



October 19, 2020

Filed Electronically

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

Dear Mr. Doucet:

**Re: Broadcasting Notice of Consultation CRTC 2020-336: 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**

The Writers Guild of Canada (WGC) is the national association representing approximately 2,400 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.

With respect to broadcasting, the screenwriters who make up the WGC's membership work primarily in the production of Canadian television programming in the genres of drama and comedy, including children's and youth programming, both live action and animation, as well as long-form documentary. As such, our comments here focus exclusively on television, primarily on Canadian programming expenditure (CPE) obligations, and especially those with respect to programs of national interest (PNI), which apply predominantly to larger broadcaster ownership groups.

### **Executive Summary**

ES.1 The WGC **strongly opposes** the overbroad, sweeping, and extreme proposal put forward by the Canadian Association of Broadcasters (CAB) in this application. In our decades of experience before the CRTC, the WGC has seen private, English-language broadcasters consistently argue that Canadian programming requirements represent an undue burden placed upon them, which should be reduced or eliminated, no matter the market or other circumstances at the time. Whether the industry was in a growth phase or facing stiff competition from new players, whether revenue years had been strong or weak, broadcasters have argued they should do less on Canadian content. Now, Corus Entertainment Inc. CEO Doug Murphy has been quoted as saying

the current pandemic is, “one crisis I am not going to waste” in achieving regulatory reform.<sup>1</sup> The cynical reading of this comment—that the COVID-19 pandemic provides an opportunity to reduce regulatory obligations that Corus and others have wanted to see reduced or eliminated anyway, under cover of a global public health crisis—is sadly not also a far-fetched one. The requirements to make expenditures on Canadian programming are absolutely central to the Canadian broadcasting system, the *raison d’être* of which is to provide that programming to Canadians who would otherwise not have access to it. They also support hundreds of Canadian screenwriters and thousands of other production workers who are also hurting amidst the pandemic. The WGC opposes the CAB’s application in the strongest possible terms.

- ES.2 It seems clear, from the CAB’s perspective, that time was of the essence of its application, as evidenced by the aggressively expedited process the CAB proposed, with a decision from the Commission sought by the first week of August, 2020. The Commission did not provide a decision on that timeline, however, rendering the CAB application effectively moot. The Commission has presented a preliminary view that the “deemed compliance” approach is not appropriate, and instead has suggested an approach to determine a broadcaster’s regulatory compliance over a more protracted period of time. The WGC agrees with the Commission’s preliminary view that “deemed compliance” would be inappropriate, and acknowledges that its alternative approach would be preferable to it. The result of the current series of events, however, is that we now have a process in which the application, as made, is seemingly moot, while the proposal to be considered in detail—i.e. the Commission’s alternative approach—is without an evidentiary basis in an application.
- ES.3 In the circumstances, then, the WGC fails to see any evidence on the record of this proceeding that it is necessary to grant any additional flexibility to broadcasters at this time, at least as it pertains to CPE and, especially, PNI obligations. On the contrary, the natural operation of existing CPE and PNI policies—in which revenue changes in one year are proportionally reflected in expenditure obligations in the next—is already under way to grant broadcasters reductions in spending obligations in 2020-2021, based on actual revenues earned from broadcasting in 2019-2020. In addition, broadcasters already have flexibility to under-spend in a given year provided it is made up in the next, and the fact that regulatory expenditures are reported and assessed on an amortized basis further mitigates volatility in spending requirements. Any under-spending for 2019-2020 is now a *fait accompli*, and broadcasters’ capacity to make up that spending by the end of the licence term is best assessed at licence renewal, when more data—and the longer-term economic realities—will be better understood by all parties.
- ES.4 The result of the CAB’s application, if approved as-is, would be to effectively grant two years of regulatory relief for one year of depressed revenues. Broadcasters are not airlines, and spending obligations are expressed in terms of money, which is fungible, and not in anything analogous to airplane flights, which are not fungible. Any under-spending on Canadian programming requirements can and should be made up in future years, according to on the existing CPE and PNI formulae, which is based on real revenues that were actually earned by broadcasters. The CAB’s proposal does not recognize the different circumstances of different broadcasters, would not be proportional to the challenges created by the pandemic, and would almost certainly result

---

<sup>1</sup> COVID has created a CanCon crisis, and Corus won’t waste it: CEO, *The Wire Report*, September 15, 2020. Sept. 15, 2020.

in inequities, in which some broadcasters could obtain an unfair benefit from regulatory relief, without bearing a real relationship to the financial challenges it has faced, or faces. The CAB’s “absent bad faith” stipulation unfairly shifts the burden of regulatory compliance to intervenors or others, and would be administratively complex and burdensome to enforce.

ES.5 Broadcasters have obtained other forms of COVID-19-related relief, including the Canada Emergency Wage Subsidy (CEWS) and the waiving of Part 1 licence fees, worth \$30 million in total, and they may also be eligible for additional government supports generally available to Canadian businesses. At the same time, the impacts of the pandemic have been felt acutely by the WGC’s members. The WGC’s own data shows a 25% decrease in writer earnings during the March-through-August, 2020 period. This decrease is highly significant for our membership. For the 2019 calendar year, the median income from screenwriting amongst WGC members who earned any money in our jurisdiction was \$28,284. These are individual screenwriters who are trying to pay rent and put food on their tables, often in Canada’s most expensive cities, like Toronto and Vancouver, where many screenwriters have to live in order to be close to television production centres and broadcast decision-makers. Screenwriters are now bracing for the effects of lower CPE and PNI spending in 2020-2021, as the revenue declines of last year make themselves felt in the calculation of this year’s expenditure levels.

