



Canadian
Association of
Broadcasters

L'Association
canadienne des
radiodiffuseurs

October 13, 2004

Via Email

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
1, Promenade du Portage
Gatineau, Quebec
J8X 4B1

Dear Ms. Rhéaume:

**RE: Broadcasting Public Notice CRTC 2004-53: Call for comments
on assessing requests for non-Canadian third-language services**

The Canadian Association of Broadcasters (CAB), the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services – including private television and radio stations, networks, and specialty and pay and pay-per-view television services – is pleased to submit its comments with respect to the above-noted call for comments.

Attached is a copy of the CAB's submission.

Sincerely,

Wayne Charman
Senior Vice-President, Television,
Specialty & Pay Services and New Technologies

Attach.

**A Submission to the
Canadian Radio-television and Telecommunications Commission**

With respect to

Broadcasting Public Notice CRTC 2004-53

**Call for comments
on assessing requests for
non-Canadian third-language services**

Prepared by



Canadian Association of Broadcasters
L'Association canadienne des radiodiffuseurs

October 13, 2004

Executive Summary

1. Canadian third-language programming services play a key role in the communities they serve, providing:
 - information, enlightenment and entertainment from numerous countries of origin;
 - a vital link to those countries of origin in times of difficulty, helping Canadians follow and interpret significant international events;
 - information on the ethnic communities in Canada on a local, regional and national level;
 - a forum for local journalistic, artistic and other talent in the Canadian ethnic communities to express themselves in their language of comfort;
 - an opportunity for the emergence of new forms of cultural expression in their languages of comfort, reflecting the Canadian experience;
 - opportunities to understand the political and social structures of Canadian society with informed commentary on local, regional and national issues of interest to the communities and all Canadians; and
 - balanced programming that meets the requirements of the *Broadcasting Act* and the Commission's regulations, policies and industry codes, including those with regard to abusive comment, advertising of alcoholic beverages, violence, gender portrayal and advertising to children.
2. Moreover, Canadian third-language programming services make a direct and meaningful contribution to the Canadian broadcasting system:
 - creating more than 500 jobs with total salaries of over \$ 12.2 million;
 - investing over \$ 11 million in Canadian programming;
 - generating over \$ 42.9 million in revenues; and
 - airing over 15,000 Public Service Announcements per year.
3. The approval of additional non-Canadian third-language services to the lists of eligible satellite services has a real and lasting impact on Canadian third-language services:
 - competition for programming rights;
 - fragmentation of a narrow subscriber base;
 - fragmentation of a narrow advertising base; and
 - undermining the launch of new Canadian third-language services.
4. For these reasons, the CAB urges the Commission to proceed carefully when assessing the impact of additional non-Canadian third-language services on the ability of Canadian third-language services to continue to make a direct and meaningful contribution to Canadian society.

5. Specifically, the CAB makes the following recommendations with respect to how the Commission should assess requests to add non-Canadian third-language services for inclusion on the lists of satellite services eligible for digital distribution in Canada:

Competitiveness test

- Where a Canadian third-language service devotes 25% or more of its programming schedule to a generalist approach in any one language, any general interest non-Canadian service in that same language should be considered directly competitive with the Canadian service in question.
- Where a non-Canadian service operates in a niche programming category, for example music videos or news, the Commission should verify that there is no Canadian service dedicating a minimum of 25% of its schedule to similar programming in that language.
- The competitiveness test should continue to apply equally to services that have been approved but have yet to launch. The CAB acknowledges, however, that there should be a mechanism to ensure that an unlaunched Canadian service does not unreasonably prevent the inclusion of additional non-Canadian services on the lists.
- Where an operational Canadian third-language service sponsors a non-Canadian service that operates in its genre and language(s) for inclusion on the lists, the Commission should authorize that service without regard to the competitiveness test, unless the sponsored service would be competitive with an existing Canadian service unaffiliated with the sponsor. Subsequently, the continued authorization of the foreign service would be dependent on its adherence to the packaging arrangements proposed by its Canadian sponsor at the time of its authorization, or as later amended with the consent of the sponsor.

Deadline for launch of Category 2 third-language services

- Given the uncertainty that has resulted from numerous requests to add non-Canadian third-language services to the lists, the Commission should immediately suspend any imminent deadlines for the commencement of operations of approved Category 2 third-language services. Furthermore, the Commission should extend the final date for the commencement of operations of such services to one year after the date of the issuance of its determinations in this proceeding.

