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REGULATORY

BNC 2025-2-1 The Path Forward – Working Towards a Sustainable Canadian Broadcasting System

March 11, 2025

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Mr. Marc Morin Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin,

1 The Canadian Communication Systems Alliance ("CCSA") is a national organization representing more than 100 small independent broadcasting distribution companies and ISPs providing TV, internet, and telecommunications services to nearly half a million Canadian residents and businesses in urban and rural communities, from coast to coast to coast.

2 From a high level of analysis, the CCSA notes that many interveners recognize that the sustainability of the market is a distinct concern. Whether that is because of regulatory requirements[1], inequality in the market[2], or because of business practices designed to favour Vertically Integrated companies[3]. With an industry that is suffering from declining audiences and subscriber numbers, these concerns from BDUs are systemic and need to be resolved for there to be sustainability in the market.

3 There are also alternative views from some programmers and industry groups asking the Commission to keep the status quo or to strengthen it. The CCSA is very sympathetic to the concerns of those groups, especially as a membership-based organization, but the arguments, which have largely remained static since 2014's Let's Talk TV hearing will necessarily not resolve the broader problems facing the industry.

4 The CCSA will focus this submission on three main points: Supporting the positions of other interveners, challenging regulatory interpretations, and finally refocusing arguments the CCSA believes are constructive but represent missed opportunities. It does so with the intent of providing the Commission with regulatory latitude.

Supporting Other Positions

Independent BDUs

5 The CCSA appears to be aligned with many points of view offered by Eastlink's intervention. CCSA supports Eastlink's position that any new positions considered by the Commission should ensure that: "VI-programmers are incented to engage in good faith negotiations with rival BDUs for distribution of their services."[4] CCSA notes that VI programmers necessarily do not engage in 'bad faith' negotiations by virtue of being VIs, however, we would suggest that any instance of such behaviour should be discouraged. CCSA is aligned with wholesale access to OU's.[5] Indeed, this is what CCSA proposed in its initial submission.

[1] As noted in Bell, Rogers, CCSA, Cogeco, Eastlink, etc first round submissions regarding 9.1(1)h.
[2] As noted in CCSA and Eastlink first round submissions regarding access to Online Undertakings
[3] As noted by Bell, CCSA, and Eastlink in their first round submissions, regarding certain programmers providing unreasonable terms.
[4] Paragraph 67, point 'b' Eastlink's first round submission.
[5] Paragraphs 175-176. Eastlink first round submission.

Alternatively, CCSA would not object if the Commission instead applied the requested solution that "OU's provide equitable access to resale opportunities"[6].

6 Finally, while CCSA can support Eastlink's position on the elimination of VBRC's[7] and much of the logic that Eastlink makes of the arguments for an end to PBRC's[8], CCSA as a representative of multiple smaller independent BDUs still sees advantages in having PBRCs in the market[9]. CCSA instead supports Cogeco's initial argument on PBRCs[10], and would suggest the Commission adopt Cogeco's position on this point.[11]

Regulatory Interpretation

MPA-C

7 While submissions on behalf of foreign Online Undertakings were made by Netflix, Amazon, etc. they are consolidated and particularly well argued through the intervention by MPA-C in paragraphs 8-13, and 16-24. CCSA would offer alternative views to further explore this idea, with paragraph 10 being a relevant place to start.

8 It states: "We are unaware of any foreign online undertaking in Canada today that can be classified as an "online undertaking that provides the programming services of other broadcasting undertakings in a manner that is similar to a distribution undertaking. Online undertakings are fundamentally different from traditional BDUs. They operate in an open-access model…"[12]

9 MPA-C argues the 'model of delivery' as the crux of their argument, and that internet delivery is fundamentally different than traditional broadcasting. While not wrong, the CCSA would propose it's also not the relevant issue for consideration. To discuss 'a manner that is similar to a distribution undertaking', the Act defines a distribution undertaking as:

"an undertaking for the reception of broadcasting …"[13] (emphasis added for effect)

10 The CCSA would suggest that the concern is not the model of distribution, but the reception of 'broadcasting' as defined in section 2(1) of the Act:

"any transmission of programs — regardless of whether the transmission is scheduled or on demand or whether the programs are encrypted or not — by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus…"[14] (emphasis added for effect)

11 Is a Ford F150 truck similar in manner to a Tesla Cyber truck? The difference in engine and fuel supply doesn't change the fact that they are both vehicles that can transport people and cargo. Foreign Online

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[6] Paragraphs 172-174. Ibid
[7] Paragraph 101. Ibid
[8] Paragraphs 102-110. Ibid
[9] Though CCSA would note that some VI's have been using PBRCs to effectively have been attempting make-whole. This is why PBRC's need to be effectively regulated.
[10] Paragraph 33. Cogeco first round submission.
[11] Paragraph 42. Ibid
[12] Paragraph 10. MPA-C first round submission.
[13] Definition of '**Distribution Undertaking**'. s2(1) Broadcasting Act 1991
[14] Definition of '**Broadcasting**'. Ibid.