ES.6 Broadcasters should be required to publicly report on any and all elements of any additional flexibility provided by the Commission. The WGC is not aware of any actual or proposed element of the regulatory framework that would or should be confidential or not publicly reported. Revenues and expenditures, which are central to the CPE and PNI regimes, are publicly reported now. If they become subject to additional flexibility, that flexibility and how it was used should be publicly reported, and the interests of transparency would support reporting that demonstrates precisely how that flexibility was used. Beyond that, we are aware of no additional measures of reporting necessary. The current frequency of relevant reporting—i.e. annual reporting—is expected to be sufficient. As with any reporting, however, providing reporting on a timely basis is important. Stakeholders should not be in a position of having to wait until up to halfway into the broadcast year before being able to access data that existed many months before.

### **Two proposals, one (sparse) evidentiary record, and the question of time**

1. The application in this proceeding is from the CAB, and is dated July 13, 2020. In it, the CAB proposes “that the Commission introduce, as an emergency measure, a policy of *deemed compliance* in respect of expenditure requirements, along with other appropriate regulatory flexibility measures, for the 2019-2020 broadcast year.”<sup>2</sup> The CAB proposed an expedited process for this application, with either no intervention period or a greatly abridged one of five days to intervene and two days to reply, and in which the Commission would, “Make all reasonable attempts to render a decision by the first week of August.”<sup>3</sup> The Commission did not adopt these proposals, however, and the 2019-2020 broadcast year ended on August 31, 2020. Subsequently, the Commission published Broadcasting Notice of Consultation CRTC 2020-336 (the Notice) in this proceeding on September 17, 2020, with interventions due October 19, and replies due October 29. In the Notice, the Commission provided a preliminary view that, “‘deemed compliance’ for all broadcasters, as proposed by the CAB, may not

---

<sup>2</sup> Application, para. 19. Emphasis in original.

<sup>3</sup> Application, para. 62.

be the appropriate approach,”<sup>4</sup> and instead stated that it considers that, “it may be more appropriate to adopt an approach...whereby it would determine a broadcaster’s compliance with its regulatory obligations for the 2019-2020 broadcast year based on whether that broadcaster has fulfilled such obligations over a more protracted period of time.”<sup>5</sup>

2. It seems clear, from the CAB’s perspective, that time was of the essence of its application, as evidenced by the aggressively expedited process the CAB proposed. What is less clear, however, is why. The application notes significant advertising revenue declines for its member broadcasters and states that, “without express relief, *virtually all private broadcasters will fall short of certain requirements codified in their conditions of licence and the regulations.*”<sup>6</sup> Given the context, this must refer to requirements for the 2019-2020 broadcast year, which at the time was roughly a month and a half away from ending. At the same time, the CAB also stated:

Budgeting for the 2020-2021 broadcast year is now underway, and materially lower revenue forecasts for the sector, particularly in the short to medium term, are anticipated. Accordingly, broadcasters require a better understanding of how the Commission expects to treat past expenditure requirements in order to make informed financial and operational decisions, including cost controls that, in some cases, may otherwise come at expense of local news budgets in order to meet regulated financial requirements.<sup>7</sup>

3. Why did the CAB’s broadcaster members need the Commission to decide on this issue by the beginning of August? Was it with respect to spending decisions for the 2019-2020 broadcast year? If so, what kinds of spending decisions were still left to be made, in the eleventh month of the broadcast year, that would have had a material impact on broadcasters’ annual regulatory obligations for that same year? What kinds of spending decisions on PNI programming in particular, which generally involve many, many months to develop, plan, and produce to completion, were still left to be made in late July and/or early August? And if broadcasters’ revenue challenges were so dire that “virtually all [broadcasters] will fall short...of requirements” anyway, such that they would happen with or without the Commission’s approval, what purpose was the regulatory relief, other than to rubber-stamp decisions that had already occurred or were certain to occur?
4. Alternatively, if this was all about planning for 2020-2021, the proposed expedited process raises even more questions. CPE and PNI obligations for one year are based on revenues from the year before. Broadcasters have now had many years of experience with this model, and have been able to plan accordingly. The revenue challenges that the CAB cites occurred in the spring and summer, were known to broadcasters on the date of this application, and therefore surely could have been planned for in respect to broadcasters’ 2020-2021 spending obligations. Would broadcasters have known their general 2019-2020 revenue situation by early August, 2020, eleven months into the year, or not? Surely the CAB cannot be claiming to have had demonstrable revenue challenges in 2019-2020 that are so significant to have prompted this application, and which are specific enough to be cited to the tenth of a percentage therein,<sup>8</sup> yet at the same time not know what their 2019-2020 revenues are

---

<sup>4</sup> Notice, para. 25.

<sup>5</sup> Notice, para. 26.

<sup>6</sup> Application, para. 11. Emphasis in original.

<sup>7</sup> Application, para. 17.

<sup>8</sup> Application, para. 6.

with enough specificity to be able to budget for 2020-2021 expenditure obligations. And if market volatility is unprecedentedly high due to the pandemic, just how much certainty could the Commission reasonably be expected to provide? We are now amidst an apparent “second wave” of COVID-19. Will the CAB soon seek to “write off” its 2020-2021 regulatory obligations, as it is now asking to do for 2019-2020, despite claiming that 2020-2021 would be a “return to normal compliance”<sup>9</sup> in this application?

