

CANADIAN COMPETITION RECORD

REGULATORY AND TRADE DEVELOPMENTS

CRTC APPROVES BCE'S ACQUISITION OF CTV

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On December 7, 2000, the Canadian Radio-Television and Telecommunications Commission (the "Commission") issued its decision approving the acquisition of the CTV Inc. ("CTV") private English-language television network by BCE Inc. ("BCE"). In its decision, the Commission describes this transaction as "one of the largest to come before the Commission for its consideration" and "of considerable significance to the Canadian broadcasting system".¹ A summary of this transaction and of the Commission's decision is provided below.

The BCE-CTV Application

On June 12, 2000, BCE filed an application on behalf of CTV for authority to effect a change in ownership of the licensed broadcasting undertakings held by CTV. These undertakings include a 100% interest in CTV Television Inc., the licensee of several conventional television stations across the country, and interests in a large number of licensed pay and specialty television channels including, among others, The Sports Network (TSN), Le Réseau des sports (RDS), The Discovery Channel, The Comedy Network, CTV NewsNet and Outdoor Life.

In order to gain the Commission's approval for this transaction, BCE was required to provide a benefits

package "that will yield measurable improvements to the communities served by the broadcasting undertaking and to the Canadian broadcasting system".² More specifically, it was required to "make commitments to clear and unequivocal tangible benefits representing a financial contribution of 10% of the value of the transaction as accepted by the Commission".³

To satisfy this requirement, BCE's application proposed a benefits package consisting of \$230 million in expenditures over seven years. This amount included expenditures of \$140 million which will result in a minimum of 175 hours of new priority programming.⁴ In addition, BCE proposed to invest \$72.6 million in non-priority programming (e.g. news and information programming) and \$17.4 million for Canadian talent development. This benefits package is described in the BCE application as "the largest such package ever filed with the CRTC".

The Commission's Decision

On December 7, 2000, the Commission issued its reasons for approving the transfer of effective control of CTV to BCE. In granting its approval, the Commission identified three broad areas of concern arising from this transaction: (1) the potential for a reduction in the diversity of editorial voices arising from media cross-ownership; (2) the potential for anti-competitive practices; and (3) the adequacy of BCE's benefits package.

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Diversity of Editorial Voices

Regarding the potential for a reduction in the diversity of editorial voices, the Commission stated that it would consider this question in the context of the public hearings, scheduled for the spring of 2001, on the renewal of the television licenses held by CTV and CanWest Global. In addition, the Commission referred to the recent proceedings involving the renewal of the television network license issued to TQS Inc. following the TQS acquisition by Quebecor. In this case, the Commission imposed various safeguards as conditions of license including, for example, a requirement that TQS adhere to a code of professional conduct ensuring the independence and separation of the newsroom of TQS from those of Quebecor's newspapers. This reference may be interpreted as an indication that the Commission is considering similar conditions in the context of the upcoming CTV license renewal decision.

Possible Anti-Competitive Practices

With respect to possible anti-competitive practices, the Commission noted that the interveners had expressed concern about four types of possible anti-competitive practices. First it was suggested that the bundling of complementary services, such as telephone, Internet access, programming and multi-media content, could provide BCE with an unfair advantage over its competitors.

The Commission responded by noting that services bundling by dominant carriers is already subject to other regulatory measures, and that incumbent telephone companies are currently required to unbundle essential services and/or obtain the Commission's approval before marketing bundled services. For example, the Commission noted that rules are currently in place to require prior approval and application of an imputation test in the case of any bundle of services that includes

a tariffed telecommunications service. An imputation test addresses potential anti-competitive low pricing by obliging a dominant telecommunications carrier to impute (identify) its incremental cost for each service carried within a bundle containing a tariffed service.

Thus, if BCE were to bundle its Bell ExpressVu service with a tariffed telecommunications service, the Commission noted that the telecommunications components of such a package would have to satisfy the imputation test and would require the Commission's prior approval. Furthermore, if BCE were to bundle broadcasting services with a forborne telecommunications service (e.g. basic long distance or retail end-user Internet services), anti-competitive behaviour could still be addressed under sections 24 and 27(2) of the *Telecommunications Act* which continued to provide a broad discretion to the Commission to prevent anti-competitive behaviour. Similarly, any anti-competitive practices associated with the bundling of broadcasting distribution services could be addressed under the undue preference provision already established by the Distribution Undertaking Regulations made under the *Broadcasting Act*.⁵

Second, CanWest Global suggested that BCE's ownership of CTV and its interest in a variety of specialty services might give BCE sufficient purchasing power to seriously destabilize the market for Canadian rights to non-Canadian programming. In particular, CanWest Global mentioned the possibility that BCE-CTV could purchase non-Canadian programming with the primary intention of denying access to it by other Canadian broadcasters.

