



17 September 2020

Claude Doucet
Secretary General
CRTC
Ottawa, ON K1A 0N2

Via GC Key

Dear Secretary General,

Re: Broadcasting Notices of Consultation CRTC [2019-379](#) (Ottawa, 25 November 2020), [2019-379-1](#) (Ottawa, 28 January 2020), [2019-379-2](#) (Ottawa, 8 April 2020) and [2019-379-3](#) (Ottawa, 22 June 2020) – Procedural request – broadcast notifications – answer to CBC

- 1 The Forum is in receipt of CBC's 14 September 2020 reply to the Forum's 2 September 2020 procedural request.
- 2 The Forum respectfully requests that the Commission accept this answer to CBC's reply for the public record in the 2019-379 proceeding. Briefly, the Forum submits that CBC's reply does not meet the requirements of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (CRTC's Rules)*.
- 3 We begin by setting out the CRTC's requirements for CBC's reply. We then review the manner in which CBC has addressed the Forum's points, whether CBC has admitted or denied the facts set out by the Forum and CBC's grounds for opposing the Forum's procedural request.

I **CBC has ignored CRTC's requirements for its reply**

- 4 Section 27(2) of the *CRTC's Rules* states that CBC's

... reply must

- (a) be restricted to the points raised in the answer or the document;
- (b) admit or deny the facts alleged in the answer or the document;
- (c) state the grounds of objection or opposition, if any, to points raised in the answer or the document;
- (d) be accompanied by a list of the persons on whom the reply is served and the email address of each, if any; and
- (e) be served on the respondents and the interveners to whom the applicant is replying and any other persons that the Commission directs.

5 The Forum submits that CBC's reply does not comply with subsections 27(2)(a), (b) and (c).

A. CBC did not restrict itself to the points made by the Forum

6 Section 27(2)(a) of the *CRTC's Rules* require that CBC's reply "be restricted to the points raised in the answer or the document"

7 CBC argues that the Forum's request "has no merit and should be denied" because CBC "is in full compliance" with the *CRTC's Rules*:

3. ... As noted in the CRTC's letter to the FRPC dated 22 July 2020, CBC/Radio-Canada has broadcast the notices as required by the Commission and is in full compliance with section 35(1) of the Rules.

4. ... The vast majority of the FRPC's concerns are based on discrepancies between the Attestations contained in the report and CBC/Radio-Canada's logs.... some of the Attestations provided the break in the program rather than the exact timeslot, which the FRPC erroneously interpreted as a discrepancy with the logs and as evidence of non-compliance. Further, the FRPC noted a few minor clerical errors in the Attestations. In short, the FRPC has not provided any evidence of non-compliance.

8 The Forum's procedural request did **not** argue that CBC was non-compliant in making broadcast notifications. Rather, the Forum argued that the dozens of inaccuracies in the declarations made by CBC about these broadcasts are relevant to CBC's "trustworthiness" (FRPC, para. 5) and raise serious questions about Canadians' reliance on and trust in CBC's statements (FRPC, para. 8).

9 CBC also claims that the Forum made an "argument about CBC/Radio-Canada's proposal for the use of regulatory expectations in connection with its digital services" (CBC Reply, para. 5).

10 The Forum's procedural request did **not** make arguments about CBC's proposals concerning regulatory expectations. What the Forum said at paragraph 137 of its intervention is that CBC's licensing proposals require the CRTC and Canadians to trust the Corporation to keep its word:

[t]he Forum's concern is that CBC is in effect asking the CRTC and Canadians to be content with fewer hours of Canadian programming on its existing television services, and to trust that it will keep its promises to meet vague goals for its online programming services. It has not said why Canadians should accept less Canadian programming on CBC's conventional television services, and has not offered evidence to show why it is trustworthy. To the contrary: the Forum's analysis of the programming of its English- and French-language flagship conventional television stations found that since 2013 CBC has reduced overall Canadian content, reduced local television programming and not provided any programming for young people.]

11 The information set out by the Forum's 2 September 2020 procedural request sets out evidence available to CBC and the CRTC as of 20 February 2020 which is relevant to the issue of trust and to paragraph 137 of the Forum's intervention: specifically, the evidence shows that 54% of the 82 statements CBC made about the notifications it claims to have broadcast were inaccurate.

12 The CRTC should disregard CBC's misrepresentations of the points made by the Forum and should instead address the matter at the heart of FRPC's procedural request: whether the evidence of

numerous errors in written and signed declarations set out and submitted by CBC to the CRTC to certify the broadcast of notifications about the CRTC hearing process and intervention deadline are relevant to the Corporation's statements in its 2019 licensing application that it wants to 'be a beacon for truth and trust', that it wants to 'earn' the public's trust and that trust is CBC's 'most precious asset'.

