



29 October 2020

Claude Doucet
Secretary General
CRTC
Ottawa, ON K1A 0N2

Via GC Key

Dear Secretary General,

Re: *Call for comments on an application by the Canadian Association of Broadcasters requesting regulatory relief for Canadian broadcasters in regard to the COVID-19 pandemic*, Broadcasting Notice of Consultation CRTC 2020-336 (Ottawa, 17 September 2020), https://crtc.gc.ca/eng/archive/2020/2020-336.htm?_ga=2.20536190.73343484.1600965043-1211976415.1582553073 – Reply

- 1 On 13 July 2020 the Canadian Association of Broadcasters (CAB) applied to the CRTC seeking emergency relief, primarily for Canada's private radio and television stations, in light of the Covid-19 crisis.
- 2 The CRTC called for comments on the CAB's application on 17 September 2020, and published 59 interventions, the majority of which were from organizations, associations and broadcasters.
- 3 The Forum for Research and Policy in Communications (FRPC) intervened to support a temporary modification of the CRTC's current approach to broadcast regulation, while noting the general absence of evidence in the CAB's application.
- 4 The following constitutes the Forum's reply to the majority of interveners in the proceeding; in the absence of comment on individual points made by interveners we rely on the submissions made in our 19 October 2020 intervention.
- 5 Part I addresses several general issues regarding the regulatory relief proposal. Part II deals with questions 3, 4, 5, 6 and 7 of the CRTC. Part III addresses the matter of the CRTC's *Digital Media Exemption Order*.

I. General issues

6 This section addresses five general issues that arose with respect to the CAB's application: general agreement on need for some regulatory relief; limitations on CRTC's authority to act; evaluation based on objective criteria rather than 'good' or 'bad' faith; whether broadcasters should be made whole, and whether requirements for evidence represent an administrative 'burden'.

A. General agreement to provide some regulatory relief to private broadcasters

7 Regardless of the details of such relief, nearly all interveners supported some measure of CRTC support for private broadcasters due to the serious impact of the Covid-19 pandemic on broadcasters' capacity to operate.¹

8 While several interveners emphasized that regulatory relief should be limited to private broadcasters, the Forum had proposed that CBC be included in any approach for regulatory support (¶64).

9 If the CRTC includes CBC in any regulatory-support approach, it should take into account the level of public funding provided to the Corporation and the actions taken by CBC with respect to its broadcasting licences in response to the Covid-19 pandemic.

10 Insofar as funding is concerned it is a matter of public record² that, for example, the Federal government on 22 October 2020 proposed supplementary budgetary estimates that included \$33.7 million (reallocated from CBC's capital budget to its operating budget) for the "Covid-19 impact to advertising revenues and operating costs" and \$36.7 million "for broadcasting rights for the[2020] Tokyo Olympics" now rescheduled to mid-2021.³ As for broadcasting performance, CBC has not yet clearly explained why it cancelled local television newscasts in March 2020.

11 The Community Radio Fund of Canada (CRFC) made the point that campus and community radio stations which receive some support through private broadcasters' CCD payments are the sole source of local broadcast information in many communities:

19 For example, during the pandemic, the people of Cortes Island in BC who have no newspaper and no other source of information turned to CKTZ 89.5FM as their only source of information. Due, in part, to CCD funded projects, CKTZ was able

¹ The CAB pointed out that while "[b]roadcasting is a people business", "broadcasters had to quickly pivot to minimize in-station staff [and] enable remote hosting anhttps://www.canada.ca/en/treasury-board-secretariat/services/planned-government-spending/supplementary-estimates/supplementary-estimates-b-2020-21.html announcing ..." (¶18(a)).

² Canada, *Supplementary Estimates (B), 2020-21*, <https://www.canada.ca/en/treasury-board-secretariat/services/planned-government-spending/supplementary-estimates/supplementary-estimates-b-2020-21.html>; see entries under "Canadian Broadcasting Corporation" in "Organization Summary" (CSV, 88KB).

³ "TOKYO ANNOUNCES OLYMPIC TORCH RELAY PLANS FOR 2021" 28 September 2020, <https://www.olympic.org/news/tokyo-announces-olympic-torch-relay-plans-for-2021>.

to hold regular town hall meetings and information sessions interviewing the mayor, health directors. This was the only source of information for the people living on the island at a critical time. While they were in lockdown, they were connected by a community radio station. If, as the CAB predicts, there will be 200 more communities unserved by commercial stations, this is the worst time to be depriving those people of such a critical connection.