The Commission agreed with CanWest Global and noted that such an occurrence could be detrimental to the Canadian broadcasting system. Therefore, the Commission stated that it "places particular importance on BCE's firm commitment not to engage in such

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potentially anti-competitive behaviour” and “expects BCE to adhere to this commitment”.

Third, CanWest Global raised a further concern regarding the possibility that BCE or its affiliates could discriminate against unaffiliated Canadian content providers through the manner in which content is delivered or accessed on Sympatico/Lycos, or other new media platforms owned by BCE. To deal with this concern, CanWest Global requested that the Commission prohibit BCE, as operator of the Sympatico/Lycos Internet portal, from discriminating against unaffiliated Canadian content providers.

Here the Commission disagreed with CanWest Global. The Commission concluded that it would be difficult, if not impracticable, to implement and monitor the prohibition proposed by CanWest Global. Moreover, the Commission noted that, in its recent policy framework concerning new media, it held that there was no present basis for concern regarding the visibility of Canadian content on the Internet, and thus no present basis for regulatory measures to support access to content aggregators on the Internet. The Commission therefore concluded that it would be inappropriate to impose any specific requirement concerning BCE's operation of its Sympatico/Lycos Internet portal.

Finally, some interveners also expressed concerns about the holdings BCE would have in both specialty programming undertakings and distribution undertakings following its acquisition of CTV. In particular, the possibility that BCE might restrict access by competitors to the various distribution platforms it controls (gatekeeping) or extend access to such competitors on disadvantageous terms relative to those applied to its own services (undue preference), was considered.

The Commission noted that similar concerns had been expressed, and dealt with, in the context of the 1999

license application filed by Canal Évasion (which is controlled by a BCE subsidiary). In this decision, the Commission reasoned that, while BCE's other subsidiary, Bell ExpressVu, had access to a very large potential subscribership across Canada, the actual number of its basic subscribers was then quite small (in the neighbourhood of 150,000), and that it therefore did not occupy a dominant position in the distribution market. Accordingly, the Commission concluded that the concerns expressed about the participation of a distributor in the ownership of specialty program services were sufficiently mitigated.

In the present case, the Commission adopted the same approach. According to the Commission, even though the number of Bell ExpressVu's basic subscribers has reached approximately 570,000 (5% of all broadcasting distribution undertakings subscribers), Bell ExpressVu remained a non-dominant player in the broadcasting distribution market. This continuing non-dominant position, and the undue preference regime provided in the regulations made under the *Broadcasting Act* (see above), were viewed as sufficient to mitigate the concerns expressed about gatekeeping and undue preference.⁶

The Benefits Package

As noted above, BCE's application on behalf of CTV contains a package of tangible benefits consisting of \$230 million in expenditures over seven years. According to the Commission, this benefits package is sufficient to satisfy the requirement that BCE make commitments to “clear and unequivocal tangible benefits representing a financial contribution of 10% of the value of the transaction”.

In applying this benefits test, the Commission emphasized the need to ensure that the expenditures proposed as benefits be truly incremental, i.e. that they be directed to projects and initiatives that would not be

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undertaken or realized in the absence of the transaction. Also, the Commission noted the importance of ensuring that the expenditures proposed as benefits flow predominantly to third parties, such as independent producers.

Generally, applicants tend to satisfy these requirements by allocating sizeable portions of their proposed benefits packages to independent production funds. BCE, however, proposed to direct more than 90% of its benefits package to new television program production, most of it to be funded by the applicant through a combination of license fees, equity investments and distribution advances. The resulting programs would be broadcast on the CTV television network.

This approach was characterized by the Commission as “daring and not without risk”. However, the Commission decided that this approach should be supported in view of “the worthwhile nature of CTV Inc.’s objectives, the commitment and experience of its management team, and the broad acceptance of the plan expressed in interventions filed by representatives of Canada’s independent production community”. At the same time, the Commission imposed certain conditions, such as a requirement that all expenditures proposed as benefits be truly incremental, and that they flow predominantly to third parties, such as independent producers. BCE will also be required to adhere to a strict annual reporting regime to demonstrate the incremental nature of the benefits program.

Notes

¹ *Transfer of effective control of CTV Inc. to BCE Inc.*, Decision CRTC 2000-747 (the “Decision”).

