



2017 08 01

To: Ms. Danielle May-Cuconato
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Subject: **Application by BCE Inc. to rescind Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-335, Simultaneous substitution for the Super Bowl (the Order)**

Dear Ms. May-Cuconato,

1. This is an application by BCE filed pursuant to Part 1 of the *CRTC Rules of Procedure* requesting that the Commission rescind the Order, which removed authorization for simultaneous substitution for the Super Bowl effective 1 January 2017.
2. In the short time it has been in effect, the Order has caused significant harm to broadcasters, creators and Canadian businesses. The Order has deprived the Canadian creative community of \$3.3 million in funding and \$4 million in promotional time, and cost the Canadian economy approximately \$158 million and nearly 500 jobs across numerous sectors, while undermining long-standing government tax policy by driving Canadian advertising dollars to U.S. border television stations.
3. Further, the stated policy rationale for the Order is misconceived. Far from being "integral" to the Super Bowl, recent research reveals that the advertising aired during commercial breaks is significantly less important to Canadians who watch the program than the actual game and the Halftime show. Indeed, only 0.001% of viewers complained to the Commission about the lack of advertising in Canadian Super Bowl broadcasts.
4. The Order is therefore inconsistent with the Commission's mandate under Sections 3(1) and 5 of the *Broadcasting Act* (the *Act*), Canada's trade obligations and the *Copyright Act*. Moreover, the perceived problem it was intended to solve can be addressed through other less disruptive means. Accordingly, we respectfully submit that the Order should be rescinded. In addition, given that the sale of advertising inventory in the Super Bowl began in June, eight months before the game, and appreciating that Commission procedures and standard timelines likely would not allow for this Application to be addressed before the end of the summer, we propose that the Commission temporarily suspend the operation of the Order until after Super Bowl LII on 4 February 2018, while the Commission's treatment of this broader Application proceeds in the normal course.

Background to the Order

5. Over the years, the Commission's policies relating to simultaneous substitution (or simulcast), which give Canadian television stations the ability to require broadcasting distribution undertakings (BDUs) to substitute local signals over a U.S. television station when the same program airs at the same time, have helped preserve a distinct Canadian television market while still allowing the major American networks to be distributed in Canada. Because of simultaneous substitution, local television stations are able to generate approximately a quarter of a billion dollars in revenue annually as it allows them to exploit the local program rights they have acquired. These revenues, in turn, drive significant investment in Canadian programming critical to the Canadian broadcasting ecosystem.

6. On 29 January 2015, the Commission issued Broadcasting Regulatory Policy CRTC 2015-25, *Measures to address issues related to simultaneous substitution* (BRP 2015-25). In this policy, the Commission reaffirmed the importance of simultaneous substitution to local television stations, a sector of the broadcasting industry that has been in structural decline for a number of years, while announcing certain measures to help ensure the accuracy and seamlessness of substitutions. At the same time, however, the Commission announced its intention to prohibit simultaneous substitution for one program only, the Super Bowl, which, year after year, delivers the single highest audience of any program on Canadian television. The Commission's rationale for doing so was the following:

. . . given comments received from Canadians and the fact that the non-Canadian advertising produced for the Super Bowl is an integral part of this special event programming, distributors will no longer be allowed to perform simultaneous substitution for this event as of the end of the 2016 NFL season (i.e. for the January/February 2017 broadcast of the Super Bowl). The Commission notes that the existing commercial arrangement relating to the broadcast of this event by CTV provided for its broadcast over a number of years. However, the Commission is of the view that the above determination will provide the broadcaster with a reasonable period to make adjustments. . . .¹

7. This issue was never addressed in any detail as part of the proceeding leading up to BRP 2015-25. No evidence was submitted attesting to the "integral" nature of the Super Bowl commercials. In fact, the number of people that filed complaints with the Commission about not being able to access the U.S. ads during the game represents roughly 0.001% of those people who watch the game in Canada. Moreover, there was no evidence on the record as to what the financial impact of eliminating simultaneous substitution for the Super Bowl would be to broadcasters, creators or the Canadian economy more broadly.