- 12 The Forum's intervention noted the absence of evidence in the CAB's application about the amounts to be saved by private broadcasters if they reduced their 2019/20 CCD expenditures. Some broadcasters, such as Westman Radio Ltd. (page 1), reduced their CCD expenditures for in-person events – a reasonable response given social-distancing advice with respect to Covid-19 (though Westman also reduced \$1,000 in expenditures for community radio).
- 13 Appendix 9 of the Forum's intervention noted that total CCD payments amounted to an annual average of \$48.2 million over the five years from 2014 to 2018. In our view any approach adopted by the CRTC should ensure that CCD payments that support campus/community radio stations serving smaller, underserved communities, are neither delayed nor reduced.
- B. CRTC's authority to act is limited by the *Broadcasting Act***
- 14 While nearly all interveners agreed that the CRTC should grant broadcasters some measure of regulatory relief, few interveners commented on the legal form of this relief. As it happens the *Broadcasting Act* limits the CRTC's authority to act to setting regulations to govern all members of a class of broadcaster and imposing conditions on the licences of individual licensees based on their individual circumstances.
- 15 While the CAB's application appears to ask that the CRTC use the same approach for all private broadcasters – in essence, to set regulations – it is actually asking that the CRTC grant flexibility using its power to set conditions of licence. Given Parliament's express requirement that the CRTC consider the circumstances of a licensee before setting a condition of licence, the Commission lacks the power to simply grant all private broadcasters identical relief: its enabling legislation requires that it evaluate evidence from individual licensees about their circumstances and set conditions of licence based on that evidence.
- 16 Parliament's requirement that the CRTC tailor conditions of licence to the circumstances of each licensee is why it has no choice but to disregard arguments that its requests for evidence constitute a burden or that this burden is somehow unfair. (This argument is addressed in more detail in section E, below.)

- 17 Similarly, in the absence of express provisions stating that the CRTC bears a duty to protect the investment or financial interests of Canada’s private broadcasters, such arguments⁴ should be dismissed.
- 18 The CRTC is still required, however, to consider the issue of employment opportunities, Corus’ arguments to the contrary notwithstanding,⁵ because Parliament specifically referred to this issue in its broadcasting policy for Canada.⁶
- C. The ‘good faith / bad faith’ suggestion**
- 19 Several addressed the issue of good / bad faith, suggesting that the CRTC either grant relief to broadcasters operating in good faith or deny relief to broadcasters operating in bad faith.
- 20 Focussing on good or bad faith would require the CRTC to evaluate intention rather than performance. Even if it were possible to devise an objective test to measure good or bad faith or broadcasters’ intentions, the Forum respectfully submits that an approach more in line with the rule of law is to assess broadcasters’ compliance with the *Broadcasting Act*, the CRTC’s regulations and their conditions of licence. After all, this is clearly what Parliament intended when it established sanctions for breaches of the

4 Corus, ¶15:
Respectfully, characterizing CPE as simply “contributions to Canada’s creative and artistic sectors” is antithetical to the interests of private broadcasters who operate on the premise that Canadian programming expenditures represent investments in assets, which can be monetized. In Corus’ case, these investments constitute a significant portion of our total corporate cost structure. Thus, it is imperative for us to be able to make these expenditures with a market-driven focus, undergirded by the principle of ‘quality over quantity.’
[footnotes omitted]
¶133: Finally, to reiterate, this is an urgent, extraordinary situation. We freely acknowledge it is not the Commission’s role to serve the interests of private sector actors. It has a public mandate defined in the Broadcasting Act. However, the Commission has repeatedly recognized over the years that successful Canadian broadcasters are integral to broadcasting policy objectives. This success is very much at risk. Faced with an unprecedented crisis, decisive CRTC action is necessary to prevent an already difficult situation for Canada’s private broadcasters from worsening.

5 Corus, ¶12:
... in relation to CPE, it appears the Commission is placing inordinate weight on a potential loss of “funding [that] directly benefits Canada’s creative and artistic communities” in this process. To our knowledge, the dominant policy rationale for CPE is not the funding of Canada’s creative and artistic communities. Rather, recent regulatory policies and statements have aimed to promote successful, high quality content that entertains and informs Canadian audiences.
CAB, ¶127: “The simple reality is that Canadian private broadcasters should not be expected to bring lost production back. In fact, they can’t. It is as gone as pandemic-induced lost concert ticket sales, unserved restaurant meals, and empty plane seats.”