Carriage and packaging

- Where a licensed or approved Canadian third-language service offers programming in a particular language of operation, no non-Canadian service

operating in that language should be approved for distribution on a stand-alone basis, and BDUs should be required to carry all complementary Canadian services before they can carry the non-Canadian service in question.

- The Commission should introduce a mechanism whereby the consent of a Canadian third-language service is required before that service is included in a package that includes non-Canadian third-language services, or prior to any realignment or repackaging of the Canadian service can occur.

Introduction

1. The Canadian Association of Broadcasters (CAB), the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private radio and television services, networks, specialty and pay and pay-per-view services, is pleased to respond to Broadcasting Public Notice CRTC 2004-53 *Review of the approach to assessing requests to add non-Canadian third-language services to the lists of eligible satellite services for distribution on a digital basis* (PN 2004-53).
2. While this review is clearly focussed on the Commission's policies with respect to the addition of non-Canadian third-language specialty and pay services to the lists of eligible satellite services (the lists), the CAB notes that the broader issues raised in the context of PN 2004-53 are also of direct interest to the licensees of English- and French-language conventional, specialty and pay services, inasmuch as any change to the Commission's existing policies relating to how it assesses requests to add non-Canadian third language programming services to the lists of eligible satellite services could create a precedent with respect to any request for the addition of non-Canadian English- and French-language services to the lists.
3. Moreover, the CAB notes that non-Canadian third-language services operating in certain genres such as sports (where language of operation is not a determining factor in the ability of audiences to access the programming) could be considered competitive with existing Canadian English or French language sports services.
4. This submission addresses a number of issues related to third-language services in Canada, including the Report of the Panel on Access to Third-Language Public Television Services, as well as broader issues related to the role of non-Canadian services in the Canadian market. It also provides responses to the specific questions posed by the Commission in PN 2004-53.

The Report of the Panel on Access to Third-Language Public Television Services

5. The Panel on Access to Third-Language Public Television Services (the Panel) submitted its report *Integration and Cultural Diversity* to the Minister of Canadian Heritage on September 27, 2004. The CAB understands that this report will be filed with the Commission as part of the current proceeding.
6. The CAB commends the Panel for its thoughtful treatment of this important issue. Moreover, the CAB applauds the Panel for its recognition of the major contribution of Canadian third-language services toward the cultural diversity and multicultural nature of Canada, and for its recommendation that measures to strengthen existing Canadian services and help to create new Canadian services offering third-language programming must be considered.

7. The CAB wishes to address several specific recommendations put forward by the Panel.

Panel recommendation 2: *The regulatory policy should be based, in part, on the definition of “public broadcaster” that this panel has adopted in its work. “Public broadcasters” would be “the principal, or significant, broadcaster(s) in a foreign country that provides generalist programming culturally relevant to a particular language group in Canada.”*

8. The CAB is concerned that the definition of “public broadcaster” adopted by the Panel in its work is too broad, in the sense that it could reasonably be applied to any non-Canadian generalist service, whether privately or publicly owned, operating in any language, originating from any country.

9. The CAB submits that a more appropriate definition of a “public broadcaster” would be “a foreign broadcasting service that is owned and operated by the public sector in its country of origin, and that operates under a clear public service mandate”. To adopt the broad-based definition advanced by the Panel would open the door to literally hundreds of non-Canadian services whose operations in no way resemble Canadian understanding of what constitutes a “public broadcaster.”

Panel recommendation 3: *The regulatory policy should give preference to non-Canadian services that enter into a partnership with Canadian broadcasters.*

10. The CAB strongly supports this recommendation, and makes several further recommendations in this regard in this submission.

Panel recommendation 4: *The panel recommends that the third-language policy that is developed as a result of this report recognize that foreign broadcasters should make a contribution to Canada’s broadcasting system. In situations where the CRTC becomes convinced, after using all the powers at its disposal, that alliances or partnerships are not feasible, foreign broadcasters of third-language programming could be added to the list of eligible services.*

11. The CAB strongly agrees that foreign broadcasters should make a direct and meaningful contribution to Canada’s broadcasting system, in exchange for the privilege of accessing the Canadian market. It wishes, however, to address two other issues related to this recommendation.

12. First, the Panel’s suggestion that, where alliances or partnerships with Canadian third-language programming services “are not feasible”, non-Canadian third-language services could be added to the lists of eligible satellite services, is problematic.