B. CBC has not denied the facts alleged by the Forum

13 Section 27(2)(b) of the *CRTC's Rules* require CBC' reply to "admit or deny the facts alleged in the ...the document". The Forum set out facts related to

- 23 errors involving broadcast times, in that the times attested to by the declarations and the times shown by CBC's TV logs differed by 6 minutes (10% of a clock hour) or more
- 2 errors as to broadcast (broadcasts not shown in CBC's TV logs)
- 4 errors as to prematurity, in that CBC said it broadcast announcements of the extended deadline in the CRTC proceeding days before the CRTC announced the deadline extension
- 6 errors arising from the broadcast of two different announcements by the same CBC service on the same date and at the same time, and
- 9 errors involving prematurity of declarations, in that the dates of the attestations precede the dates on which CBC said it had broadcast the notifications.

14 CBC has admitted all of these facts. Specifically, paragraph 4 of its reply acknowledges "discrepancies between the Attestations ... and CBC/Radio-Canada's logs."¹ The remainder of CBC's text in paragraph 4 then describes how some of these discrepancies occurred.²

¹ At para. 4 CBC's Reply states that "The vast majority of the FRPC's concerns are based on discrepancies between the Attestations contained in the report and CBC/Radio-Canada's logs." CBC then explains how these discrepancies occurred – but does not deny their occurrence. CBC does not address any of the other inaccuracies identified by the Forum in its 2 September 2020 letter to the CRTC, thereby failing to deny these facts.

² CBC set out four explanations for its errors: last-minute scheduling changes, end-of-month log reconciliation, its use of estimated rather than actual times, and minor clerical errors.

Last-minute scheduling changes: CBC claimed that of the 23 notifications whose times differ from those in its logs some differences (CBC did not state how many) were due to last-minute changes to the scheduling of breaks. CBC provided no evidence to support its claim. Such evidence might have shown that some or all of the 21 programs in which the declared times of broadcast notifications differed from log times were broadcast live – when last-minute changes might conceivably occur. As it happens, at least 15 of the 21 programs whose notification times differed from log times were pre-recordings with pre-scheduled breaks, including an episode of *Rizzoli & Isles* whose last original episode was aired in English in September 2016; CBC's French-language station CBFT-DT broadcast a notification about the CRTC proceeding in this pre-recorded program on 29 January 2020 at 12:35 am (*i.e.*, after midnight).

End-of-month log reconciliation: CBC also claimed that it could not correctly state the times of its broadcast notifications because it reconciles its logs at the end of the month – that is, before 20 February 2020 when it sent the CRTC its declarations about the broadcast notifications. Presumably this means that the certified dates and log times in January would be accurate (as CBC's logs for January would have been reconciled at the end of that month). Yet the certified and log times for the notifications broadcast by ARTV and Explora matched in February – while the certified and log times for the notifications broadcast by CBLT-DT (CBC English-language conventional television),

15 CBC's reply did not dispute the facts set out by the Forum that

- CBC's own logs *do not confirm* two notifications that it declared that it broadcast
- CBC's declarations certify that it broadcast notifications about the CRTC's extension of the intervention deadline *before* the CRTC itself announced the extension
- CBC certified that its French-language radio and television services as well as three of its French-language discretionary television services *broadcast two different announcements on the same dates and at precisely the same times*, and that
- three of CBC's declarations about broadcasts that had purportedly already been made were signed *before* the dates of those broadcasts.

16 By not disputing any of the facts stated by the Forum about CBC's declarations of broadcast notifications, CBC admits these facts.

C. CBC's grounds for opposing FRPC's request: ignore evidence to ensure finality

17 Section 27(2)(c) of the *CRTC's Rules* require CBC "to state the grounds of objection or opposition, if any, to points raised" by the Forum.

18 CBC appears to set out three grounds for opposing the Forum's procedural request: that the CRTC should ignore CBC's errors as there is no evidence of CBC's non-compliance, that the 2019-379 process requires finality and that the Forum's submission lacks substantive information.

1. *CBC wants CRTC to ignore evidence about declarations' inaccuracies*

19 CBC argues that the CRTC should deny the Forum's procedural request because FRPC has not provided the Commission with evidence of CBC's non-compliance with the CRTC's requirements (CBC Reply, paras. 3 and 4).

20 The Forum's procedural request does not claim that CBC has breached the CRTC's requirements, because we lack the information needed to establish the veracity of such a claim. We therefore instead simply propose to add information about 44 errors in CBC's declarations about 82 notifications it purportedly broadcast to inform Canadians about the CRTC intervention process, to the Forum's intervention.