5. In any event, it seems clear that the CAB’s proposal was predicated on an approval by the Commission in August. That approval—thankfully, for the WGC and its members, for the reasons we will lay out below—did not happen. As such, it appears to us that the CAB application now is effectively moot. Whatever the precise logic involved in seeking to conclude this application before the end of the 2019-2020 broadcast year, it was presumably rendered irrelevant by the decision of the Commission not to proceed on an expedited basis, as per the CAB’s request, but instead to publish the Notice in September and direct this proceeding on the timeline it has.
6. At the same time, the Commission has presented a preliminary view that the “deemed compliance” approach is not appropriate, and instead has suggested an approach to determine a broadcaster’s regulatory compliance over a more protracted period of time. The WGC agrees with the Commission’s preliminary view that “deemed compliance” would be inappropriate, and acknowledges that its alternative approach would be preferable to it. The result of the current series of events, however, is that we now have a process in which the application, as made, is seemingly moot, while the proposal to be considered in detail—i.e. the Commission’s alternative approach—is without an evidentiary basis in an application. In other words, while the Commission has laid out its alternative approach in principle, that approach was not the request in the CAB application and, presumably as a result, it does not come with the detailed arguments and supporting evidence that might otherwise be expected. We have, in this proceeding, an application (with some evidence) that appears to be moot, and we have an alternative proposal that is not moot but which does not include evidence in support of it.
7. In the circumstances, then, the WGC fails to see any evidence on the record of this proceeding that it is necessary to grant any additional flexibility to broadcasters at this time, at least as it pertains to CPE and, especially, PNI obligations. On the contrary, as discussed below, the natural operation of existing CPE and PNI policies is already under way to grant broadcasters reductions in spending obligations in 2020-2021, based on actual revenues earned from broadcasting in 2019-2020. Any under-spending for 2019-2020 is now a *fait accompli*, and broadcasters’ capacity to make up that spending by the end of the licence term is best assessed at licence renewal, when more data—and the longer-term economic realities—will be better understood by all parties.

**Canadian programming expenditures are calculated on last year’s revenues, so “relief” has already effectively been granted**

8. As the Commission stated in the Notice, financial requirements are calculated based on the previous year’s revenues.<sup>10</sup> As set out in the conditions of licence of the three large, English-language broadcast groups of Bell Media Inc. (Bell), Corus Entertainment Inc. (Corus), and Rogers Media Inc. (Rogers):

---

<sup>9</sup> Application, para. 22.

<sup>10</sup> Notice, para. 15.

In accordance with *A group-based approach to the licensing of private television services*, Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010, the licensee shall in each broadcast year devote to the acquisition of or investment in Canadian programming a minimum of 30% of the previous year's gross revenues of the undertaking.<sup>11</sup>

9. The same basic formula applies with respect to PNI, albeit with different percentages.<sup>12</sup>
10. The fact that CPE and PNI requirements are calculated on previous year's revenues is conspicuous by its absence in the CAB application. Anyone reading the application who didn't already know how CPE and PNI are calculated could be forgiven for being unaware that this method of calculation is even a feature of the existing regulatory framework. Virtually the entire CAB application appears predicated on the suggestion that there is no mechanism to reflect the revenue challenges of 2019-2020, and therefore some way to recognize these challenges must be found.
11. The simple fact, however, is that such a mechanism already exists, in the form of the CPE and PNI calculation formula itself. Spending obligations for Canadian programming for 2019-2020 were based on revenues earned in 2018-2019. Spending obligations for Canadian programming for 2020-2021 are based on revenues earned in 2019-2020. Declines in revenue that were experienced in the previous broadcast year are automatically reflected in the spending obligations for the broadcast year we're currently in. This will be in proportion to the severity of the revenue challenges. If revenue declines last year were moderate, then the reduction in spending obligations this year will be proportionally moderate. If revenue declines were severe, then the reduction in spending obligations this year will be proportionally severe. This is already baked in to the existing framework. Spending obligations already adjust to revenues.
12. The result of the CAB's application, if approved as-is, would be to effectively grant *two* years of regulatory relief for one year of depressed revenues.<sup>13</sup> The CAB is seeking to simultaneously obtain the benefit of the existing framework, which would automatically provide for reduced spending obligations this year based on revenues of the year prior, *and* to avoid the obligations that would require spending on Canadian programming based on the very real revenues that were earned in 2018-2019.
13. Moreover, it is notable that 2018-2019 was generally a good revenue year for broadcasters. According to data from recent Aggregated Annual Returns, the Corus designated group saw revenue increase by \$30,546,000 in 2019 from the previous year, which represented the first increase in a number of years. This would have resulted in an additional \$2,596,410 in PNI spending, for example, in 2020. The Bell English-language designated group saw revenue increase by \$25,917,000 in 2019 from the previous year, the first increase ever since the group-based licensing regime was introduced. This would have resulted in an additional \$1,943,775 in PNI in 2020 by Bell. The CAB's application would effectively wipe out these obligations, based on a good year for many broadcasters, while retaining obligations based on a bad year, with no future obligation to make up the lost spending.

---

<sup>11</sup> E.g. Broadcasting Decision CRTC 2017-149, Appendix 3, Condition of Licence 2.

<sup>12</sup> Broadcasting Decision CRTC 2018-335, Appendix.

<sup>13</sup> Or, presumably, three years of relief for two years of depressed revenues, and so on, depending on how long the current crisis lasts.

14. The existing regulatory framework is already responding to revenue declines experienced in 2019-2020. The “regulatory relief” that the CAB seeks in relation to those declines has already been provided by the CPE and PNI calculation formulae. There is no evidence on the record demonstrating that this is insufficient in the circumstances.