6 In s. 3(1)(d)(iii) Parliament says that the Canadian broadcasting system should
...
(iii) through ... the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society

CRTC's regulations and the conditions imposed on licences in sections 32(2) and 33 of the Act.

- 21 Rather than considering broadcasters' motivations – the desire to serve communities or the fear of financial loss – the CRTC's mandate and responsibility is to evaluate how broadcasters meet the *Broadcasting Act*, its regulations and their individual conditions of licence.
- 22 Broadcasters that breached these regulatory requirements would be entitled to provide the CRTC with evidence about their programming performance and financial capacity, and to undertake steps to address non-compliance going forward.

D. The 'making broadcasters whole' argument

- 23 A number of private broadcasters opposed the suggestion that they be required to make expenditures in the future to compensate for reduced expenditures in 2019/20 and 2020/21. Some argued that broadcasters' services resemble airline companies or restaurants and that these sectors will not be 'making up' seats not sold or food not eaten in the future.⁷ These arguments were not supported by evidence showing that in these sectors such companies make legal undertakings to provide specified levels of services or goods in any given period, or that compliance with these undertakings is enforced by a regulatory tribunal.
- 24 In reality, nearly every person and nearly every business has suffered because of the unique losses caused when governments attempted to save lives by limiting social exposure to reduce the spread of Covid-19. The challenge for the CRTC is that the *Broadcasting Act* does not provide the CRTC with blanket discretion to ignore non-compliance with its regulations and/or licence conditions when expedient; its duty is to implement Parliament's broadcasting policy for Canada by enforcing such requirements.
- 25 That said, the Forum believes it is reasonable to assume that the majority of private broadcasters will be able, over time, to compensate at least in part for the cancellation of Canadian programs from 2019/20 to 2020/21. We do not argue that every broadcaster must be treated in an identical fashion for the simple reason that broadcasters are not identical. Therefore, to the extent that the CRTC accepts the idea that Canadians are entitled to be made whole in terms of Parliament's broadcasting

⁷ Bell, ¶14:

The simple fact is that most businesses are not going to be able to make up for lost revenues. Broadcasters are not going to be able to make up their lost advertising revenues. Retail stores are not going to be able to make up for lost sales of merchandise. Restaurants are not going to be able to make up for lost meals and drinks. We are faced with a new economic reality and everyone must adjust.

Corus, ¶38:

... Canada's airlines will not be required to make up for the inputs they did not purchase from their suppliers when they had to cancel flights this year. Canada's restaurants will not be required to make up for the inputs they did not purchase from their suppliers when they had to close their doors this year. Canada's broadcasters should not be required to make up for the programs that were not delivered this year.

policy for Canada, we submit that it should focus its attention on large, vertically integrated companies that are far more likely to have the resources to resume and make up cancelled programming than are smaller companies.

E. The 'administrative burden' argument

- 26 Several interveners raised arguments related to their expenditures, often in the context of reporting requirements.
- 27 The Forum notes first that while section 5(2) of the Act says that the CRTC “should” be “sensitive to the administrative burden” of regulation, section 5(3) states that it “shall give primary consideration” to Parliament’s broadcasting policy. Parliament clearly envisaged that the CRTC’s key role is to implement Parliament’s policy – not to stop-gap the business of individual broadcasters: that role falls to the *Income Tax Act* and that, of course, is a very detailed legislative scheme to address matters such as the deductibility of business expenses including administrative expenses from income. Asking the CRTC for relief from administrative expenses that broadcasters may already deduct from their income constitutes a hidden form of double-dipping, something Corus described as an unreasonable windfall.⁸
- 28 Second, if the evidentiary requirements set by the *Broadcasting Act* are factually burdensome, broadcasters may apply at any time to the CRTC (with evidence) to support requests to reduce the amount of information they currently submit. It is noteworthy that while several interveners claimed that providing the CRTC with the evidence required by the *Broadcasting Act* is burdensome only one – Corus – provided actual evidence of the work entailed in reporting to the CRTC and even then did not provide evidence establishing the cost of that work. Yet the fact remains that even if more figures are provided to the CRTC, technological advances have greatly reduced administrative costs by simplifying the collection, collation and publication of such information.
- 29 The Forum’s position is that the evidence gathered by the CRTC in response to requests for regulatory support will enable it to provide that support. It will be difficult for CRTC decisions granting regulatory support to withstand legal challenge if the decisions are not based on evidence, and appeals of such decisions will only lengthen the time that

⁸ Corus, ¶139:

... If broadcasters are required to carry forward obligations for these same production shutdowns, the independent production and creative groups stand to be compensated twice for them. We note the Commission’s second desired outcome in this process is to avoid “unreasonably” impacting any parties who currently benefit from obligations. Surely, it must be considered “unreasonable” to provide a windfall to such parties.

