



April 27, 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 2010-783 – Review of the regulatory framework relating to vertical integration

The Writers Guild of Canada (the “WGC”) welcomes the opportunity to provide the attached comments regarding the above-mentioned consultation.

The WGC requests the opportunity to appear at the Public Hearing scheduled to commence on June 20, 2011 to elaborate on our views expressed in the attached submission. We reiterate our request, included in the attached submission, for a reply phase to this hearing to allow stakeholders the opportunity to respond to submissions and proposed solutions prior to the Public Hearing.

Sincerely,

A handwritten signature in black ink, appearing to read 'Maureen Parker'.

Maureen Parker
Executive Director

I. Introduction

1. The Commission issued *Review of the regulatory framework relating to vertical integration*, Broadcasting Notice of Consultation CRTC 2010-783, 22 October 2010, as amended, (BNC 2010-783) in order to consider possible regulatory changes which may be appropriate in light of the increasing vertical integration of the Canadian broadcasting system.
2. The Writers Guild of Canada (the WGC) is the national association representing over 2000 professional screenwriters working in English-language film, television, radio and digital media production in Canada. The WGC is actively involved in advocating for a strong and vibrant Canadian broadcasting system containing high quality Canadian programming.
3. The WGC notes that, on its face, BNC 2010-783 is solely concerned with regulatory measures which would be applicable to undertakings licensed under the *Broadcasting Act*. In particular, the terms of BNC 2010-783 suggest that the Commission is not considering measures which would be applicable to exempt mobile wireless or Internet-based undertakings. The WGC has focused its comments accordingly.
4. In BNC 2010-783 the Commission has identified several major issues for comment. In light of its mandate, the WGC is restricting its comments to four of the issues raised by the Commission:
 - i) whether exclusivity should be permitted with respect to the distribution of programming;
 - ii) what specific measures, if any, should be contemplated to take into account the particular situation of smaller independent broadcasting services;

iii) whether the financial information for individual specialty services should be entitled to confidentiality protection; and

iv) whether the benefits test for changes in control or transfers of ownership of distribution undertakings should be reinstated.

5. In brief, the WGC submits that:

i) the Commission should formally adopt its stated preference for non-exclusive distribution arrangements and thereby maximize the windows for Canadian programming;

ii) in order to preserve a diversity of voices the Commission should adopt focused measures to ensure equitable access to distribution platforms by smaller independent broadcasters;

iii) the benefits of open and transparent regulation outweigh any possible harm to specific services from the disclosure of financial information and, consequently, the confidentiality protections for licensed services should be made narrower, not broader; and

iv) the benefits test for changes in control or transfers of ownership of distribution undertakings should be reinstated.

6. The WGC expands on each of these points in the following sections.

II. Exclusivity

7. In an unregulated environment a supplier and a distributor can make exclusive arrangements unless it can be shown that there would be significant anti-competitive effects which would render the arrangements contrary to the *Competition Act*. The sole consideration in such circumstances is the proper functioning of the market.

8. In contrast, the *Broadcasting Act* requires the Commission to take into
WGC Submission to the CRTC re Vertical Integration – CRTC 2010-783

account numerous policy objectives when assessing the effects and desirability of exclusive arrangements. In particular, the Commission must ensure that a diversity of programming is available to all Canadians:

(i) the programming provided by the Canadian broadcasting system should

- (i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,
- (ii) be drawn from local, regional, national and international sources,
- (iii) include educational and community programs,
- (iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and
- (v) include a significant contribution from the Canadian independent production sector;

(k) a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available;¹

9. In the WGC's view, one of the simplest and most direct ways of ensuring that all Canadians enjoy a full diversity of programming is by prohibiting exclusive arrangements. In the absence of such a prohibition a vertically integrated broadcaster could wall off its programming content - granting access only to subscribers of an affiliated distribution platform. The exclusion of all other Canadians from access to such programming would run directly contrary to the objectives cited above.
10. The WGC also notes that by prohibiting exclusive arrangements the Commission would provide the widest possible window for Canadian programming. This would promote the visibility of that programming and thereby support the Canadian creative community - to the overall benefit of Canadian culture and the Canadian broadcasting system.