#### **Broadcasters already have year-over-year flexibility**

15. As the Commission stated in the Notice, spending obligations on Canadian programs are already subject to year-over-year flexibilities that permit the carrying over of under-expenditures into subsequent broadcast years.<sup>14</sup> For the large, English-language broadcast groups, this generally amounts to up to 5% less than the minimum required expenditure for that year.<sup>15</sup>
16. There is no evidence on the public record demonstrating how or why this existing level of flexibility is not sufficient. The CAB states that, “the current 5% CPE over/under-expenditure flexibility is clearly insufficient to address a five-month production shut-down.”<sup>16</sup> Firstly, it is the WGC’s experience that not all production was indeed shut down for five months. On the contrary, much animation programming continued throughout the spring and summer, because it involves work that can be accomplished largely from home. It is important to be precise about what we mean by “production shut-down”, to a level of detail not contained in the CAB application. Secondly, the CAB has not provided evidence or argument as to why the 5% is insufficient—it has simply said that it is. And more importantly, even if the 5% limit cannot be met in the circumstances, the CAB has not said what could be met, why, based on what evidence. Indeed, rather than propose a new flexibility level based on an evidentiary foundation, the CAB has simply proposed to wipe all Canadian program obligations from the slate entirely.
17. The fact remains, however, that flexibility to under-spend on CPE and PNI currently exists, and there is no factual evidence on the record demonstrating that it’s insufficient, and/or what additional flexibility would be required. Moreover, the 2019-2020 broadcast year is now closed, and spending was either met for that year or it wasn’t. The issue for that year appears to be moot, with respect to decisions that could be made for 2019-2020 spending. The job now appears to be not about retroactively granting flexibility for last year’s spending obligations, but to determine how to recognize that going forward and, we submit, to ensure any actual under-spending is made up in future years.

#### **Spending on CPE and PNI is done on an amortized basis**

18. Broadcaster spending on Canadian programming is accounted for by the Commission on an amortized (accrual) basis. This means that spending that is reported by broadcasters for a given broadcast year, and which goes to meeting the broadcasters’ regulatory obligations, does not represent “cash out the door” that year, but rather the amortized value of that spending attributed to that year pursuant to Generally Accepted Accounting Principles (GAAP). As the Commission may recall, Corus recently

---

<sup>14</sup> Notice, para. 15.

<sup>15</sup> E.g. Broadcasting Decision CRTC 2017-149, Appendix 3, Condition of Licence 12.

<sup>16</sup> Application, footnote 11.

argued that its strong revenue year in 2019-2020 *also* resulted in a regulatory burden requiring additional flexibility. In that context, Corus said:

Because broadcasting regulations require Canadian programming expenditures to be calculated on an amortization basis, the cash burden of the additional CPE expenditure requirement is even heavier. Since amortization occurs over time, only a portion of the additional cash expenditures will count as eligible CPE expenses in the first year of program broadcast. Therefore, in order to meet our dramatic, unanticipated increase in CPE requirements, Corus would have to commission a significantly higher volume of programming in a very short and unrealistic period of time.

Generally Accepted Accounting Principles (“GAAP”) require programmers to amortize the costs of their programming assets over their useful life. A standard GAAP-compliant amortization schedule allocates expenditures on a 50/30/20 percent basis over a three-year period. Since programming start dates are staggered throughout the broadcast year, and amortization begins when the contracted term of a program begins, in such a scenario approximately 35 percent of the asset value would typically be amortized in the first fiscal year.<sup>17</sup>

19. We trust that Corus and other members of the CAB will remain consistent in their acknowledgment of the impact of amortization on regulatory obligations.
20. Amortization, in combination with the 5% under-expenditure flexibility, further mitigates year-over-year revenue and spending volatility. If a hypothetical broadcast group was required to spend \$100 million on Canadian programming in a given year, that does not mean it would have to make \$100 million in cash outlays that year. Rather, it would need to report \$100 million in spending, which would be the aggregate of amortized Canadian programming costs that were recognized that year under an accrual method of accounting. Since amortization schedules typically run over several years—i.e. over the useful life of the programming acquired in exchange for the expenditure—that means that broadcasters will be recognizing and reporting spending in 2019-2020 for costs that were actually incurred years previously. As such, broadcasters’ spending obligations for last year, for which the CAB is now seeking regulatory relief, do not represent cash that must be spent—they represent the aggregate of amortized spending over multiple years, including last year in which revenues and spending were higher.
21. The CAB itself recognizes that amortization plays a role in program spending in this application,<sup>18</sup> but does not explain precisely how, with any level of detail sufficient to determine the real impact of 2019-2020 revenue declines on broadcasters’ ability to meet regulatory obligations. We are therefore again left without an evidentiary basis to determine what further “flexibility” is needed with respect to CPE and PNI, if any. The point remains, however, that amortization of programming expenditures already further contributes to mitigating the volatility of regulatory obligations in the face of bad revenue years.

---

<sup>17</sup> Corus Entertainment Inc., Application 2019-0957-4, Supplementary Brief (Revised 09\_30\_2019), paras. 21-22.

<sup>18</sup> E.g. Application, paras. 30 (footnote 17) and 34.



**Expenditure requirements are the central pillar of regulatory support for Canadian programming (and were set historically low)**

22. The creation and presentation of Canadian programming is at the centre of the *Broadcasting Act* (the Act). The concept of Canadian programming is expressed at least a dozen times in section 3(1) of the Act, as very arguably the primary manner in which its various social and cultural objectives are given effect. Indeed, it's virtually impossible to imagine a distinct, meaningful "Canadian broadcasting system" without Canadian programming. The creation of Canadian programming has long been the key challenge of the English broadcasting system, faced as it is with the multiple difficulties of being produced for a small market while being linguistically and geographically proximate to the largest media production centre on the planet.<sup>19</sup> And the Commission has increasingly focused its regulatory framework on Canadian programming expenditure requirements as the primary means of support. As recently noted by the Commission:

In Broadcasting Regulatory Policy 2015-86, to support the production of high-quality programming, the Commission continued a shift in focus from a regulatory approach based on exhibition quotas (the number of hours of Canadian programming broadcast) to one based on expenditures (the amount of money spent on Canadian programming).<sup>20</sup>

23. The WGC has supported the use of expenditure requirements to incent the creation of a critical mass of high-quality Canadian productions. We have also noted, however, that reliance primarily on this one regulatory tool makes it ever more important that it be robust and effective.