8. As the most watched program on Canadian television, the revenue broadcasters derive from the broadcast of the Super Bowl is significant. Consistent with how the system benefits from simultaneous substitution generally, these funds help support the production of Canadian programming. In addition, the program's large audience has historically made it an ideal opportunity to promote Canadian programs. However, the game has also been a crucial marketing vehicle for Canadian businesses, which see it as a unique opportunity to reach consumers.

9. Notwithstanding these factors, in Broadcasting Notice of Consultation CRTC 2015-330, *Call for comments on the proposed Simultaneous Programming Service Deletion and Substitution Regulations*, the Commission indicated its continued intention to implement its

¹ BRP 2015-25, paragraph 22.

policy determination regarding the Super Bowl, and that it would do so by an order issued pursuant to section 9(1)(h) of the *Act*. The Order was issued on 19 August 2016 and came into force 1 January 2017.

The Negative Effects of Removing Simultaneous Substitution for the Super Bowl

a) *Immediate Impact on Bell Media*

10. The first Super Bowl to be broadcast in Canada not in simulcast as a result of the Order took place on 5 February 2017. Super Bowl LI featured the New England Patriots and the Atlanta Falcons. While the Atlanta Falcons took a large lead into halftime and it looked like the game would be a blowout, the New England Patriots mounted a furious comeback in the second half, tying the score late in the fourth quarter and then prevailing in overtime, making this the first Super Bowl that required extra time.

11. Not surprisingly, the audience for the game was very large. In the U.S., the game ranked as one of the Top 5 television broadcasts in television history. In Canada, approximately 5.4 million people watched the game across the Bell Media properties airing the event (CTV, CTV Two, TSN and RDS), which had licensed the exclusive Canadian rights to the game. However, it is estimated that an additional 3.4 million people watched the game on Fox-affiliated stations available through Canadian BDUs, driven largely by the hype surrounding the availability of the U.S. feed for the first time.

12. Bell Media lost 40% of the audience associated with the game and \$11 million, roughly two-thirds of the revenue it would have generated had BDUs been allowed to substitute its over-the-air signals over the Fox-affiliated stations.

b) *Impact on Funding and Promoting Canadian Programming*

13. The economic impact of simultaneous substitution being removed for the Super Bowl extends far beyond the revenue lost by our services. Among other things, it has negatively impacted the funding of creators of Canadian programming.

14. Bell Media's baseline obligations relating to spending on Canadian programming are calculated as a percentage of revenue. Therefore, the \$11 million revenue decline translates into a reduction in required spending of approximately \$3.3 million². While Bell Media treats such spending requirements as a floor rather than a ceiling, over-the-air television stations (including Bell Media's) in Canada have lost hundreds of millions of dollars since 2013. As the Commission noted in its most recent financial overview for the sector, private conventional television stations' revenues have fallen steadily over the past few years, decreasing by 18% - or \$361 million - between 2012 and 2016, while 2016 marked the fourth consecutive year of financial losses. Over the same period, these stations have shed hundreds of jobs and been forced to scale back expenditures. The additional financial hit caused by removing substitution for the Super Bowl compounds these pre-existing problems, and results in even less money being available to fund Canadian production, which is already difficult to finance and often unprofitable. This will, in turn, potentially lead to further job losses.

15. In addition, Bell Media has historically used the Super Bowl, to promote other programming - much of which is Canadian - on its channels, given the game's massive audience and broad reach. In the past, this promotional time has been valued at roughly \$4 million. Aside from the dollar value, this promotional time has helped to ensure the success of

² The baseline for Canadian programming expenditures is 30% of prior year's revenue.

numerous Canadian programs over the last number of years by driving viewers to these shows, including: *Orphan Black*, *Saving Hope*, *Motive*, *The Amazing Race Canada*, *MasterChef Canada*, *Cold Water Cowboys*, *Bitten*, *19-2*, *Letterkenny* and *Cardinal*. This promotion helped to broaden the audience for these shows, which in many cases have gone on to be distributed in multiple territories internationally and receive numerous awards.

c) *Driving Revenues and Audiences to Border Broadcasters*

16. In addition to depriving Canadian creators of funding and other jobs, the Order also undermines longstanding government tax policy by driving Canadian advertising dollars to U.S. border stations.

