

Review of Broadcasting Public Notice CRTC 2008-4: “Diversity of voices”

Campaign For Democratic Media

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Part I: Overview

The CRTC Broadcasting Notice of Public Hearing 2007-5 (NPH 2007-5) raised a number of issues regarding the diversity of voices in Canada's broadcasting system for public comment and was the subject of a public hearing in September 2007. Broadcasting Public Notice CRTC 2008-4 (15 January, 2008) sets out the Commission's determinations with respect to that hearing.

In the introduction of PN CRTC 2008-4, the Commission notes that it considers the concept of "diversity" in the Canadian broadcasting system has three distinct levels: "diversity of elements (e.g. public, private, community); plurality of editorial voices within the private element, and diversity of programming" (10)¹. And while this hearing was generally addressed to the private element of the broadcasting system, the Commission also notes the importance of the public and community elements and that "ensuring the availability of all three elements provides the foundation for viewpoint diversity within the Canadian broadcasting system" (13).

In the Commission's view the central concern of this proceeding was "the question of the need for specific ownership limits to ensure diversity in the private element" (35). Both existing and new policy principles were considered in this regard. Other issues considered included: possible changes to ethnic and aboriginal broadcasting; possible changes to benefits policy; concerns regarding vertical integration of programming services and producers; license trafficking; cross ownership of broadcast and new media undertakings; and how the Commission might address the community element in broadcasting. These are all summarized and discussed in Part II below.

In brief, the new policies introduced by the Commission include: i) a prohibition on cross media ownership that precludes "one person" owning a local radio station, a local television station and a local newspaper serving the same market; ii) a cap on the common ownership of television services that will help prevent (but not guarantee) "one person" from controlling more than 45% of the total national television audience share; iii) a prohibition on "one person" controlling all the broadcast distribution undertakings (e.g. cable, satellite, etc.) in any given market.

While these measures provide important benchmarks for regulating concentration of media ownership as measured on a national scale, they do not safeguard diversity of voices in local broadcast markets and they will not require any divestment on the part of Canadian media companies, despite the fact that by measures employed in a number of other countries, such as Australia, Canada already has unacceptable levels of concentration. The absence of safeguards for local diversity in broadcasting runs counter to the Commission's own suggestion that any benefits related to increased consolidation should include improvements "*at both the local and national level*" (36).

Also discussed in Part II, there are a number of problems with each of these new regulations as well as with existing rules.

¹ Bracketed numbers refer to paragraph numbers in PN CRTC 2008-4

In addition, the new ownership caps do not directly address media content, and by themselves are not sufficient to guarantee the third level of diversity the Commission identifies – “diversity of programming.”

Consequently, by its own standards, if the CRTC wants to secure the levels of diversity within the broadcasting system, base line criteria for maintaining levels of diversity in programming must also be established. For example: i) limits on the repurposing (and re-broadcasting) of all types of content across media platforms; ii) clear, enforceable conditions of license surrounding the separation of newsrooms and editorial decision making within companies holding multiple media properties; iii) conditions of license requiring the broadcast of some degree of local programming, and particularly original news programming.

Moreover, given – as the CRTC acknowledges -- the importance of “the diversity of elements” in terms of overall diversity within the broadcasting system, measures to support the development and maintenance of public and community expression should be instituted. Currently the private sector overwhelmingly dominates the system and both the public and community sectors are to varying degrees dependent upon it, particularly in terms of carriage.

From this perspective, measures to “rebalance” the system to increase the presence of the public and community sectors are necessary – measures that will necessarily impact upon the private sector (but were not included in this review). For instance, one such measure might be a “must carry” tier of socially mandated not-for-profit public and community channels on the basic service offered by all BDUs. Such a tier might be supported by mandatory subscription fees as well as other means such as a production fund dedicated to such services and one-time infrastructure development grants from benefits packages. Similarly, because digital technologies offer opportunities to significantly increase spectrum use, spectrum allocations should be made specifically for the public and community elements of the system.