CBFT-DT (CBC French-language conventional television) and Documentary in January differed 9 times. None of the certified and log times for the notifications broadcast by CBC News Network matched, in either January or February.

Estimated rather than actual times: CBC also said that when "some of the Attestations provided the break in the program rather than the exact timeslot", the Forum incorrectly interpreted this as a discrepancy with the logs and as evidence of non-compliance". In fact, CBC's 20 February 2020 letter to the CRTC stated that it was providing "the signed attestations of times and dates of each broadcast" – not that it was providing signed attestations of approximate times and exact dates of each broadcast.

Minor clerical errors: Finally, CBC said the Forum "noted a few minor clerical errors in the Attestations". In fact the Forum made no statement at all about "minor clerical errors". CBC did not identify which errors were 'minor' and 'clerical', making it impossible to answer its statements.

- 21 **CBC has not denied that it made any of the errors identified by the Forum.** Instead it explained how some of the errors might have occurred without providing any evidence to support its explanations.
- 22 The fact that just over half (44 of 82, or 54%) of CBC's declarations about broadcasts CBC said it made were inaccurate is evidence that is relevant in considering CBC's claim that it wants to ensure that Canadians trust the Corporation. Trust must be based on accountability: Canadians are entitled to know that when CBC provided the Federal communications regulatory authority with an accounting of its fulfilment of the requirement to notify Canadians about the CRTC intervention process, more than half of the declarations about these notifications had errors.
- 23 The Forum respectfully submits that, in light of CBC's failure to deny any of the 44 errors identified by the Forum in connection with CBC's declarations about 82 notifications it broadcast, the Forum's procedural request should be granted.
- 2. CBC wants CRTC to ignore evidence because CBC wants 'finality'**
- 24 CBC also argues that the Commission should deny the Forum's procedural request because "there is a need for finality in the intervention process leading up to the licence renewal hearing in January 2021" (CBC Reply, para. 5).
- 25 The Forum agrees that finality is important as it provides an end to interminable process and establishes predictability.
- 26 That said, denying the admission of relevant evidence – and CBC has not argued that the Forum's evidence is irrelevant and has not denied the facts set out by the Forum – may taint the integrity of the CRTC's process and of the final outcome in this proceeding.
- 27 It should also be pointed out that outside of the Covid-19 pandemic, **the main cause of delay in the current 2019-379 has been CBC**, not interveners such as the Forum. Insofar as the broadcast notifications issue is concerned CBC delayed consideration of this issue when it denied the Forum's 26 February 2020 request for information about its broadcast notifications on 11 March 2020. Had CBC granted its request at that time the Forum would have been able to submit its procedural request within a month of the intervention deadline, rather than now.³ Arguing that the CRTC should deny the Forum's procedural request because CBC wants finality is to blame the victim.
- 28 The Forum notes moreover that other delays in the 2019-379 proceeding were also caused by CBC. CBC's fall 2019 applications envisaged that CBC's digital services would play an important role in the next licence term – but CBC failed to make full disclosure about the finances of these

³ The Forum first asked CBC for the broadcast notifications on 26 February 2020; CBC denied this request on 11 March 2020.

The Forum then asked the CRTC to amend its procedures to add the broadcast notifications information to the public record of the 2019-379 proceeding on 12 March 2020; the CRTC denied this request on 22 July 2020.

The Forum then asked the CRTC for the CBC's broadcast notifications document(s) under the *Access to Information Act* on 23 July 2020; the CRTC provided the information on 21 August 2020. The Forum analyzed the notifications and submitted its procedural request on 2 September 2020.

services until after the 20 February 2020 intervention deadline. On 6 March 2020 it said it would provide additional financial information by 17 April 2020 – and did not. In fact CBC then did not provide the information it had promised to provide in mid-April 2020 until 12 June 2020 – after the CRTC wrote CBC on 6 May 2020 to ask for the information. When the CRTC invited comment on CBC's new information it heard from many interveners, including the Forum, that the information previously withheld but now disclosed by CBC raised significant concerns about CBC's applications.

29 It is true that the Covid-19 pandemic has also led to unexpected delays in this and other CRTC proceedings: it is disingenuous for CBC to conflate the delays caused by a global pandemic with the Forum's request to add relevant but only recently disclosed evidence to the record. And, to the extent that the Commission actually accepts CBC's 'finality' argument, the Forum then assumes that neither the Commission nor CBC will themselves add new information to the record before the 11 January 2020 CRTC hearing now scheduled to consider CBC's licensing applications.

30 The Forum respectfully submits that, in light of CBC's own decision to deny and therefore delay access to its broadcast notification declarations, the Forum's procedural request should be granted.