17. This is illustrated by the report of Communications Management Inc. (CMI), commissioned by BCE, and attached as Appendix 1 to this Application. As the CMI report notes, the removal of simultaneous substitution from the 2017 Super Bowl renders ineffective the intent of Section 19.1 of the *Income Tax Act* (the *ITA*), which prohibits Canadian businesses from deducting advertising costs for advertisements aimed at Canadians but placed on non-Canadian television stations. Like simultaneous substitution (a Commission regulation), Section 19.1 (federal legislation) came into effect in the 1970s. The two measures were designed to work together to protect copyright rights in programs purchased by Canadian stations, and ensure that advertising revenues earned from those programs were realized in Canada (rather than on U.S. border television stations). Simultaneous substitution took away the ability of U.S. border broadcasters to sell advertising on top shows otherwise available in Canada to Canadian advertisers, and, over time, the growth of specialty services further reduced the audiences for the remaining programs coming from these border stations.

18. However, the Commission prohibition of simultaneous substitution during the Super Bowl now has re-invigorated the potential for cross-border selling of advertising by U.S. television stations. The Super Bowl is not only an advertising vehicle in and of itself; it is often also sold as part of a package. The Commission simultaneous substitution decision has effectively transferred part of that packaging tool from Canadian to American broadcasters. Section 19.1 cannot prevent this on its own as U.S. border stations simply reduce rates to compensate for the inability to deduct the cost of the advertising.

19. This was evident during the 2017 Super Bowl. As reported in the *Globe and Mail*, Canadian chain Pizza Pizza bought advertising on the Fox affiliate in Buffalo³ while the Fox station in Spokane aired advertising from Leon's Furniture and Canadian Mitsubishi dealers. In these cases, Canadian advertisers were able to target their large customer bases in Canada through an American television station and their decision to do so was directly motivated by the Commission's removal of simultaneous substitution for the Super Bowl.

d) *Advertising Leaving the Canadian Broadcasting System and Driving Commerce to U.S. Retailers*

20. Finally, the Commission's decision on simultaneous substitution in the Super Bowl also has a number of additional economic ripple effects. The CMI report concludes that when these inputs are combined, it is evident that was originally seen as a fairly self-contained policy change that has actually cost the Canadian economy approximately \$158 million and nearly 500 jobs across numerous sectors.

³ Kate Taylor, "Fuss over American Super Bowl ads ignore reality of Internet TV", *The Globe and Mail*, 10 February 2017.

21. First, as CMI highlights, it is unlikely that the \$11 million in Super Bowl advertising revenue that was lost was redistributed to other programs or players in the Canadian television industry or media sector overall. This is because the reach and audience associated with a top-rated, major live-event program like the Super Bowl that is "PVR proof" would be difficult to replace with lower rated programs as those shows would not be able to deliver a comparable marketing "spike". Furthermore, a number of the companies that do buy advertising in the Super Bowl are subsidiaries of U.S. companies that can achieve their marketing objectives through spots designed for and airing in the U.S. broadcast. This was the case for one major advertiser, which remarked that it was going to get some of the Canadian audience for free due to the fact that it will be advertising in the U.S. feed.⁴

22. Second, the removal of simulcast in the Super Bowl also tilts the economic balance in favour of U.S. advertisers and against Canadian companies, because it increases the ability of retail destinations south of the Canada-U.S. border to reach potential Canadian customers. This is especially true in markets such as Vancouver, Winnipeg, Toronto and Montreal, where there is constant attraction to major U.S. shopping destinations within reasonable driving distance. Furthermore, greater access to these ads has the potential to increase the amount of e-commerce Canadians conduct with U.S. businesses (and decrease what they order from Canadian retailers).

23. The economic consequences outlined above were either not discussed in the proceeding leading up BRP 2015-25, or were simply not evident at the time. However, what is clear after only one Super Bowl without simulcast is that the Order is bad for the Canadian broadcasting system and bad for the Canadian economy. Further, as discussed in detail below, the rationale for the Order is misguided and hardly justifies the significant negative impacts.