24. We have also explained in past proceedings that expenditure levels from large broadcast groups were set historically low.<sup>21</sup> Briefly, in 2010, the Commission examined the television policy that had been in place since 1999 and concluded that it had not worked effectively to generate a sufficient level of investment in Canadian programming by private, English-language broadcasters. Broadcasters at the time were significantly underinvesting in Canadian content. As such, the Commission developed the group-based policy, which was intended to *grow* such investments from these sub-optimal levels. The mechanism chosen to do this—expenditure requirements set as a percentage of broadcasting revenues—was premised on the growth of those revenues, and it was ultimately ineffective, unfortunately, due to stagnation and/or decline of revenues. Compounding this was the fact that the reference years chosen coincided with a major drop in television advertising revenue as a consequence of the recession of the late 2000s and early 2010s, which itself followed the worldwide financial crisis of 2007-2008.

---

<sup>19</sup> The WGC went into further detail on these challenges in our written submission to Broadcasting Notice of Consultation CRTC 2017-359: *Call for comments on the Governor in Council's request for a report on future programming distribution models*, at paras. 26-37 ([http://www.wgc.ca/files/WGC%20Submission\\_BNC%202017-359\\_Future%20programming%20models\\_FINAL.pdf](http://www.wgc.ca/files/WGC%20Submission_BNC%202017-359_Future%20programming%20models_FINAL.pdf)).

<sup>20</sup> Broadcasting Decision CRTC 2020-220: *Television services that form part of the Corus group of services – Licence amendments*.

<sup>21</sup> E.g. WGC submission to Broadcasting Notice of Consultation CRTC 2017-429: *Reconsideration of the decisions relating to the licence renewals for the television services of large English-language private ownership groups*, paras. 10-17 (<https://www.wgc.ca/sites/default/files/resource/2018-09/WGC%20Submission%20BNC%202017%20429%20Group%20Licence%20Reconsideration.pdf>).

25. The fact that broadcasters are now seeking to further erode this core pillar of Canadian programming support must be considered in this context.

### **The CAB's proposal is overbroad, sweeping, and extreme**

26. The proposal by the CAB, for a policy of “deemed compliance”, is overbroad, sweeping, and extreme. The CAB itself describes it as, “exceptional”,<sup>22</sup> and indeed it is. As stated by the CAB, under this proposal, “licensees would be deemed compliant with their expenditure based conditions of licence and applicable regulations for the 2019-2020 broadcast year,”<sup>23</sup> full stop.

- Licensees would be considered in compliance with their conditions of licence and applicable regulations for the 2019-2020 broadcast year regardless of actual expenditure levels; and
- The Commission would not require any shortfalls or under-expenditures resulting from this broadcast year (2019-2020) to be carried forward or “made up” in any way.<sup>24</sup>

27. To be clear, this is a proposal that takes the central pillar of regulatory support for Canadian programming and effectively eliminates it for a broadcast year. The proposal makes no reference to types of programming, types of broadcasters, or types of impacts from the COVID-19 pandemic. It does not tie degrees of revenue losses or other challenges to the degree of the relief sought. It simply proposes a blanket pass on a core element of the Canadian broadcasting system. It is difficult to imagine a response to regulatory compliance challenges more broad or extreme—it seeks to simply wipe them off the books.

### **Broadcasters are not airlines, and spending obligations are not flights**

28. The WGC believes the issue of how broadcasters could make up for under-spending on regulatory requirements during the 2019-2020 broadcast year would appear to be an obvious one to address in this proceeding, and indeed the Commission has made it central to its alternative proposal to the CAB's application. So, it is strange to us that the CAB chose to address it largely in a footnote to their application, in which they state:

The Commission should rightly dismiss any calls from certain sectors that COVID-19 related “shortfalls” in production must be made up. There is no “making up” for COVID-19 related losses. For example, Canada's airlines will not be expected to “make up” flights that they cancelled during the pandemic in future years. Broadcasters are not going to be able to make up for lost revenues. Nor are other Canadian businesses. Everyone must operate (or not) based on a new set of economic realities.<sup>25</sup>

29. The WGC does not propose any regulatory response to the CAB's application that would be analogous to an airline flying additional flights in the future to “make up for” flights cancelled in the past. The WGC takes no position on “making up” for unmet exhibition requirements at this time, and we do not

---

<sup>22</sup> Application, para. 19.

<sup>23</sup> Application, para. 22.

<sup>24</sup> *Ibid.*

<sup>25</sup> Application, para. 31, footnote 18.

propose that broadcasters somehow “go back in time” to do something in the past that they did not originally do. We do not make any proposals that would involve any party making use of a time machine.