¹ *Broadcasting Act* section 3(1)(i) and (k).

11. A third factor weighing against exclusive arrangements is the greater opportunity for independent producers to licence their programming to multiple windows and platforms if non-exclusivity is the rule. Additional windows implies additional revenue support for independent producers - another important policy objective under the *Broadcasting Act*.²

12. Finally, Canadian television programming is supported either directly or indirectly by public monies (i.e., by grants from production funds or via tax credits or both). In these circumstances, the public that ultimately paid, in part, for the programming should not be denied access to that programming because of exclusive arrangements.

13. In sum, the WGC submits that any economic advantage which might accrue to vertically integrated broadcasters from exclusive arrangements is more than out-weighed by the policy benefits which would result if exclusive arrangements were prohibited. Consequently, the Commission should formalize its stated preference for non-exclusive arrangements and establish a binding regulatory measure to put this requirement into effect.

III. Preserving Small Broadcasters

14. It is critical to the social, cultural and political vibrancy of Canada that there be a diversity of voices in the Canadian broadcasting system. The consolidation and vertical integration of the Canadian industry threatens this diversity of voices. Consequently, it is essential that the Commission take steps to ensure that there continues to be a place for independent

² Section 3(1)(i)(v) of the Act states that the programming delivered over the Canadian broadcasting system should include "a significant contribution from the Canadian independent production sector".

broadcasters in the system.

15. The WGC would like to emphasize that it is not enough that independent broadcasters merely survive. Weakened broadcasters cannot contribute in the way they should to the system; and they cannot possibly provide the significant amount of high-quality, diverse programming that is required if Canadian culture and society are to be rich and vibrant. Independent broadcasters must be able to thrive within the Canadian broadcasting system just as the vertically integrated broadcasters are thriving.
16. If this type of balanced, vibrant industry is to be a realistic possibility, regulatory measures must be put in place to counter-balance the inequality of bargaining power that exists between independent broadcasters and the distribution arms of vertically integrated broadcasters. There must also be regulatory measures which directly address the conflict of interest which exists whereby a vertically integrated entity has an incentive to favour its own broadcasting services over unaffiliated services.
17. It is the WGC's understanding that independent broadcasters - either individually or in groups - will be proposing regulatory measures to promote their distribution on equitable terms. Rather than increase the number of proposals at this point in time, the WGC intends to provide its views on specific proposals in the next stage of this process. In this regard, the WGC believes it would be helpful if there were a written reply stage before the oral hearing in June. These reply submissions could help clarify and focus the issues before the Commission. In any event, the WGC will address this issue further at the oral hearing.

IV. The Need for Open and Transparent Regulation

18. It is a basic principle of good regulation that it be open and transparent to the maximum extent possible so as to enable meaningful public participation, ensure public confidence in the decision making process and enhance the comprehensibility of regulatory decisions.

19. The need for maximum disclosure of information in a regulatory setting was emphasized in *Smart Regulation: A Regulatory Strategy for Canada*, an expert report prepared for the Federal Government in 2004:

In order to facilitate citizen involvement, the Committee believes that the public should have all the information it needs during the consultation process, including the supporting rationales, the technical or scientific information, the analyses performed, the costs and benefits, the trade-offs considered, the risk assessment, the potential impacts and consequences, and the alternatives considered. The public needs to know which problems the government is paying attention to and what drives the government in solving those problems.³

20. In the context of broadcasting regulation, an open and transparent process means that the financial information of programming services should be made public to the maximum extent possible. This would enable thorough public analysis of licensees' contribution to the broadcasting system, as well as a critical analysis of any claims of financial constraints made by licensees.

21. In this context, the WGC believes it is important to emphasize that a broadcasting license is a privilege, not a right. Anyone who applies for and is granted a broadcasting licence must accept the associated obligations, including those related to disclosure of information. Consequently, claims of

³ *Smart Regulation: A Regulatory Strategy for Canada* (2004) at page 55
WGC Submission to the CRTC re Vertical Integration – CRTC 2010-783

commercial confidentiality should have limited weight. The Canadian broadcasting system provides programming services with a sheltered business environment. The *quid pro quo* for that protection should be, among other things, that claims about the ability of licensees to contribute to the system should be open to full public scrutiny.