² This requirement is outlined in *Elements Assessed by the Commission in Considering Applications for the Transfer of Ownership or Control of Broadcasting Undertakings*, Public Notice CRTC 1989-109. This policy was later amended in *Application of the Benefits Test at the Time of Transfers of*

Ownership or Control of Broadcasting Undertakings, Public Notice CRTC 1993-68.

³ *Building on Success – A Policy Framework for Canadian Television*, Public Notice CRTC 1999-97.

⁴ In Public Notice CRTC 1999-97, the Commission states that the following types of programs are priority programs: (1) Canadian drama programs; (2) Canadian music and dance, and variety programs; (3) Canadian long-form documentary programs; (4) Canadian regionally produced programs in all categories other than news and information and sports; and (5) Canadian entertainment magazine programs.

⁵ At the hearing, the Canadian Film and Television Production Association (“CFTPA”) also invited CTV, under its new ownership, to work with the CFTPA to develop a “Terms of Trade” agreement, similar to that being established between the CFTPA and the CBC. Of particular concern to the CFTPA was the possible bundling of Internet rights with broadcast rights by broadcasters having multiple platforms. The Commission expects CTV to enter into discussions with the CFTPA to address this issue, and requires it to report on progress in this area at the time of the group 2001 renewal proceeding.

⁶ This being said, the Commission still required BCE to develop and implement a code of conduct applicable to BCE’s broadcasting distribution undertakings. This code will govern such matters as the distribution, packaging and pricing of specialty services. Also, it should be noted that the Commission’s decision requires BCE to ensure that all future affiliation contracts between its broadcasting distribution undertakings and program suppliers contain provisions ensuring that all such suppliers are treated equally and equitably, and grant reciprocal rights to third-party audits of such contracts (“most favoured nation” provisions).

CRTC APPROVES NEW DIGITAL SPECIALTY CHANNELS

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On December 14, 2000, the Canadian Radio-Television and Telecommunications Commission (the “Commission”) issued its reasons with respect to the approval of new digital specialty television services, pay-per-view services and video-on-demand services.¹ With this decision, the Commission completed a process

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that began in February 1999, when it called for comments on the most appropriate framework for the consideration of new pay and specialty applications. A summary of this process is provided below.

Background

On February 3, 1999, the Commission issued a public notice calling for comments on the development of an appropriate licensing framework to be used in the consideration of applications for new pay and specialty services.² This call for comments was issued in the context of the Commission's recognition, in 1997 and 1998, that the level of interest for new pay and specialty service licenses was increasing (over 70 applications were received by the Commission in 1997) and, at the same time, that the availability of vacant analog channels on cable systems outside Quebec was becoming increasingly limited. Furthermore, the Commission indicated that it was concerned about the slow pace of digital cable technology, which was perceived by the Commission as a possible solution to the problem of scarcity of analog channels.

Some of the specific issues raised in this call for comments included the following:

- whether digital or analog licensing would be more appropriate;
- the extent to which the access rules should apply to any new services that may be licensed;
- the appropriate carriage status for any new services that may be licensed; and
- tiering, packaging and linkage rules that might be applied to any new services that may be licensed.

In addition, the call for comments requested comments on the possible licensing criteria that would be appropriate in any consideration of applications for new pay and specialty services. Some criteria, such as the

ability of new services to contribute to broadcasting policy objectives, were provided as examples in the public notice.

In light of the limited availability of analog channel capacity, most submissions received by the Commission emphasized that new services should be licensed on a digital basis. There was also general agreement among the parties that new Canadian services that launch on a digital basis at this time will face financial risk. In particular, a number of parties stated that, in their opinion, the initial subscriber base for these services would be limited and the rate at which the subscriber base would grow is uncertain.

In order to ensure the long-term profitability of new pay and specialty digital services, the programming sector emphasized the need for regulatory support, including carriage rights and rules to ensure that new services are sold in packages rather than on a stand-alone basis. In this regard, most programmers supported the continuation of the Commission's traditional licensing and regulatory approach. Distributors, on the other hand, generally stated that the Commission should strive to maximize the benefits of digital distribution, including increased customer choice in the selection of services. In particular, distributors generally favoured a more open-entry, market-based approach to the licensing and eventual launch of new services.

In response to the above-mentioned submissions, the Commission issued two further public notices on January 13, 2000 and February 4, 2000. The January 13, 2000 public notice outlined the general licensing framework policy to be followed by the Commission in licensing new digital pay and specialty services.³ According to the Commission, the purpose of this licensing framework is to:

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- make possible the provision of a diverse selection of attractive new Canadian programming services to be distributed to Canadian viewers with digital technology;
- facilitate the rollout of digital distribution technology;
- provide a balance between the traditional licensing approach and a more open-entry, competitive environment made possible by the expansion of digital capacity; and
- promote alliances between Canadian and foreign services.