CMPA, meanwhile, said at ¶123 if the CRTC grants

... private broadcasters “relief” from non-compliance with spending obligations in the 2019-2020 broadcast year, it would actually be providing that relief twice over: firstly, by extinguishing any non-compliance with spending obligations in the 2019-2020 broadcast year based on the revenues of 2018-2019 broadcast year and, secondly, because the spending obligations in the 2020-21 broadcast year will already be based on decreased revenues in the 2019-2020 broadcast year due to the COVID-19 pandemic.

broadcasters will have to wait for regulatory support. It would be unreasonable for the CRTC to grant regulatory relief to private broadcasters without additional information (*i.e.* evidence) to support their requirements for such relief.

II. Specific questions

30 This section addresses interests' answers to CRTC questions 3, 4, 5, 6 and 7.

A. Question 3: Exhibition and expenditure requirements

31 The Directors Guild of Canada (DGC) noted at para. 19 the importance of distinguishing between different types and categories of CPE, "whether it is sports, drama or information programming". The Forum agrees that the CRTC should establish expenditure and exhibition requirements, and that drama (including comedy) programming requirements may require more time given the necessity to plan the production of this type of programming (whereas news, information and sports programming are nearly live).

32 In considering expenditure requirements, the Forum's intervention noted (at footnote 1) the general absence of discretionary broadcasting services in CAB's Part 1 application. We were therefore interested to note the comment by the Canadian Cable Systems Alliance (paras. 12-13) that discretionary services' wholesale rates to broadcasting distribution undertakings (BDUs) were increasing, although (due to the pandemic) the value of the programming was diminishing, particularly with respect to live sports. It is unclear whether individual broadcasting distribution undertakings have asked the CRTC to intervene in disagreements over these rates; a policy for 'regulatory relief' should address the concerns of non-vertically integrated BDUs.

B. Question 4: Application of regulatory relief

33 Several interveners (including Rogers, p. 11; Quebecor, para. 37 and Corus, para. 48) recommended that any CRTC regulatory relief be available to all private broadcasters. The absence of clear evidence from individual broadcasters makes it difficult to support this proposal, which in any event appears to contradict the CRTC's basic premise for permitting highly concentrated media ownership – that larger, integrated companies would have the resources to support their weaker components.

34 While every broadcaster should have the same opportunity to make its case for relief to the CRTC, the Forum's position is that smaller broadcasters should be first in line, so to speak, for relief, and that vertically integrated ownership groups must be required to demonstrate the level of support their vertically integrated businesses are providing to their conventional television and radio stations before access to relief is granted.

C. Question 5: Spreading requirements over time

35 The Forum agrees that broadcasters be required to 'reimburse' Canadian programming requirements over several years, as in the case of non-news programming broadcast

over multi-year periods (see Corus, ¶123). We proposed in our intervention (paras 10-11) that, in the absence of clear evidence, the largest broadcasters be required to meet their obligations within current licence terms, but that smaller broadcasters be granted more time. (Other parties have proposed shorter periods; our concern is that insufficient evidence is available to enable a specific period to be determined. Similarly the Forum does not support Rogers' proposal at p. 11 for five years because evidence to support the proposal is currently unavailable.)

- 36 Colin Clarke, however, asked the CRTC to consider setting requirements that directly support Canadian performing artists:

My name is Colin Clarke. I am a freelance classical musician and chiefly work as conductor for multiple orchestras in and around the Greater Toronto Area, including the Toronto Youth Wind Orchestra. I can attest firsthand to the devastating effects of COVID-19 on the Canadian music scene. I believe that these broadcast companies should be required to honour in full their contractual financial obligations to Canadian music. If it is deemed necessary by the CRTC that those obligations be fulfilled over a longer period of time in order to provide broadcasters with some relief, I think that would be acceptable, but only if the receiving parties get least half of their funding immediately. Canadian music is in real jeopardy, and this inaction has only made that jeopardy worse.

- 37 The Forum agrees with this suggestion (along with the CRFC proposal to ensure that campus and community radio stations be provided with their portion of CCD funding).

D. Question 6: Other regulatory relief

- 38 Telus suggested that BDUs' community channels be granted similar regulatory flexibility and relief (paras 17-18). Where the revenues of private radio and television stations come primarily from the sale of advertising time, BDUs' revenue comes from subscriber fees and has been more stable. The stability of BDUs' income during the pandemic does not support the argument that BDUs need regulatory relief to maintain their provision of a community channel.