13. The CAB submits that the notion of “feasibility” is vague and that, were the Commission to adopt this recommendation without further qualification, it would actually create a disincentive for non-Canadian services to enter into partnerships with Canadian broadcasters. For example, a non-Canadian service seeking to enter

the Canadian market could simply unilaterally decide that a joint venture with a competitive Canadian service was “not feasible” in order to be added to the lists.

14. As the CAB notes below, the lure of direct market entry is often an excuse for non-Canadian services to forgo existing partnerships with Canadian services. Adopting a “feasibility” test, without putting the onus on the non-Canadian service and/or its Canadian sponsor to clearly demonstrate why a joint-venture is not feasible, would have the opposite of its intended effect: it would create a clear disincentive for non-Canadian services to enter into productive joint ventures with Canadian broadcasters.
15. Second, the CAB notes the Panel’s position that a non-Canadian third-language service could be added to the lists, even where the non-Canadian service provides programming of a generalist nature in the same language as a general interest Canadian third-language service, “unless it is likely to cause some form of irreparable harm to an existing service.”
16. The CAB submits that the “irreparable harm” standard is unrealistic, as the presence of a competitive non-Canadian service in the Canadian market can cause significant, even debilitating, harm to an existing Canadian service, short of its being “irreparable.”
17. The CAB recommends that the onus should be on the Canadian sponsor of a non-Canadian third-language service to demonstrate unequivocally that the addition of that service to the lists will not unduly harm the ability of an existing Canadian service to meet its regulatory obligations.

Panel recommendation 8: *The panel recommends the creation of a third-language programming fund. The fund will consist of contributions from third-language services (on the eligibility list) that broadcast in Canada. The Government of Canada should also consider matching funds contributed by third-language broadcasters.*

18. As noted above, the CAB strongly agrees that non-Canadian programming services operating in Canada should be required to make a direct and meaningful contribution to the Canadian broadcasting system in exchange for the privilege of accessing the Canadian market.
19. However, with respect to the Panel’s recommendation that a new fund be established consisting of 10% of the revenues received by non-Canadian third-language services from Canadian distributors, the CAB is concerned that such a contribution by a non-Canadian service could be seen only as a low cost “cover charge” to gain entry the Canadian market. The CAB further notes that there are numerous practical issues to be addressed before such a fund could be implemented.
20. Accordingly, the CAB recommends that the Commission initiate a separate public proceeding into the most appropriate means by which all non-Canadian third-language services operating in Canada should be required to make a direct

contribution to the Canadian broadcasting system, whether in the form of a production fund or by some other measure.

Panel recommendation 9: *The regulatory framework that supports the policy should strongly favour and encourage the development of packaging options (in the same third language) that would strengthen third-language Canadian services and increase the cultural choices available to Canadians.*

21. The CAB strongly supports this recommendation, and makes specific proposals as to its implementation in this submission.

Panel discussion re the black and grey markets (Section 3.9 of the Panel's report)

22. The CAB notes that section 3.9 of the Panel's report outlines the Panel's views on the issue of signal theft. Specifically, the Panel observes that "dealing with piracy will require enforcement, and stiffer fines which in turn will require changes to legislation."
23. The CAB strongly supports the Panel's views in this regard, and urges the Commission to engage with the relevant line departments to ensure that the re-introduction, in this session of Parliament, of a Bill to amend the penalty and import control provisions of the *Radiocommunication Act* remains a priority of the Government of Canada.

The distribution of non-Canadian services in the Canadian market

24. The Commission originally authorized the carriage of non-Canadian programming services to contribute to the diversity of the Canadian broadcasting system by providing attractive programming options for subscribers and to provide attractive packaging partners for newly-launched Canadian pay and specialty services, provided that the addition of those non-Canadian services to the lists were not to the detriment of Canadian programming services.
25. In Public Notice CRTC 1983-245, the Commission stated that:

[It] has previously indicated a willingness to license the introduction of certain foreign specialty services which add diversity to the overall mix of programming services available to Canadian cable subscribers as long as such foreign services contribute to, and do not adversely affect the development of the Canadian broadcasting system.
26. Subsequently, the Commission published a list of non-Canadian services eligible for carriage in Canada, and the criteria for their distribution. In particular, the Commission noted that they could not be partially or totally competitive with Canadian specialty and pay services, that they could not be distributed until affiliate

agreements were concluded with existing Canadian specialty and pay services, and that they could only be distributed in packages with Canadian services.