The licensing framework outlined by the Commission sets out two basic categories of licenses for new digital pay and specialty services. The first category ("Category 1") was described by the Commission as including a limited number of specialty services which, according to the Commission, "make a strong contribution to the development, diversity and distribution of Canadian programming and are the most attractive services for early digital distribution". In order to assess an applicant's "contribution to Canadian programming", the licensing framework established Canadian content exhibition criteria. The Commission also indicated that the licenses would be issued for seven years and on a one-per-genre basis. Finally, in order to make Category 1 services available to the maximum possible number of digital subscribers (and minimize the financial risk resulting from the introduction of such services), the Commission stated that distributors using digital technology would be required to distribute all Category 1 services appropriate to their market on a digital basis.

The second category ("Category 2") was described as including an unlimited number of services that meet basic licensing criteria and are not directly competitive with any existing pay or specialty, or Category 1 services. These basic licensing criteria include

compliance with the Commission's ownership policies, eligibility requirements and Canadian content exhibition requirements.⁴ These services may be competitive with one another and, contrary to Category 1 services, are not assured of access to the distributors' digital network.

In recognition of the key role of distributors in launching new digital services, the Commission announced that it would consider applications for distributor-affiliated Category 1 and Category 2 services. As part of the licensing framework, the Commission established specific carriage terms for the new services, including measures to ensure equitable terms of carriage for services that are not affiliated with distributors.

The February 4, 2000 public notice called for applications for licenses to operate such services in accordance with the licensing framework outlined in the January 13, 2000 public notice.⁵ This call for applications also stated the Commission's intention to consider at the same time applications for new video-on-demand ("VOD") and digital pay-per-view ("PPV") services.

In response to the call for applications, the Commission received 452 applications for new digital services, including 91 applications for new Category 1 services, 355 applications for new Category 2 services, 4 applications for VOD services, and 2 applications for PPV services.⁶ These applications were considered at a three week public hearing which began on August 14, 2000.

The Commission's Decisions

On November 24, 2000, the Commission issued a news release stating that it was forced to take "responsible action in reply to an unfortunate and inappropriate disclosure to the media regarding the issuing of licenses for the new digital pay and specialty television undertakings". In order to deal with concerns "about

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the potential impact on the financial markets of the publicly traded companies affected”, the Commission decided to release the list of the approved applications for Category 1, Category 2, VOD and PPV services.

The Commission awarded 21 Category 1 licenses: 16 in English and 5 in French⁷. The list of Category 1 applications approved by the Commission is as follows: 13th Street (Global, TVA, Rogers); The Biography Channel (Rogers, Shaw, A&E); BookTelevision: The Channel (Learning and Skills Television of Alberta); The Canadian Documentary Channel (Corus, CBC, NFB, 4 other independent producers); Connect (Craig); FashionTelevision: The Channel (CHUM); Health Network Canada (Alliance Atlantis, WebMD); Independent Film Channel Canada (Salter Street, Triptych Media); Issues Channel (Stornoway, Cogeco); Land & Sea (Corus, CBC); Men TV (TVA, Global); PrideVision (Levfam, Alliance Atlantis); TechTV Canada (formerly ZDTV Canada) (Rogers, Shaw, techTV (formerly ZDTV)); Travel TV (BCE Media, CTV, TVA); Wisdom: Mind, Body and Soul Channel (Vision TV, Radio Nord, Wisdom Media Group); Women's Sports Network (TSN); 13ième rue (TVA, Global, Rogers); LCN Affaires (TVA, Publications Transcontinental, BCE); Le Réseau Info Sport (RDS); Perfecto, La Chaîne (MusiquePlus, CHUM); Télé Ha! Ha! (TVA, Film Rozon, BCE).

In addition to these Category 1 licenses, the Commission awarded 262 Category 2 licenses⁸, 4 VOD licenses⁹, and 2 PPV licenses¹⁰. The list of Category 2 services is extremely varied. It includes a number of esoteric channels, such as The Single's Channel and The Nerd Network, as well as numerous mainstream services such as news and sports channels. (A full listing of these services can be found on the Commission's web site at <http://www.crtc.gc.ca>.) The VOD services approved by the Commission are Corus Entertainment/On-Demand, Rogers Cable, Cogeco Câble Canada and

Videon CableSystems. Finally, the PPV licensees are Bell ExpressVu and David Cobb (Breakaway).