30. The question of expenditures on Canadian programming, however, does not involve time travel, and is not the same as cancelled flights. Airline flights are not fungible—a given flight on a given date to a given destination is generally undertaken for a particular purpose in time, and cannot generally be replaced by another flight on another date and/or to someplace else. Airlines cannot go back in time to “make up for” flights cancelled, and it serves no purpose to anybody to fly “extra flights” in the future if there are not people to make use of those specific flights. None of this applies to expenditures, which is expressed in the form of money. Money is fungible. Its fungibility is one of its most fundamental attributes. Money not spent yesterday can very much be “made up” by being spent tomorrow. Expenditures are not like airplane flights.
31. Similarly, the fact that “broadcasters are not going to be able to make up for lost revenues” is beside the point. Broadcasters’ 2019-2020 expenditure obligations were based on 2018-2019 revenues. Those revenues were real. They do not need to be “made up for” because they existed in 2018-2019, and broadcasters received them at that time. Revenue declines for 2019-2020 are reflected in 2020-2021 expenditure requirements, as explained above. The WGC does not propose that broadcasters “fabricate” revenues that did not exist in 2019-2020. We propose that broadcasters make their regulatory expenditures, which were based on real revenues in existence in the year in question. The CAB appears to be prepared to accept the regulatory consequences of lower revenues in 2019-2020—i.e. lower expenditure obligations for Canadian programming—so they should accept the regulatory consequences of higher revenues in 2018-2019.

### **The CAB application does not recognize the different circumstances of different broadcasters**

32. The Canadian broadcasting system includes many different types of broadcasters. There are large corporate groups like Bell, Corus, and Rogers, there are smaller corporate broadcast groups, like Blue Ant Media Inc., and there are independent television stations. There are conventional, over-the-air stations, which are heavily reliant upon advertising revenues, and there are discretionary services which also obtain subscription revenues from broadcasting distribution undertaking (BDU) subscribers. There are broadcasters serving major metropolitan markets, and broadcasters serving smaller markets. There are channels that provide a substantial amount of news programming, and those that don’t. News programming has reportedly gone up,<sup>26</sup> whereas sports programming has been subject to the vagaries of professional sports shutdowns and subsequent re-starts. Market conditions for drama, lifestyle, children’s & youth, and other programming may differ still. The market conditions and revenue impacts of COVID-19 are certain to vary across these different types of broadcasters and the programming they carry.
33. The CAB’s proposal does not take any of these distinctions into account. As noted above, it is a broad, sweeping proposal that would seek to treat all regulatory obligations for all broadcasters the same, regardless of circumstances. This approach would not be proportional to the challenges created by the pandemic, and would almost certainly result in inequities, in which some broadcasters could

---

<sup>26</sup> Application, footnote 3.

obtain an unfair benefit from regulatory relief, without bearing a real relationship to the financial challenges it has faced, or faces. It is the regulatory equivalent of a flat tax, or worse.

34. In this vein, we also note that the CAB application provides data on some elements of the impacts on their members, but not all. For example, the CAB states that, “Private TV saw 46.4% advertising declines in April and 50.4% declines in May.”<sup>27</sup> Yet aside from similar data for radio, the CAB provided no data on other broadcasters. Advertising revenue is not all revenue—discretionary services that also see subscription revenues will be less affected, and the CAB does not report on their financial health as a result of the pandemic. Similarly, the CAB emphasizes the importance of local news impacts throughout its application, yet many broadcasters do not provide news, local or otherwise, and do not face the same issues as others.

#### **“Absent bad faith” unfairly shifts the burden of regulatory compliance to intervenors or others**

35. The CAB proposal is that licensees be deemed compliant with their expenditure-based conditions of licence and applicable regulations for the 2019-2020 broadcast year, “absent evidence of bad faith.”<sup>28</sup>
36. While the CAB may perceive that making its proposal contingent upon the absence of evidence of bad faith provides some comfort that regulatory relief will not be abused, the WGC submits that this is an unhelpful component that simply shifts the burden of proof of regulatory compliance onto others, most likely to intervenors themselves. Bad faith necessarily involves the intentions—the mental state—of the entity in question. Intervenors will not know or have access to the intentions or decision-making process of broadcasters in determining which regulatory obligations to dispense with, and to what extent. The evidence of that decision-making process will necessarily lie largely, if not entirely, within the knowledge and control of the broadcasters themselves and their senior managers. Broadcasters will be the ones in possession of the evidence of bad faith, if any, yet intervenors (or others) will bear the burden of providing that evidence.
37. And if the CAB contemplates the Commission doing its own investigations of bad-faith behaviour in this respect, this seems equally problematic, is accompanied by no further detail from the CAB, and would appear to contradict the “simplicity” that the CAB claims this solution affords. Lengthy Commission investigations into broadcasters’ “level of faith” does not seem like an administratively efficient or minimally burdensome means of regulation.

#### **Broadcasters are not the only ones suffering, nor have they gone without other government support**

38. The CAB application appears to suggest that other elements of the Canadian broadcasting system—and in particular the creators and others involved in the production of Canadian programming—have somehow been spared the worst financial consequences of the COVID-19 pandemic, by virtue of government assistance, while at the same time minimizing what broadcasters have obtained.
39. Broadcasters, however, have already obtained COVID-19-related relief from multiple sources. As the CAB acknowledges, broadcasters would be entitled to receive the Canada Emergency Wage Subsidy (CEWS) if they meet the requirements, and indeed the CAB notes that this is “currently providing

---

<sup>27</sup> Application, para. 6.