The Commission acknowledges that the community sector is underdeveloped and notes that “(i)n light of the record of this proceeding and the changes taking place in the broadcasting environment,” it will undertake a comprehensive review of its policies with respect to community broadcasting (172). This appears to be a positive outcome of the diversity hearings.

On another note, while a number of intervenors raised the issue of net neutrality and asked the CRTC to develop regulations in this regard, there is no discussion of this issue here.

In sum, while the new ownership regulations establish benchmarks in terms of the regulation of concentration of ownership, they will have no impact on what are deemed by many to be already excessive levels of concentration. Moreover, these caps address only one of the three levels of diversity identified by the Commission.

In order to secure diversity at all three levels, base line criteria for maintaining levels of diversity in programming must be established and measures to “rebalance” the system to increase the presence of the public and community sectors must be undertaken.

Part II: Summary and Discussion of the Issues and Recommendations

This section reviews each of the policy areas addressed in PN CRTC 2008-4.

Re: Ownership Policy (39-106)

Radio ownership (39-45)

No changes were seen as necessary to existing rules but we don't know if the existing rules are being universally enforced or how effective they are. Certainly, in terms of diversity of editorial voices, radio is a small player as few radio stations have active newsrooms and much (if not most) radio news emanates from wire services. Similarly, radio format rules were relaxed several years ago. This improved the financial position of the industry and had the potential for impacts on diversity of content.

Over-the-air television (46-50)

Existing rules that generally limit ownership to “no more than one conventional television station in one language in a given market” were seen as sufficient to ensuring “a plurality of editorial voices in local markets” (46, 50).

A key concern here is whether or not this rule is being fully enforced. Because the CRTC often rules on a “case by case” basis there are sometimes exceptions to such rules and in NPH 2007-5 they do note that “the Commission has approved several exceptions to the existing policy” (59). While in the past there were exceptions in both the Vancouver and Toronto markets we don't know what exceptions are currently in play. Obviously, if there are exceptions in major markets there is some question of the effectiveness of the rule.

Cross media ownership (51-68)

Previously there were no regulations in this regard. Now “The Commission, as a general rule, will not approve applications for a change... that would result in the ownership or control, by one person of a local radio station, a local television station and a local newspaper serving the same market” (64).

This is one of the main policy innovations rising from this hearing. But given that The Globe and Mail and National Post are defined as “national” rather than “local” it does not

appear that any companies are currently in violation of this new policy. (If the Globe and Mail was classified as a “local” paper, CTVglobemedia would have a number of violations.) While the rule does provide a solid benchmark by which to assess cross media ownership, there are several issues regarding its possible effectiveness:

i) Given the Commission states that the “central objective” of this policy is to ensure “a plurality of editorial voices” (58) and that most radio stations rely upon wire services or local newspapers for their news, it’s not clear how effective this policy will actually be in promoting diversity. Because people primarily rely upon newspapers and television for news, a policy requiring separate ownership of these types outlets would be much more effective.

Along these lines, while the Commission notes that it has in the past required “separation between the editorial operations of commonly owned television stations and newspapers,” it has not followed up to investigate whether these conditions are being fulfilled (54). What is the point of imposing such conditions without follow up to ensure compliance?

ii) It is limited to newspapers published at least five days per week and to those with no less than 50% paid circulation. Hence the growing number of free daily commuter papers are excluded, as are free community newspapers (some published up to three times per week). In many small towns there are no daily newspapers, only free community papers. However, if the definition of “local newspaper” was enlarged, what impact this might have is not clear.

iii) Because this regulation supposedly focuses on production, broadcast distribution undertakings (BDUs: cable, satellite, telco’s, etc.) are not included in this calculation. While, as discussed below, there are regulations regarding vertical integration between “producers” and “distributors” a more effective way of dealing with possible favouritism between these companies would be to simply bar common ownership of such properties.