3. *CBC says that its inaccuracies about broadcast notifications "add nothing substantive" to the record about its digital proposals*

31 Having chosen not to deny the existence of any of the 44 errors regarding its declarations about 82 notifications that CBC purportedly broadcast, CBC then argues that the paragraphs the Forum proposes to add to its 20 February 2020 intervention "would add nothing substantive to the FRPC's argument about CBC/Radio-Canada's proposal for the use of regulatory expectations in connection with its digital services" (CBC Reply, para. 5).

32 To begin, let us agree for the sake of argument that the paragraphs that the Forum would like to add to its intervention have to do with the use of regulatory expectations for CBC's digital services – rather than the degree to which Canadians can trust the Corporation, which is what FRPC actually said.

33 The difference between regulatory expectations and conditions of licence is relevant not only because CBC raised this issue in its applications⁴ but because the current *Broadcasting Act* sets out penalties for breaching the CRTC's regulations or conditions of licence but not for failures to meet the CRTC's expectations or broadcaster's own commitments.⁵ In wanting the CRTC to use 'regulatory expectations' rather than conditions of licence to govern CBC's performance CBC is effectively asking the CRTC for a *carte blanche* during its next licence term.

⁴ See e.g. DM#3720734, CBC, *Supplementary Brief*, at para. 15:

At present, our services on traditional platforms are subject to licensing, with accompanying conditions of licence and expectations, while our digital services are exempt from licensing pursuant to the DMEQ. We believe the current approach should continue until such time as the Broadcasting Act is revised and a new regulatory regime is introduced. ...

⁵ It may be that the CRTC will, at a licensee's next renewal proceeding, set out its concerns about failures to meet its expectations or the broadcaster's own commitments and may then impose conditions of licence, but by then the harm engendered by the failures will have already occurred.

- 34 Suppose that in analyzing CBC's declarations the Forum had merely discovered that two of the weekdays identified by CBC were incorrect, that CBC's TV logs did not confirm two of the broadcast notifications and that CBC neglected to replace the times at which nearly two dozen notifications were scheduled to be broadcast, with their actual broadcast times. We would all probably agree that such errors would be relatively minor and inconsequential to the overall issue of CBC's notifications to Canadians of their opportunity to participate in the CRTC's proceeding.
- 35 These relatively minor and inconsequential errors did happen, but they are not all that happened. Instead, CBC has also admitted – by not denying the facts – that it attested or certified to the CRTC that
- 9 broadcast notifications had been made before the broadcasts actually happened
 - Attested that 4 notifications about the extended (20 February) deadline were broadcast before the CRTC announced the extension, and
 - Attested that 6 notifications about the 20 February deadline were also broadcast by the same services, on the same dates and at the same times as 6 notifications about the 13 February deadline.
- 36 The cumulative effect of these errors, in the Forum's view, is to misinform the CRTC about the manner in which CBC notified the public about the Commission's licensing proceeding. If one accepts that one cannot certify broadcasts as having already occurred before they are actually made, that one cannot broadcast deadlines before the deadlines are actually announced and that one cannot broadcast two announcements at the same time, at least 19 of CBC's notifications may not have been made. Add to these 19 broadcasts the two broadcasts that CBC's logs do not confirm, and a quarter (21, or 25%) of the 82 broadcast notifications claimed by CBC may not have happened at all.
- 37 As the paragraphs proposed for addition to the Forum's intervention establish, it is not the one or two or three sets of minor errors about notifications that CBC purportedly broadcast, but the cumulative weight of six different types of inaccuracies with at least 44 separate and identifiable errors, that raise a substantive issue relevant to the trust that Canadians have in CBC's commitments. CBC has not explained why a 54% rate of error (44 inaccuracies out of 82 statements of broadcast) in its declarations about the notifications it claimed to have broadcast is not a substantive fact when it comes to evaluating the CRTC's decision either to trust the CBC to meet the Commission's unenforceable expectations, or to impose conditions of licence whose breach has legal consequences.
- 38 The Forum respectfully submits that, given CBC's failure to explain why inaccuracies concerning more than half of the declarations it made concerning its broadcast notifications are not substantive, its procedural request should be granted.

II Conclusion

- 39 CBC has misstated and misconstrued the points made by the Forum in its procedural request.
- 40 CBC has not denied any of the facts set out by the Forum's procedural request.

- 41 CBC's grounds for opposing the Forum's procedural request – that the CRTC should ignore relevant and substantive evidence whose disclosure was delayed by CBC, so as to provide CBC with finality – represent an abuse of process.
- 42 The Forum appreciates the CRTC's consideration of its procedural request. Should the CRTC or its staff have any questions, we would be pleased to respond.

We look forward to the Commission's response.

Sincerely yours,



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