Undertakings provide "programs"[15] to homes as do traditional BDU's. Even if the 'engine' under the hood is different, the broadcasting still ends up on a broadcasting receiving apparatus in the home, making the manner of the service the same. The programs are getting to the same smart TVs of the same end users who want 'something to watch'. What matters for jurisdiction isn't the label but the definition, and the definition catches OU's.

12 If the Commission's legal staff agrees with the CCSA interpretation, then the conclusions made by MPA-C in paragraphs 11, and 17-24 are jurisdictionally wrong. Further, it would also mean MPA-C's reference to the SCC ruling in paragraph 16 would be equally supportive of CCSA's interpretation instead of MPA-C's.

13 Additionally, the CCSA would suggest that the undue preference issues raised in the MPA-C submission in paragraphs 12 and 13 are premature until Foreign Online undertakings are made available to independent BDUs in a similar manner to the big VI-BDUs.

14 Finally, regarding the application of powers the Commission has involving foreign OUs, the CCSA would suggest a light touch, and to remain on the right side of all international agreements.

Rogers

15 Given Rogers' lengthy submission, and its aggressive approach towards the removal of regulatory protections, it is important to address its submission.

16 In part, Rogers appears to be asking the Commission to cease or minimize regulating everywhere possible to allow market forces to apply to a maximum capacity. The CCSA would note however that while the Telecommunications Act has section 34, the Broadcasting Act has no such equivalent section. In the Broadcasting sector, with a tight national oligopoly that controls some 85-90% of the market share, and many local and regional markets where there is often a duopoly, Rogers is the dominant force in the market[16]. Given the dominance in the traditional market by VI-BDU's the wholesale code is essential for the protection of Canadian consumers, and other industry players. Modernization of the code would be preferable (if required) over elimination.

17 Rogers proposed undue preference criteria[17] demonstrates its clear intent to be able to never have an undue preference be found again.[18] Additionally, Rogers apparently misunderstands a core element of 'good faith', being 'sincerity of intention'.[19] Rogers argues in Paragraphs 154 and 155 that good faith is 'procedural' in nature for ongoing negotiations as opposed to behavioural and intentional. As examples of 'non-compliant' behaviours Rogers glaringly omits unreasonably high/low offers based on industry and historical norms. In a hypothetical negotiation with any other BDU, Rogers might meet every procedural requirement of timely responses, however, if rates proposed through successive rounds are never commercially reasonable, the sincerity of intention toward mutual contractual benefit is absent; as is good faith.

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[15] As defined in s2(1) of the Broadcasting Act 1991.
[16] If not always in BDU subscriber numbers alone, then also through sheer volume of offering and resources as compared to a small independent BDU.
[17] Paragraph 36. First Rogers' round submission
[18] In particular the 'quantifiability' in criteria 'a', and all of criteria 'c', and that all three points should need to be found concurrently instead of any one being sufficient on their own.
[19] Paragraph 154. Op Cit

18 Rogers' arguments regarding undue preference and good faith combined suggest its intention as it relates to its future strategy for 'direct-to-consumers' (DTC).

"If a BDU is not providing the programmer with the economic incentive to partner with them, then the programming service should be able to go elsewhere with its programming or pursue customers direct-to-consumer (**DTC**)."[20]

19 CCSA is concerned that without appropriate regulatory involvement, Rogers as a Vertically Integrated company with significant market share will seek only unreasonable economic incentives through 'procedural good faith'. It will then go DTC, and when independent BDUs want to charge Rogers with undue preference, Rogers will rely on their proposed new criteria to never face repercussions. This would be breach of sections 3(1)e and 3(1)(t)(i)(iii) combined with s3(1)(d)(iii.5) of the Act.[21] [22]

20 In CRTC BD2022-76 -Shaw Communications Inc. – Change of ownership and effective control, the Commission held on paragraph 77:

"… its increased scale will not have a deleterious effect on competition in the distribution market, the distribution of Canadian and non-Canadian online broadcasting services, or the availability of Canadian programming services, particularly independent services."[23] (emphasis added for effect)

21 The CCSA agrees that scale alone is not deleterious. However, a shift in market behaviour combined with a newfound scale can certainly have a deleterious effect on competition. To quote many first-year economics professors: 'Bigness is not badness, but bad behaviour is badness, which is enhanced by bigness'. The CCSA requests the Commission regulate appropriately, and not to forbear from its responsibilities as defined by the Act. Additionally, the CCSA requests that the Commission be flexible but proactive to meet its other objectives under 3(1), 5(2)(g)(h), 9.1(1)(h)(i)(j), and 10(1) to ensure the sustainability of the market for equal and fair competition.

