sector to the goals of the Broadcasting Act.

As we have detailed in three submissions, we are convinced that, should the Commission move forward as outlined in the July 5 Public Notice and the March 14 Schedule 2, the result will be a reduction in access, in the number of services not BDU-affiliated, in available hours of Canadian programming, and in expenditures on Canadian programming – in other words, a derogation from your responsibilities under the Act.

The rules you administer have evolved since the dawn of cable. The Canadian broadcasting system is an ecosystem where each of the components is inextricably linked so that a change in one will affect the others. It is therefore vital to consider their interdependence, and its consequences.

The BDUs espouse the “market forces” theme because they ARE the market force. In our broadcasting system a reliance on market forces is analogous to the Darwinian notion of letting only the strongest survive. As CTV, CanWest and Friends have previously noted, real market forces in cable would arrive only if US distributors were licensed to operate in Canada.

During the Diversity of Voices hearing, you heard many times about the predatory practices of BDU “negotiations”. This highlights the great vulnerability of smaller, independent programming services² – despite their substantial contribution to diversity in the system.

Based on the preliminary data the Commission provided in advance of this hearing, BDU subscriptions between 2002 and 2007 have increased by 9.4% – from 9.3 to 10.1 million. During the same period BDU programming revenues increased from \$4.2 to \$6.1 billion – an increase of 44%. Moreover, combined BDU revenue per subscriber increased from \$455 to \$600 per annum – an increase of nearly 32%.

² Friends defines smaller independent programming services as those unaffiliated services where major station groups have less than a 20% interest.

In the 2006 broadcast year, average per sub BDU revenue went up 5.4%. If Canadian demand for BDUs' services had been as sensitive as Blackwell and Gliberman preposterously suggest, such a price rise would have caused a subscriber loss of between 300,000 to 600,000. Instead, subscriptions grew by 7.6% for cable, 5.6% for DTH – for an overall annual increase of 662,800 subscribers – or 7.1% over the previous year.

Pollara found that 41% of subscribers report that they do not have a choice of BDU, and 49% indicate that their service is bundled with telephone or Internet service, thereby constraining mobility between services.

Since basic cable de-regulation in 2002, Rogers and Shaw have raised basic rates by an astounding 70%:

	De-reg Date	Basic Rate			% Increase
		Before de-regulation	Sept 2002	Jan 2008	
ROGERS CABLE					
Toronto Peel	23 Aug '02	\$21.29	\$21.29	\$34.97	+64.3
Ottawa West	1 Feb '02	\$16.69	\$20.00	\$34.97	+109.5
Saint John	1 Aug '02	\$18.86	\$20.00	\$34.97	+85.4
AVERAGE		\$18.95	\$20.43	\$34.97	+71.2
SHAW					
Vancouver	23 Aug '02	\$19.26	\$19.26	\$29.95	+55.5
Winnipeg-East	13 Aug '02	\$15.75	\$15.75	\$29.95	+90.2
Calgary	15 July '02	\$18.55	\$18.55	\$29.95	+61.5
AVERAGE		\$17.85	\$17.85	\$29.95	+67.8

Source: CRTC, Broadcasting Policy Monitoring Report 2002, Rogers, Shaw Online

Tiering, Linkage & Preponderance

The Broadcasting Act states that “Each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming”.³ The Commission’s Public Notice and Schedule 2 would open the gate to a significant reduction in the number of Canadian channels offered – and a corresponding increase in American services.

³ Section 3 (1)(f)

None of this would increase diversity. However, it could be expected to reduce significantly the amount of foreign programming that would subsequently be available for purchase by Canadian channels – threatening the very existence of the Canadian territorial rights market, which cross-subsidizes Canadian content production. Adopting this watered-down standard could also create a precedent for television programming services to reduce overall CanCon levels from 60% to 50.1%.⁴

Parliament set “preponderant” as a rock-bottom expectation, as distinct from the desired “maximum”. So how is it possible for BDUs to advance the goals of the Act by reducing Canadian services to the lowest expectations?

A review of the CRTC BDU Financial Database for the 2007 broadcasting year indicates that 88% of all affiliation payments by BDUs were made to Canadian pay and specialty services.⁵ Non-Canadian services received the balance of 12% – or nearly \$250 million – up from \$200 million in 2006. If, under a proposed 50% + 1 regime, affiliation payments to Canadian services were to drop proportionately, this could extract more than \$750 million per annum from the system and ship it south.⁶ More than a blip in Canada’s balance of payments!

Canadian subscribers understand this. Pollara asked: “Do you think that allowing cable and satellite providers to choose which Canadian and foreign channels are available or not available to consumers would be good for Canadian viewers or listeners?” Yes 28%; No 59%.

Friends does not consider that Canadian services should receive preferential tiering based solely on when they were licensed. The 5:1 linkage rule is essential to ensure a fair and balanced system in which independently-owned and unaffiliated services can obtain shelf-space and access to viewers, alongside the ones in which major BDUs have an ownership position.⁷ Just look at a graphic of the services offered by SkyVision, an affiliate-dominated system in the UK. Can one really expect that independent services would be carried in the absence of rules?