27. As the Commission's policies in this area evolved over the years, the same principles continued to govern the approval of additional non-Canadian satellite services. In numerous decisions, the Commission reiterated its position that non-Canadian services:
- should contribute to the diversity of services available to Canadian by having a different format than Canadian services;
 - should provide support to Canadian services in packages where possible;
 - must hold Canadian rights to the programming that they distribute; and
 - should not be wholly or partially competitive with Canadian services.
28. Between 1997 and 2001, the Commission received numerous requests for the approval of non-Canadian third-language services to the lists. In each case, the Commission reiterated its policy with respect to how it assesses such requests, authorizing those non-Canadian services that did not directly compete with an existing Canadian third-language service, and denying the addition of non-Canadian third-language services to the lists where they were competitive with existing Canadian third-language services.¹
29. The most recent addition of non-Canadian third-language services to the lists was announced in Public Notice CRTC 2004-50 (PN 2004-50) and Public Notice CRTC 2004-51. The Commission again approved the addition of several services to the lists where those services were found not to be competitive with existing Canadian services, and denied the addition of non-Canadian services found to be competitive with one or more existing Canadian services. The decision not to authorize RAI International for addition to the lists garnered considerable public attention.
30. In deciding not to authorize RAI International and several Spanish-language services of general interest, the Commission concluded that they were sufficiently competitive with Telelatino as to not meet the current policy. At the same time, the Commission did authorize the distribution of five specialized Spanish-language services, two niche Arabic-language services (news and movies) and one Romanian-language service.

The Commission's Ethnic Broadcasting Policy and the licensing of Canadian third-language specialty services

31. The Commission's 1985 Ethnic Broadcasting Policy (Public Notice CRTC 1985-139 *A broadcasting policy reflecting Canada's linguistic and cultural diversity*) provided a framework for the licensing and regulation of ethnic radio, television and specialty services. The Commission noted that representatives of national cultural organizations emphasized that ethnic programming should:

¹ In particular, see Public Notices CRTC 1997-17, 1997-96, 2001-33, and 2001-82.

- serve as a bridge to enable groups to overcome cultural barriers;
 - increase access by ethnic groups to conventional radio and television and to cable services;
 - foster cultural appreciation and promote encounters among all Canadian cultural groups; and
 - assist immigrants to acquire at least one of Canada's official languages.
32. In announcing its Ethnic Broadcasting Policy, the Commission noted that, when it had licensed Teletatino Network Inc. and Chinavision Canada Corporation, it had "...considered that such ethnic specialty programming services would assist in fostering the cultural values and traditions of Chinese, Italian and Spanish-speaking people who live in communities across Canada, and would assist these groups to participate in, and contribute to, Canadian society."
33. The Commission licensed a number of ethnic pay and specialty services in the pre-digital era:
- Worldview in 1983 as a regional pay service in Chinese and other East Asian languages. The service eventually became Talentvision, authorized as a national specialty service in 1993 to broadcast in Mandarin, with some programming in Vietnamese and Korean;
 - Teletatino in 1984 to serve the Spanish and Italian-speaking communities;
 - Fairchild in 1984 to provide programming in Cantonese;
 - Odyssey in 1996 to provide programming in Greek; and
 - ATN in 1996, providing programming in some 15 South Asian languages.
34. These analog third-language programming services are complemented by four conventional services: CJNT (Montreal), OMNI 1 and OMNI 2 (Toronto), and Channel M (Vancouver). Together, these services offer over-the-air programming in more than 40 languages.
35. Beginning in 2000 and continuing on to the present, the Commission has licensed over 50 Category 2 digital ethnic specialty services in many languages, including Portuguese, Tamil, Hindi, Urdu, Punjabi, Spanish, Gujrati, Telegu, various Balkan languages, Persian, Korean, Russian, Caribbean and African, Filipino and Arabic. In many cases, there are multiple general interest and niche services in any one language.
36. Today, the Canadian broadcasting system provides Canadian audiences with an abundance of programming choices in a multitude of languages via conventional, analog and digital distribution. In addition, ethnic radio services broadcasting in a multitude of languages are available in Montreal, Ottawa, Toronto, Winnipeg, Calgary, Edmonton and Vancouver.