The Commission's reasons, published on December 14, 2000, indicated that the Commission had reviewed the various Category 1 applications by applying the following selection criteria (based on the licensing framework):

- contributions to Canadian programming, including minimum commitments to exhibition (not less than 50% by the end of the license term), expenditures and original production;
- attractiveness of the proposed service to potential viewers, including evidence of demand;
- contribution to the diversity of available programming genres, as well as contributions to the reflection of Canada's cultural diversity and linguistic duality;
- reasonableness of the business plan and ability to fulfill proposed commitments;
- innovative use of the digital medium, e.g. interactivity; and
- cost of the proposed service to subscribers.

In its reasons, the Commission also indicated that attractiveness was the “key criterion in the selection of Category 1 services”, but noted that “all of these elements played a role in the Commission's decision” and “no one specific criterion outweighed any other in considering the many strong applications”.

Given the special challenges facing new services in a digital environment, the Commission discussed with each applicant whether Canadian programming expenditure obligations for Category 1 services are still relevant or necessary. Ultimately, the Commission decided to set Canadian programming expenditure obligations on a case by case basis based on a

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percentage of total advertising, infomercial and subscriber revenue over the license term. Beginning in the second year of operation, all Category 1 services will therefore be required to spend a percentage of the previous year's total advertising (including infomercials) and subscriber revenue on Canadian programming in each year.

In addition, the Commission indicated that each Category 1 licensee would be required to ensure that at least 25% of its Canadian programming, other than news, sports, and current affairs, is produced by non-related production companies. For the purpose of this condition, the Commission has defined as non-related any production company in which the specialty service, or any of its shareholders, owns or controls, directly or indirectly, less than 30% of the equity.

Consistent with the principles outlined in the licensing framework, the Commission adopted an open-entry approach in licensing 262 Category 2 pay and specialty services. According to the Commission, the applications that were denied were rejected because they did not satisfy the basic selection criteria or they were directly competitive with either an existing pay or specialty service or a new Category 1 service.

In determining whether a proposed service is competitive with an existing pay or specialty service or a new Category 1 service, the Commission adopted a "case-by-case" approach, and did not apply any rule or threshold. Instead, the Commission stated that it had "examined each application in detail, taking into consideration the proposed nature of service and the unique circumstances of the genre in question" and, "where appropriate, ... narrowed the nature of service from that proposed, rather than deny the application".

The Commission's decision does not impose any specific Canadian programming expenditure requirements for

Category 2 licensees. However, it should be noted that the licensing framework states that "for pay services, the Commission will expect Canadian content exhibition and expenditure commitments to be comparable to those of existing pay services".

Finally, the Commission stated that all Category 1 licensees must begin operation no later than November 24, 2001, unless the Commission approves a request for an extension before that date. Category 2 licensees are required to implement service no later than November 24, 2003, unless the Commission approves a request for an extension before that date.

Notes

¹ These reasons were issued as part of two separate public notices: *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, and *Introductory statement to Decisions CRTC 2000-733 to 2000-738: Licensing of new video-on-demand and pay-per-view services*, Public Notice CRTC 2000-172.

² *Call for comments on a licensing framework for new pay and specialty services*, Public Notice CRTC 1999-19.

³ *Licensing framework policy for new digital and specialty services*; Public Notice CRTC 2000-6 (the "licensing framework").

⁴ These ownership and eligibility requirements are set out in *Direction to the CRTC (Ineligibility of non-Canadians)*, P.C. 1997-486, dated 8 April 1997 (amended by P.C. 1998-1268, dated 15 July 1998), and in *Direction to the CRTC (Ineligibility to hold broadcasting licenses)*, P.C. 1985-2108, dated 27 June 1985 (amended by P.C. 1997-629, dated 22 April 1997). The Canadian content exhibition requirements are set out in the licensing framework, *supra* note 3.

⁵ *Call for Applications for Licenses for New Digital Pay and Specialty Television Programming Undertakings*, Public Notice CRTC 2000-22 (the "call for applications").

⁶ *CRTC process for new digital pay and specialty TV services applications*, CRTC news release, April 11, 2000.

⁷ The Category 1 applications approved by the Commission are listed in CRTC Decisions 2000-449 to 2000-469. The Category 1 applications that were denied are listed in CRTC Decision 2000-739.

⁸ The Category 2 applications approved by the Commission are listed in CRTC Decisions 2000-470 to 2000-

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731. The Category 2 applications that were denied are listed in CRTC Decision 2000-739.

⁹ All of the VOD applications received by the Commission were approved. Those applications are listed in CRTC Decisions 2000-733 to 2000-736.

¹⁰ All of the PPV applications received by the Commission were approved. Those applications are listed in CRTC Decisions 2000-737 and 2000-738.