⁴ These have already been weakened by compromises such as bonus points for some kinds of content.

⁵ Pay = 27%; specialty = 73%.

⁶ 88% of affiliation payments = \$1.79 billion; 51% = \$1.048 billion (in the 2007 broadcasting year).

⁷ Note the exchange between Commissioner Williams and Shaw’s Ken Stein on September 17, 2007: 1375 Commissioner Williams: “And you feel that many of the existing rules impede your ability to offer this choice that your customers are seeking?” 1376 Mr. Stein: “Yes, absolutely. We put “Scream” on and then we had to take it off because it was a Corus service.” Friends speculates that if the linkage rules were no longer in effect, “Scream” would certainly be carried on Shaw systems. The question is: What service would not be carried as a result? We are aware of no BDU-owned Category 2 service that has not launched.



Genre Protection

Friends argues not for genre protection, *per se*, but rather for the continuance of clearly-defined ‘nature-of-service’ descriptions. One of the key elements in the Commission’s licensing policy with respect to analog and Category 1 digital services has been defining nature-of-service obligations that distinguish one channel from another. This process has prevented a mass migration of services towards a homogenized mainstream, thereby fostering the emergence of niche services that make an important contribution to diversity.

The Commission correctly notes that licensing of additional services has blurred the boundaries, but the current rules still maintain the maximum amount of separation between the services. A legitimate concern might be that, in the absence of clear nature-of-service definitions, channels will have a financial incentive to move towards programming with the greatest audience appeal. To the extent that maximizing audience becomes the key driver of programming decisions, we can expect that the current clusters of niche appeal would dissolve, and be replaced by an abundance of programming selected from only the most popular areas – with diversity the loser.

In such a likely scenario, channels could materially change from their present form. As a consequence, the overall channel offering would likely be far less eclectic – and much more homogenized.

Unfettered Access to US Channels

The vast majority of programming currently aired on services such as USA Network and HBO is already available in Canada on Canadian services. One of the key and lasting consequences of allowing, for example, the USA Network or HBO into Canada would be that Canadian rights to this programming would most likely be retained by USA Network or HBO and no longer be available to Canadian specialty services.⁸

This concern pales in comparison with the notion of the Commission abandoning protection of Canadian services from the entry of US services in the same genre. The present policy has enabled programming partnerships that have effectively 'Canadianized' popular US services, while ensuring a valuable contribution to spending on, and exhibition of, Canadian programming. This proposal would cut this critical supply chain.

Were genre protection to be discontinued, when the existing partnership agreements expire, Canadian viewers would likely find that existing Canada/US partnerships would wither in favour of direct distribution of the US service by a Canadian BDU. Where a partnership does not exist – The History Channel, for example – we fear a scenario where a BDU would replace the Canadian channel with the US version, not because of superior programming, but rather because of cost and the prospect of receiving two minutes of new ad avails each hour as part of the carriage agreement.

Other Schedule 2 Issues

- We favour fee-for-carriage applied to DIGITAL subscribers.⁹
- Cable community channels should be given access to local advertising. In exchange, we recommend a phased de-coupling of cable community channel spending from the 5% CTF contribution, and raising that contribution to 7% along the lines of CFTPA's proposals.
- Cable access to revenue from advertising avails on US services should be permitted, provided that 75% of the net revenue is contributed to the CTF.

⁸ The system has witnessed this behaviour in the past with a number of other US services which are available in Canada and routinely purchase exclusive Canadian rights, such as A&E. One criterion for carriage of a US service might be demonstrating that the vast majority of its programming, say 75%, is not currently available in Canada.

⁹ As outlined in our January 25 submission, Friends has calculated fee-for-carriage revenue from digital subscribers at \$5 monthly rising from \$355 million currently to \$420 million when digital penetration reaches seven million subscribers. This would maintain and enhance local programming while maintaining the affordability of basic service.

- The basic service should offer a core of programming services at the lowest possible price so that the greatest number of Canadians can have access to the Canadian broadcasting system.
- Guaranteed access services are so designated because the Commission has determined that their distribution is in the public interest or aligned with public policy priorities as expressed in the Act. APTN, French-language channels in English-language markets and VisionTV are good examples. Popularity and longevity are not appropriate criteria.
- In the case of large multiple systems operators (MSOs), financial transparency is in the public interest. BDUs should not be allowed a competitive advantage over pay and specialty services, whose financial information is transparent.
- The Commission's simultaneous substitution policy is integral to the viability of OTA broadcasting and contributes substantially to resources for Canadian programming.
- BDUs must not be allowed to compete with broadcasters for the acquisition of programming rights.
- Special rules should be implemented to protect independent television owners, defined as those with less than 20% ownership by major station groups.

Thanks for the opportunity to present our views!

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