<sup>28</sup> Application, para. 22.

material support to some broadcasters”.<sup>29</sup> The federal government has also provided a number of other supports to Canadian businesses, one or more of which may apply to broadcasters depending on their particular circumstances. These include CEBA (Canada Emergency Business Account), Recovery benefits for Canadians, CERS (Canada Emergency Rent Subsidy), BCAP (Business Credit Availability Program), CECRA (Canada Emergency Commercial Rent Assistance), RRRF (Regional Relief and Recovery Funds), Black Entrepreneurship Loan Fund, Support for Indigenous businesses, Large Employer Emergency Financing Facility, and Northern Business Relief Fund.<sup>30</sup> In addition, as the Commission states in the Notice, the Government of Canada provided relief to the broadcasting sector, including the waiving of Part 1 licence fees, reportedly worth \$30 million in total.<sup>31</sup>

40. At the same time, the impacts of the pandemic have been felt acutely by the WGC’s members. While a portion of the federal government’s COVID-19 Emergency Support Fund was directed to the audiovisual sector, screenwriters were not direct recipients of that, and while benefits may ultimately flow to some of our members, it is not a simple matter, nor does it “make whole” those who are already subject to precarious work conditions in an uncertain industry. On the contrary, the WGC’s own data shows a 25% decrease in writer earnings during the March-through-August, 2020 period. This decrease is highly significant for our membership. For the 2019 calendar year, the median income from screenwriting amongst WGC members who earned any money in our jurisdiction was \$28,284. These are individual screenwriters who are trying to pay rent and put food on their tables, often in Canada’s most expensive cities, like Toronto and Vancouver, where many screenwriters have to live in order to be close to television production centres and broadcast decision-makers. For many, a 25% drop in income is devastating. In terms of direct COVID-19-related support, screenwriters put out of work have largely had to rely upon the Canada Emergency Response Benefit (CERB), which some still couldn’t qualify for that given the irregular, “gig” nature of their work.
41. Screenwriters expect to get hit hard again amidst a second wave of COVID-19, and in the current broadcast year in which the lower revenues broadcasters experienced last year will proportionally reduce CPE and PNI production levels, and the ripple effects continue throughout the sector for years to come.
42. So, to be very clear, the production community—and Canadian screenwriters—are hurting. This is not just a crisis for broadcasters themselves, and we submit they cannot be permitted to download their pain onto the backs of Canadian creators.

### **Questions of the Commission**

43. The WGC is pleased to answer the questions put forward by the Commission in the Notice of this proceeding. The Commission has stated its view that any potential regulatory relief must ensure that:

---

<sup>29</sup> Application, para. 8.

<sup>30</sup> Government of Canada, “Managing your business during COVID-19” (<https://www.canada.ca/en/services/business/maintaining-your-business.html>).

<sup>31</sup> Government of Canada, “COVID-19: the Government of Canada Provides Relief to the Broadcasting Sector”, March 30, 2020 (<https://www.canada.ca/en/canadian-heritage/news/2020/03/covid-19-the-government-of-canada-provides-relief-to-the-broadcasting-sector.html>).

- the viability of the Canadian broadcasting sector, insofar as it has been affected by the COVID-19 pandemic, is not further harmed as a result of the regulatory relief proposed;
- parties that currently benefit from the requirements imposed by the Commission on broadcasters are not unreasonably affected by any potential regulatory relief;
- when viewed as a whole, current news and information programming and the service such programming provides to Canadians is maintained; and
- any resulting regulatory action granting potential relief is minimally administratively burdensome on those entities seeking relief but is easily monitored and supervised by the Commission in order to ensure appropriate accountability.

44. As a general note, the WGC has no expertise with respect to the production of news and information programming, and therefore will not comment substantially on this point. We would simply state that while we acknowledge the vital importance of news and information programming to Canadians, we also believe it is one part of the Canadian broadcasting system, and concerns in this regard should not override other elements of the system.

Q1. Does the CAB's proposal align with the outcomes for this proceeding as set out above? If not, how could the CAB's proposal be modified to better align with these outcomes?

45. No. As discussed in greater detail above, the CAB's proposal seeks to benefit its members at the expense of much of the rest of the broadcasting system, including the creators of Canadian programming and the Canadian audiences who are entertained and enriched by it. The CAB has not provided a detailed evidentiary basis for its overbroad, sweeping, and extreme proposal, nor has it distinguished the situations of various broadcasters, so the impact on the viability of its members cannot be properly examined. The CAB's proposal does not include any method for making up lost expenditures based on the strong 2018-2019 revenue year, which unreasonably affects the production and creator community, already hit itself by the effects of the pandemic. And to the extent that "bad faith" is a factor for examining broadcasters' decisions, the proposal is not minimally administratively burdensome, involving investigations of broadcasters' decision-making processes and motivations.

46. The WGC is not aware of any way to modify the CAB's proposal in any manner that it would still be recognizable as the CAB's proposal.

Q2. Does the [Commission's] approach align with the outcomes for this proceeding as set out above? Please explain. If not, how could this approach be modified to better meet the outcomes?

47. The Commission's approach aligns much better with the outcomes of this proceeding. Crucially, it does not entail simply wiping out regulatory obligations for the 2019-2020 broadcast year but, rather, to ensure those obligations are met over a more protracted period of time. This approach strikes a much better balance between supporting the financial viability of broadcasters and ensuring that parties that currently benefit from the requirements imposed by the Commission on broadcasters are not unreasonably affected.

48. The problem is that we lack an evidentiary basis with which to determine whether additional flexibility is truly necessary, given that the expenditure framework, for example, is already recognizing the

revenue losses of the last broadcast year in this one, that broadcasters already have year-over-year flexibility to meet expenditure requirements, and programming expenditures are already amortized over several years, helping to smooth over revenue and spending volatility. It seems clear that the “urgency” expressed in the CAB’s application no longer applies, because it contemplated a decision by early August, and we are now in mid-October, with the 2019-2020 broadcast year having already closed. Whatever specific concerns the CAB had with respect to timing would appear to be moot, and therefore not capable of being addressed at this time.

49. As such, the goal now would appear to be to determine the extent of any non-compliance that occurred in 2019-2020 and ensure that it is rectified by the end of the licence term, at the latest. This seems like something that would have occurred in the normal course in any event, since broadcaster compliance is generally assessed at licence renewal.
50. Given that we don’t even know if additional flexibility is necessary, we cannot speak to the level or quantum of what such flexibility would be.