The Rationale for the Order is Misguided

24. As noted above, the rationale which the Commission has, in BRP 2015-25, for removing simultaneous substitution for the Super Bowl is that "the non-Canadian advertising produced for the Super Bowl is an integral part of this special event programming". However, this is factually incorrect for the following reasons.

25. First, for the last several years, the vast majority of U.S. Super Bowl advertisers have made the spots that will air during the game available online the week before the game. YouTube has a specific channel devoted to Super Bowl advertising and the NFL links to the ads from its web site. Even the few spots not available in advance are posted online within seconds of when they air, making them easily accessible to all Canadians who wish to view them.

26. Second, most Canadians have little problem with the lack of U.S. advertising on Canadian Super Bowl broadcasters. In connection with this Application, we retained Nanos Research to conduct a poll to determine the popularity of the Super Bowl and what elements of the game Canadians value most. The findings are attached as Appendix 2. The responses to the poll demonstrate the following:

- Only 9% of the people who responded to the survey indicated that watching the advertising live during the game is important even though the commercials are available in advance. This shows that the commercials are far from an "integral" part of the game;

⁴ Susan Krashinsky Robertson, "This Bud's for us – and them: AB Inbev shakes up strategy for 'sim sub' Super Bowl", *The Globe and Mail* (2 February 2017).

- Canadians that watch the Super Bowl view the actual game and the Halftime show as significantly more important than the advertising aired during commercial breaks;
- Nearly 60% of the people watching the game were confused as to whether the products being advertised were available in Canada;
- Of those interested in the advertising, over 40% did not know that the commercials were made available and readily accessible in advance of the game. Furthermore, nearly 60% of those respondents who initially indicated their interest in the advertising in the game concluded that because the ads were available in advance, watching them during the game was no longer as important; and
- The Super Bowl is only of interest to less than half of Canadians. In fact, 55% of respondents indicated they never watch the game. 25% watch it periodically, while 8% watch it most of the time. Only 12% of respondents indicated they watch it all the time.

27. The Nanos Research demonstrates that the issue BRP 2015-25 was trying to solve was not nearly as large or widespread as it may have once appeared. Accordingly, the negative impact of the Commission's decision is completely disproportionate to the limited beneficial effects it may have.

The Order is Inconsistent with Sections 3(1) and 5 of the Act and Canada's Trade Obligations

28. The *Act* has a primarily cultural aim. Section 3(1) sets out the Broadcasting Policy for Canada. The Supreme Court of Canada has summarized the objectives of this policy as targeting "the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring programming is diverse".⁵ Section 5(1) of the *Act* requires the Commission "to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing shall have regard to the regulatory policy set out in subsection (2)". Section 5(2) sets out further instructions as to how the Commission should regulate the Canadian broadcasting system.

29. Since its inception, the Canadian broadcasting system has struggled to deal with the fact that Canada shares a border with the world's largest exporter of entertainment. While Canada is dramatically different than the U.S. culturally, Canadians want access to the same content that our neighbours south of the border enjoy. Consequently, broadcasting policy has sought to balance this reality with the need for a domestic broadcasting industry and home grown content.

30. The Commission's rationale for removing simultaneous substitution for the Super Bowl was designed to address "frustration" from some viewers over their ability to watch certain specific advertising content, but that rationale neglects the broader "public interest" that the Commission has a statutory duty to observe. Specifically, the Commission must ensure that its policies are consistent with the Section 3(1) objectives. Although the *Act* contains a number of objectives that can be quite broad in scope, the Order directly conflicts with a number of them:

- Section 3(1)(d)(ii), which encourages "the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view";

⁵ Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-268, 2012 SCC 68, (2012) 3 S.C.R. 489 at paragraph 18.

- Section 3(1)(t)(i), which states that BDUs should "give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations"; and
- Section 5(2)(e), which requires the Commission to regulate the system in a manner that "facilitates the provision of Canadian programs to Canadians".

31. As outlined above, the impact of the Order on the Canadian broadcasting system is clear. Instead of prioritizing the carriage of Canadian services, the Order requires BDUs to prioritize the distribution of U.S. channels. As a result, the system is generating less revenue. This translates into less investment in Canadian programs and fewer jobs for Canadians. All of these outcomes are inconsistent with Sections 3(1) and 5 of the *Act* – policies the Commission is mandated by Parliament to uphold.