E. Question 7: Reporting requirements

- 39 Several broadcasters proposed that if the CRTC requires information about the impact of the Covid-19 pandemic on their operations, that information should be provided on a confidential basis.
- 40 The Forum does not support the granting of confidentiality, except for broadcasters that are reporting on one or two stations whose competitive position might well be harmed by disclosure. As for all other broadcasters, the CRTC has published aggregated financial summaries for a number of larger groups since the late 2000s without clear negative results. To the contrary: the publication of such information has provided for more detailed and informed comments in the CRTC's proceedings.

- 41 As for program logs, the Open Government portal currently makes broadcasters' television logs available to the public but does not do the same for radio logs. The Forum supports the publication of broadcasters' radio logs, but notes that subsection 8(4) of the *Radio Regulations, 1987* would require the CRTC to request radio logs for hundreds of radio stations:

A licensee shall furnish, to the Commission on request, its program log or record for any day, with a certificate signed by or on behalf of the licensee attesting to the accuracy of its content.

[underlining added]

III. *The Digital Media Exemption Order: only Cabinet can fix this problem*

- 42 The CRTC's *Digital Media Exemption Order (DMEO)* that has for all intents and purposes governed online broadcasting services since 17 December 1999⁹ was raised in this process¹⁰ with the recommendation that the CRTC revise or rescind the order.
- 43 The *Broadcasting Act* currently states that the CRTC "shall" exempt broadcasting services from regulatory requirements if it is satisfied that the services could materially support Canadian programming. When the CRTC exempted Internet-based broadcasting services from regulation in 1999, such services could not materially support Canadian programming.
- 44 This factual foundation for the *DMEO* no longer exists, however, as evidenced by the 2017 negotiated arrangement between Mélanie Jolie, then Minister of Canadian Heritage, and US-based Netflix. It agreed to establish a Canadian branch and to invest \$500 million over 5 years:

The deal with Netflix sets up a Canadian branch of operations for the company and commits Netflix to investing \$500 million over five years in original productions in Canada. The deal, agreed to under the Investment Act, means, among other things, that if Netflix doesn't live up to its side of the bargain, the government could impose fines.¹¹

⁹ *Broadcasting Act*, s. 9(4):

The Commission **shall**, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

[bold font added]

¹⁰ Unifor, at ¶15.

¹¹ Canadian Press, "Netflix to invest in Canadian programs as part of feds' new cultural plan " [ctvnews.ca](https://www.ctvnews.ca/entertainment/netflix-to-invest-in-canadian-programs-as-part-of-feds-new-cultural-plan-1.3609603), (27 September 2017), <https://www.ctvnews.ca/entertainment/netflix-to-invest-in-canadian-programs-as-part-of-feds-new-cultural-plan-1.3609603>.

- 45 The insurmountable problem with the *DMEO* is that if the CRTC rescinds the *Order*, it will remain unable to regulate foreign streaming services because of Cabinet's 1997 *Direction to the CRTC (Ineligibility of Non-Canadians)*:
- 2 The Canadian Radio-television and Telecommunications Commission is hereby directed that no broadcasting licence may be issued, and no amendments or renewals thereof may be granted, to an applicant that is a non-Canadian.¹²
- 46 The *Direction* means that even if the CRTC were to rescind the *Digital Media Exemption Order* today, it would effectively force itself to regulate Canadian streaming services without being able to regulate foreign streaming services.
- 47 Ignoring the growing impact of non-Canadian streaming services on the financial position of Canada's broadcasters and the capacity of non-Canadian streaming services to support the exhibition of and expenditure on Canadian programming brings Parliament's administration of the *Broadcasting Act* into disrepute. The effect of the *Direction* is to mock the existence of Parliament's broadcasting policy by pretending that, for the purposes of the *Broadcasting Act*, Netflix and its peers do not actually exist.
- 48 Interested parties should therefore ask the Governor in Council (Cabinet)
- 1 to revise the *Direction* to enable the CRTC to authorize the operation in Canada of non-Canadian Internet-based broadcasting services, and
 - 2 to direct the CRTC to review the *Digital Media Exemption Order*.

The Forum has appreciated the opportunity to review and comment on other interveners' submissions in this important proceeding, and looks forward to the CRTC's determinations.

Sincerely yours,



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¹² SOR/97-192, <https://laws.justice.gc.ca/eng/regulations/SOR-97-192/index.html>.