Diversity of television programming in the private element (69-89)

Up to this point the Commission has not had any policies with respect to the common ownership of discretionary (pay) television services. And given that the regulatory framework surrounding these services will be reviewed shortly, it feels that new policies in this regard would be premature (76).

However, concerned that increased consolidation in the sector as a whole might reduce diversity, the Commission has come up with a formula that prevents one person from controlling more than 45% of the total television audience share as measured on a national scale and “will carefully examine transactions that would result in the control by one person of between 35% and 45% of the total television audience share” (87). There are three key concerns here. First, while these thresholds will be measured separately in English and French markets, they are calculated on a “national basis” (87) which means that shares in some local and/or regional markets could be virtually monopolized without infringing the new guidelines. Second, the Commission notes that

they will not be concerned about increases in audience share that arise from “normal competition” or “the introduction of new services” (84). Concerns are only triggered by increases in audience share through acquisitions. Hence there is a gigantic loophole in this regulation. Third, by virtue of measuring audience share on a national scale, the Commission is enshrining current levels of media concentration and ownership as exemplary of diversity despite Canada having one of the most heavily concentrated mediascapes in the Western world.

Moreover, there is a question of the arbitrariness of these thresholds, which the Commission imported from banking regulation (82). What makes these levels appropriate or even relevant for broadcast markets? There are already complaints from independent producers that the market power of large ownership groups makes it difficult for them to negotiate equitable terms for their programs (71).

Diversity of ownership and broadcast distribution services (90-106)

Up to now the Commission has not had a policy with respect to common ownership of BDUs in a single market and has allowed common ownership subject to certain conditions (90-91). (Although, once again, it is not clear whether there has been any follow up to ensure that these stipulations are being met.)

While the Commission recognizes that BDUs do act as gatekeepers on diversity within the system, and that there have been a number of complaints from producers in this regard, because they feel that ownership caps on BDUs in any given territory may act as a deterrent on the development of new distribution technologies, they will not issue any specific ownership rules. However, the CRTC does note that from now on they are “not prepared to allow one person to control all the BDUs in any given market” (105).

Perhaps the key concern here is that this new rule does not address historical complaints by independent producers about their relationships with BDUs or complaints of self-dealing. These problems, which hinge on the degree of control BDUs exercise over what services they choose to carry, cannot be solved by the oligopolistic “competition” that characterizes broadcast distribution markets.

Moreover, in this section of the Public Notice the Commission argues that “competition in the distribution of broadcasting services is the most efficient way to serve customers” (99). However, as illustrated in the history of private OTA stations, because the largest profits are generally made distributing foreign, mainly American programming, “competition” tends to accentuate foreign over domestic programming within the system and thereby contributes to undermining diversity in terms of the very presence of Canadian programming.

Further, the Commission suggests that “BDUs that choose to offer a community channel also contribute to the plurality of voices in local markets” (98). This cannot be taken for granted. Cable company run community channels have largely abandoned the volunteer system of community production and in many jurisdictions resist including or exclude altogether independent community programs from their channels. It is by no means

easily ascertainable how BDUs who operate their own channels are contributing to diversity, and in each case this must be carefully examined rather than assumed.

Re: Ethnic and aboriginal broadcasting (107-119)

The CRTC identifies two main issues here: i) minority ownership in broadcasting; ii) on screen reflection of diversity in mainstream broadcasting.

As for i), in the Commission's view, the large number of services representing Canada's ethnic and Aboriginal communities provide ample opportunity for expression in these areas and, therefore, no changes in existing policies are required at this time. As for ii), the Commission acknowledges that more progress is needed in this area and will continue to examine licensees performance in this regard at license renewal.

Here the Commission appears to be skimming over several omnipresent problems in these areas and ignoring submissions from the communities these policies would purport to protect. For instance, Aboriginal broadcasters have been perennially under funded and could well use new measures to boost their income. Similarly, some of the largest ethnic TV stations are owned by large private, corporations. Delivering such programming through not-for-profit companies would put more money in the hands of producers.