32. In addition, the Order runs contrary to Canada's obligations under Article 2006(5) of the *Canada-U.S. Free Trade Agreement* (CUSFTA), implemented through section 31 of the *Copyright Act*. When read in context with the other clauses in the *CUSFTA*, Article 2006(5) enshrined a non-discriminatory simultaneous substitution regime as a counterweight to the ability of BDUs to retransmit over-the-air television stations without violating the program owner's copyright. This section was then incorporated into the *North American Free Trade Agreement*. It is clear that Canada fought hard to preserve simultaneous substitution in these international treaties, given its cultural and economic importance. By implementing the Order, the Commission has effectively ignored the delicate balance struck in this regime, and has put Canada offside its international treaty obligations while undermining the retransmission rights scheme of the *Copyright Act*.

The Solution

33. We recognize that the U.S. commercials that air in the Super Bowl can, at times, be entertaining, and that there are Canadians who want the option to see them. However, as noted above, the Commission must balance this with the impact that access to U.S. advertising will have upon the Canadian broadcasting system.

34. As is clear from the poll conducted by Nanos Research, the vast majority of Canadians do not believe that the U.S. ads are an important element of the overall Super Bowl broadcast. Moreover, those who feel the ads are important, are largely unaware that they could be seen ahead of time. Once made aware of this fact, very few Canadians believe that the U.S. ads are an integral part of the Super Bowl broadcast.

35. As the exclusive Canadian licensee of the rights to the Super Bowl, we want the broadcast experience to be as valuable as possible for our viewers. Therefore, we are prepared to commit to the following in exchange for rescinding the Order:

- We will produce a curated show of the ads airing during the U.S. Super Bowl broadcast.⁶ The program will air on linear television the day of the game, will be included on CraveTV and will be made available to all BDUs to offer on a video-on-demand basis free of charge; and
- Given the large number of respondents to the Nanos Research poll that responded that they were unaware the Super Bowl commercials were available online in the week leading up to the game, we will launch a public awareness campaign to ensure

⁶ The overwhelming majority of U.S. Super Bowl ads are made available in advance of the broadcast. A few ads are only released during the game. Bell will make best efforts to include in the curated broadcast any ad it can access in advance of the game.

Canadians are well informed with respect to where they can access the U.S. commercials in advance of the game.

36. Overall, this revised approach will ensure that Canadians have access to the U.S. Super Bowl commercials and can watch them at a time of their choosing, and the benefits to the broadcasters, creators and Canadian businesses of simulcasting the game can be reinstated.

Conclusion

37. As outlined above, the Order has had a significant negative impact on broadcasters, creators and the Canadian economy. While 2017 marked the first year that viewers could watch the broadcast of the Super Bowl with the U.S. commercials, Canadians have had access to the ads for years days before the game from web sites like YouTube. Those Canadians who have voiced concerns over not being able to see the commercials represent an extremely small part of the overall audience to the broadcast.

38. With this Application, we are asking the Commission to rescind the Order in exchange for a commitment to make the U.S. commercials available broadly as part of a curated program to air in advance of the game and to launch an awareness campaign around where to find the ads. We submit that these commitments will address the issues the Commission was trying to solve in BRP 2015-25 and the Order, but in a manner that is more beneficial to the system as a whole.

39. Finally, the sales cycle for the Super Bowl (and the NFL season, with which the Super Bowl has been traditionally packaged) begins eight months before the game. Appreciating that Commission procedures and standard timelines likely would not allow for this application to be addressed before the end of the summer, we are therefore respectfully requesting that the Commission temporarily suspend the operation of the Order until after Super Bowl LII on 4 February 2018, while the Commission's treatment of this Application proceeds in the normal course.

40. We would like to thank the Commission for the opportunity to submit this Application. Should the Commission require any additional information, we would be pleased to provide it upon request.

Yours truly,

[Original signed by K. Goldstein]

Kevin Goldstein

Vice President, Regulatory Affairs, Content and Distribution

Attachments

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