Proposed Revision of Intervener Positions

Bell

22 At this time, the CCSA would like to comment on two paragraphs from Bell's submission- 49 and 50:

"49…We believe the discoverability and promotion of Canadian content is integral to attracting and retaining audiences. We heavily promote the Canadian content we commission and create. Across our linear, on-demand and online platforms, we prioritize and cross-promote our Canadian content because it is central to our business and important to our audiences. One need only compare the promotion of Canadian content on

[20] Paragraph 16 Ibid
[21] Broadcasting act 1991
[22] The CCSA does not believe the Commission would view the possibility of such an outcome as appropriate.
[23] Paragraph 77. BD CRTC 2022-76 "Shaw Communications Inc. – Change of ownership and effective control" https://crtc.gc.ca/eng/archive/2022/2022-76.htm

Crave to foreign streamers to understand that we and other Canadian broadcasters embrace Canadian content in a way foreign streamers never will.

50 We believe the best way to ensure the promotion and discoverability of Canadian programming is to incent and support Canadian broadcasters to create high-quality Canadian programming that can attract an audience..." (emphasis added for effect)

23 CCSA infers that Bell would like to rely more on local Canadian content to differentiate itself in market from foreign OU's. Further, Bell in paragraph 50 of its submission proposes that incenting of more local content would be more beneficial than increased regulatory burden. The CCSA, in its initial submission, proposed that some $80M from the CMF currently being used broadly for 'cultural content'[24] be earmarked specifically for broadcasting content.[25] Following on that proposal and Bell's interest in local news and programming in general, the CCSA would further add to its own earlier position regarding the breakdown of use proposed.

24 In paragraph 31 of CCSA's first-round submission to this hearing, it proposed two options to remedy the apparent problem. As an additional option to the two already proffered by the CCSA, it suggests the CMF could maintain interest over the majority ($65M) of the $80m going forward from 2026 if it were to distribute those funds back into the broadcasting system. Over half ($45M) should be used by VI-BDUs specifically for local content (whether news OR local programming). One quarter ($20M) should be distributed to independent BDUs for local programming across the country. The remainder ($15M) should be diverted to the Independent Local News Fund (ILNF).[26]

Independent Arbitration

25 Some intervenors have asked for independent Arbitration. The CCSA hesitates to support this as Broadcasting is a specialized field. Should the Commission ultimately acquiesce to this request,[27] any third-party arbitrators should be approved as subject matter experts by the Commission as a requirement before they can facilitate.

Basic Package Pricing

26 While CCSA still believes its exempt members should be exempted from carrying 9.1(1)h services in the current market[28], it is sympathetic to other interveners' requests to raise prices for the basic TV package. CCSA proposes that if licensed BDUs are not granted exemption from carriage of 9.1(1)h services, they should be allowed by the Commission to increase the price for the basic package.

27 The basic TV package[29] costing has not been adjusted since 2015. In that time some existing 9.1(1)h services prices have increased, and new 9.1(1)h services have been added to that package. This has directly

[24] Video Games.
[25] CCSA would note that if its assessment of CMF funds going to the videogames industry is incorrect, CCSA's numbers could be adjusted proportionately by the Commission to make them applicable.
[26] CCSA was not a party to BNC 2024-164, but does not expect there would be opposition to there being more money for all parties through a reasonable division of additional resources within the **broadcasting** sector from broadcasting sector funds.
[27] This should not be taken to mean CCSA does support it.
[28] As mentioned in its first-round submission, and submission for 2024-288.
[29] Established from the Let's Talk TV hearing process CRTC BRP 2015-96

decreased the margin on the basic package, and that is without considering wages, inflationary costs for transport etc.

28 CCSA would note the price of Netflix has more than doubled since the start of the Let's Talk TV hearing. A comparatively marginal increase in prices related to inflation over the last decade is not unreasonable for other interveners to ask for.

Conclusion

29 The CCSA thanks the Commission for the ongoing opportunity to submit to this process. As the representative of small independent BDUs, the CCSA truly appreciates hearings that allow for the entire industry to address collective but varied concerns together. This ensures the Canadian broadcasting system will remain robust and adaptable while meeting the needs of Canadians in the future.

Sincerely,

John P. Roman
Director, Legal & Regulatory
Canadian Communications Systems Alliance (CCSA)