As for on screen reflection of diversity in mainstream broadcasting, this has been a long standing problem in the system and one that the regulator has the power to solve but seems reluctant to rigorously address. The Commission states that they will "closely examine licensees performance in this area at license renewal" (119). This puts the burden of proof onto communities who must monitor and document on an ongoing basis how well licensees serve Canada's cultural diversity, so that when licenses come up for renewal, well evidenced cases can be made.

Re: Benefits policy (120-136)

"(R)ecognizing the important contributions that benefits make to the creation and presentation of Canadian programming, the Commission has determined that it will retain its current policy with respect to benefits." (136)

The problem here is that the specific form that such benefits take is decided by the corporation involved in the transaction, raising serious issues of conflict of interest and potentially limiting the range of things that might be undertaken in this regard. Recommendations for creating an independent decision process were made to the Commission but these were not commented on here.

Re: Vertical integration of programming services and producers (137-150)

The Commission has a number of regulations governing the relationships between broadcasters and independent producers. These are structured to encourage broadcasters

to acquire programming from independent producers even though they may be vertically integrated with their own production facilities. Despite these regulations independent producers often complain that they have difficulty finding outlets for their products and that broadcasters tend to favour vertically integrated production companies. However, the Commission notes that they have already recommended the development of new “terms of trade agreements” between broadcasters and independent producers and believe that these will provide stability in this area. Consequently no new policies were implemented.

Previous enquiries have noted that there is no adequate information regarding the impact of ownership concentration on the independent production sector. It is not clear whether the CRTC has since acquired such information. If not, until such time that such impacts can be properly assessed and safeguards protecting the diversity of this industry developed, there should be no further consolidation of independent producers and broadcasters.

Re: Licence trafficking (151-156)

The CRTC defines “licence trafficking” as “the sale or change in the effective control of a broadcast undertaking(s) within its first licence term or shortly after” (151). The Commission sees such sales as a possible threat to the licensing process and has a series of principles it applies to such sales to help insure that licensees live up to their commitments and do not profit unduly from such sales. In this Public Notice, the Commission states that it feels current controls are adequate.

However, there is some question as to whether the CRTC should expand its definition of “licence trafficking and what penalties should be levelled in such cases. The broadcasting system is by definition a public system. Holding a broadcast license is a privilege not a property right, and regulation generally provides a strong hedge against the risks associated with private investment. Moreover, profiting unduly from the sale of a license places a private burden on the public as the new investors struggle to reap a reasonable return on an inflated investment within the economic confines of the broadcasting system. From this perspective, transactions should be scrutinized to insure that licensees do not profit unduly from the sale of broadcast licences no matter how long they have held them and, in this context, the CRTC’s time line used to define the term may be seen as inadequate. Also clear penalties for licence trafficking need to be established.

Re: Cross ownership of broadcast and new media undertakings (157-159)

The Commission has no policies with regard to the cross ownership of broadcast and new media undertakings. It has announced that it is conducting a study on broadcasting and the Internet or wireless devices and accordingly is of the view that regulations in this area would be premature (159).

In terms of new media, a number of intervenors raised the issue of net neutrality and asked the CRTC to develop regulations in this regard. However, there is no discussion of this issue in Public Notice CRTC 2008-4.

Re: How should the Commission address the community element?(160-173)

While the community sector was not mentioned in the origin Notice of Public Hearing regarding the Diversity of Voices, both the importance and underdevelopment of the sector were raised by a number of intervenors.

The Commission notes that “(i)n light of the record of this proceeding and the changes taking place in the broadcasting environment,” it will undertake a comprehensive review of its policies with respect to community broadcasting and that the “objective of this review will be to ensure that the Commission’s regulatory policy supports the development of a healthy community broadcasting sector” (172). This would appear to be a positive outcome of this process.

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