22. On this final point, the WGC would note the serious limitations on public comment which resulted from the confidentiality protections afforded the vertically integrated broadcasters in the recent group licensing proceeding.⁴ It was simply impossible for the WGC or other members of the public to provide the Commission with full, informed comments when the relevant financial data was incomplete, inconsistent, inaccurate or completely unavailable and dealt with *in camera*. This type of regulation cannot possibly be considered open or transparent.

23. In light of the above, the WGC submits that the existing confidential protections should not be broadened - as suggested in BNC 2010-783 - but, rather, those protections should be narrowed. In particular, all licensed services - whether independent or part of a vertically integrated organization - should be required to disclose sufficient financial information to permit meaningful public participation in the Commission's regulatory processes.

V. Reinstating the Benefits Test

24. As noted in BNC 2010-783, the Commission eliminated the benefits test for distribution undertakings in 1996 on the grounds that the introduction of an open entry system removed the "underlying rationale" for the benefits test. The WGC respectfully submits that in the current broadcasting environment

4 BNC 2010-952

WGC Submission to the CRTC re Vertical Integration – CRTC 2010-783

where vertically integrated companies dominate the system and "open entry" is, for the most part, a theoretical concept the Commission's 1996 reasoning is no longer valid.

25. The fact is that the acquisition of an existing BDU by another (or any other transfer of ownership or control) takes place in a constrained market where five companies - Bell, Cogeco, Rogers, Shaw and Videotron - control 89% of the BDU market⁵ and the opportunity for significant "new entry" is limited to the multi-billion dollar telephone companies such as Telus and MTS Allstream which already have wireline networks in place.⁶ In these circumstances, the theoretical possibility of "new entry" cannot possibly counter-balance the significance of the sale of an existing BDU from a policy perspective.

26. As noted above, a broadcasting licence is a privilege. It is not a form of personal property that can be bought or sold at the whim of the licensee. Consequently, a party wishing to transfer a BDU licence should be required to demonstrate that the system will benefit if the proposed transaction is completed. Otherwise, there would be no basis for permitting the transaction to take place. Instead, a call for applications to provide the licensed service would be appropriate so as to ensure that the best possible arrangement for the system is achieved.

27. Finally, it is important to recognize the ongoing significance of many of the benefits established pursuant to broadcasting transactions. The Maclean Hunter Television Fund was established in 1991 pursuant to the benefits

5 *CRTC Communications Monitoring Report* July 2010, Executive Summary at p. ii.

6 The WGC notes that while it is still possible for developers to operate as BDUs in one or more multi-unit residential buildings, these activities constitute a negligible part of the overall broadcasting system and cannot possibly justify the continued elimination of the benefits test. WGC Submission to the CRTC re Vertical Integration – CRTC 2010-783

package resulting from the transfer of Selkirk Broadcasting to Maclean Hunter Cable⁷ and is still going strong as the Independent Production Fund. The contribution of this one fund to the Canadian broadcasting system - supporting 229 drama series over the last twenty years - has been remarkable. These types of benefits packages can enrich the system for decades.

28. In the absence of a regulatory shift to issuing a call for applications whenever the owner of a BDU wishes to exit the business (or otherwise alter the ownership arrangements), the WGC submits that the benefits test should be reinstated.

VI. Conclusion

29. In conclusion, the WGC submits that:

i) the Commission should formally adopt its stated preference for non-exclusive distribution arrangements and thereby maximize the windows for Canadian programming;

ii) in order to preserve a diversity of voices the Commission should adopt focused measures to ensure equitable access to distribution platforms by smaller independent broadcasters;

iii) the benefits of open and transparent regulation outweigh any possible harm to specific licensed services from the disclosure of financial information and, consequently, the confidentiality protections should be made narrower, not broader; and

iv) the benefits test for changes in control or transfers of ownership of distribution undertakings should be reinstated.

⁷ CRTC 89-766

30. The WGC appreciates the opportunity to provide the Commission with these comments and would be pleased to expand upon them at the upcoming oral hearing.

31. All of which is respectfully submitted.

-- end of document --