Q3. Is this approach applicable equally to all expenditure- and exhibition-related requirements? If not, how should such requirements be treated?

51. As noted above, money is fungible, and expenditures that were not made in one year can be made up by being made in future years. Ensuring that broadcasters make up any under-expenditures that occurred last year by the end of their licence terms, at the latest, seems plainly applicable.
52. The extent to which exhibition-related requirements can be “made up” is less clear. The WGC is not in a position currently to make detailed proposals in this respect.
53. Similarly, we as intervenors lack a detailed evidentiary record upon which to base proposals, with respect to exhibition requirements or otherwise.

Q4. To which entities should these solutions be applied, and under what circumstances would broadcasters be eligible to make use of the proposed flexibilities?

54. We lack a detailed evidentiary record upon which to base an answer to this question in a detailed or meaningful way. Presumably, broadcasters that have already not met their regulatory obligations for 2019-2020 will be those who will be in a position to need to meet them over a more protracted period of time. Broadcasters that have been able to meet their regulatory obligations within the current framework will presumably have no need for additional flexibility.

Q5. If the Commission were to adopt this approach, what period of time should be granted to broadcasters for meeting their regulatory obligations for the 2019-2020 broadcast year? Should these obligations be spread equally over a period of time or ramped up over time?

55. We lack a detailed evidentiary record upon which to base an answer to this question in a detailed or meaningful way. Broadcasters would normally be assessed on their regulatory compliance at licence renewal. For the large, English-language broadcast groups, their current licences conclude on August 31, 2022. This is two years from when the regulatory compliance issues appear to have arisen. On its

face, then, this would appear to be a natural date by which compliance during the licence term as a whole should be contemplated. We have no evidence of the need for a greater period of time. Indeed, spreading compliance over more than one licence term may become problematic and complex, possibly even threatening the integrity of the regulatory regime by eroding the notion that regulatory obligations must be fulfilled as they come due. Eroding the time-specific component of regulation erodes the concept of regulation altogether.

56. In general, the WGC believes the Commission should be concerned about deferring regulatory obligations, due to the very volatility facing our sector. Broadcasting was already undergoing significant structural change and uncertainty before the pandemic, and the next several years could very conceivably see channel shut-downs or future revenue declines. The Commission already has experience with trying to ensure compliance with conditions of licence *after* a broadcaster finds itself in financial difficulty, with respect to Super Channel.<sup>32</sup> We submit that it is simpler and safer to hold broadcasters to their obligations when they come due, rather than defer them to an increasingly uncertain future, and any additional flexibility should be provided on as short a term as possible.

Q6. What possible regulatory relief or flexibility other than that requested by the CAB or proposed by the Commission could be granted to Canada's broadcasters and would align with the outcomes set out by the Commission? In proposing solutions, the following must be addressed: What regulatory requirements should be subject to these proposed flexibilities? To which entities should these solutions be applied, and under what circumstances would broadcasters be eligible to make use of the proposed flexibilities? For how long should any flexibilities provided by the Commission to Canada's broadcasters apply?

57. Consistent with our comments above, we lack a detailed evidentiary record upon which to base an answer to this question in a detailed or meaningful way. Given the current flexibilities that exist within the system, as noted above, we do not believe there is evidence on the record of this proceeding that additional flexibility or regulatory relief is necessary.

Q7. On which elements of any flexibility proposed in the context of this notice of consultation should the Commission require broadcasters to report? On which elements should they be required to publicly report?

58. Broadcasters should be required to publicly report on any and all elements of any additional flexibility provided by the Commission. The WGC is not aware of any actual or proposed element of the regulatory framework that would or should be confidential or not publicly reported. Revenues and expenditures, which are central to the CPE and PNI regimes, are publicly reported now. If they become subject to additional flexibility, that flexibility and how it was used should be publicly reported.
59. To our knowledge, the relevant data in this proceeding—e.g. broadcaster revenues and expenditures on Canadian programming—are currently publicly reported. If additional flexibility is granted by the Commission, then we submit that the interests of transparency would support reporting that pinpoints precisely how that flexibility was used. We submit that intervenors or other members of the Canadian public should not need to comb through existing reports attempting to understand how they differ from what would otherwise have been spent, done, or reported publicly.

---

<sup>32</sup> Application 2017-0743-1: *Broadcasting licence renewal for Super Channel (formerly Allarco Entertainment)*.



Q8. What form and frequency should such reporting take? Are additional measures beyond current reporting requirements (relating, for example, to annual returns and the program logs) necessary in regard to reporting on and monitoring compliance with the proposed approach?

60. Subject to our comments above, the WGC is aware of no additional measures of reporting necessary. The current frequency of relevant reporting—i.e. annual reporting—is expected to be sufficient. As with any reporting, however, providing reporting on a timely basis is important. Stakeholders should not be in a position of having to wait until up to halfway into the broadcast year before being able to access data that existed many months before.

Q9. Are there any elements of this reporting for which broadcasters should be granted confidentiality?

61. No. We are aware of no elements of this reporting for which broadcasters should be granted confidentiality. The reporting is with respect to regulatory obligations that are in the public interest, and the public should be able to see and understand how those regulatory obligations are being met, or not being met, as the case may be.

#### **Closing Remarks**

62. We thank the Commission for the opportunity to participate in this proceeding, and we look forward to providing further comments during the reply phase.

Yours very truly,

A handwritten signature in black ink, appearing to be 'Maureen Parker', written in a cursive style.

Maureen Parker  
Executive Director

c.c.: Council, WGC

\*\*\* End of Document \*\*\*