The contribution of Canadian third-language services to the Canadian broadcasting system

37. Canadian third-language specialty programming services provide a key role in the communities that they serve:
- information, enlightenment and entertainment from numerous countries of origin;
 - a vital link to those countries of origin in times of difficulty, helping Canadians follow and interpret significant international events;
 - information on the ethnic communities in Canada on a local, regional and national level;
 - a forum for local journalistic, artistic and other talent in the Canadian ethnic communities to express themselves in their language of comfort;
 - an opportunity for the emergence of new forms of cultural expression in their languages of comfort, reflecting the Canadian experience;
 - opportunities to understand the political and social structures of Canadian society with informed commentary on local, regional and national issues of interest to the communities and all Canadians;
 - balanced programming that meets the requirements of the *Broadcasting Act* and the Commission's regulations, policies and industry codes, including those dealing with abusive comment, advertising of alcoholic beverages, violence, gender portrayal and advertising to children.
38. In these ways, Canadian third-language programming services make a vital contribution to the overall diversity of the Canadian broadcasting system. Third-language services imported directly from abroad, on the other hand, can only make a limited contribution at best, given that programming decisions for those services are made in consideration of audiences in their country of origin, rather than in consideration of the specific needs, tastes and demographic make-up of ethnic communities in Canada. In addition, these services are not required to meet the Canadian standards, regulations and policies that apply to Canadian services.
39. Canadian third-language specialty services also provide significant economic benefits to Canada. Although there are currently sixteen licensed Canadian third-language specialty services in operation, including Category 2 digital services, the Commission's statistical and financial summaries for 2003 provide an aggregate of only eight such services. Nonetheless, the economic and public contribution of those eight services alone is impressive:
- 504 jobs with total salaries of over \$ 12.2 million;
 - \$11.2 million in Canadian programming expenditures;
 - \$42.9 million in revenues; and
 - over 15,000 Public Service Announcements aired.

The challenge of securing carriage

40. The five analog services receive distribution across Canada on Canadian DTH undertakings; however, they are not available in all cable systems across the country. Consequently, many Canadians desiring access to third-language programming in their language of origin must either opt for service from a Canadian DTH undertaking or do without service in their language, or, as some have argued, turn to foreign satellite undertakings that are not licensed to operate in Canada.
41. Of the more than 50 Category 2 services approved for operation in Canada, to date only 11 have launched, and most of these are available on a limited number of BDUs. The balance of the Category 2 services have not been able to secure carriage on a Canadian BDU, including those Category 2 services that are the product of joint ventures between Canadian programmers and international partners. Many of those international partners operate non-Canadian services that were among those most recently considered by the Commission for inclusion on the lists.
42. Many of these Category 2 services are fully prepared to begin operation, yet have been unable to secure carriage on a licensed BDU.
43. The reluctance of many BDUs to carry Canadian third-language services is not a new phenomenon. The Commission stated in its 1985 Ethnic Broadcasting Policy that "...taking into account the economic and spectrum considerations and the public demand that quality ethnic broadcasting services be developed and made available across Canada, the Commission notes with concern that representations made at the hearings indicated an unreasonable reluctance on the part of some cable licensees to carry [ethnic services] in markets where a high concentration of ethnic communities well justify the provision of such broadcasting services."
44. Even where Canadian third-language Category 2 services have been successful in securing carriage on some BDUs, they have been unable to secure carriage in many regions where there is demonstrable market demand for their service.
45. While it is clear that in some cities there may be an insufficient ethnic population to make it feasible to launch some of these channels, it is interesting that in those cities with ethnic populations sufficient to support one or more ethnic radio stations, very few of the third-language specialty services are carried.
46. The CAB also notes that the Canadian DTH providers, both of which enjoy national reach, carry a limited number of Canadian third-language Category 2 specialty services – certainly fewer than might be considered appropriate given the significantly large numbers of ethnic communities in all regions of Canada.

Joint ventures vs. direct market entry

47. The CAB has stated its support on numerous occasions for an approach that favours joint ventures between Canadian and non-Canadian third-language programming services, rather than a direct-market entry approach characterized by the addition of non-Canadian services to the lists.
48. In 2000, the Commission approved a Category 2 programming service RAI International Canada, a joint venture between the Canadian service Telelatino and the Italian service RAI International. Notwithstanding the existence of this joint venture, RAI International subsequently agreed to be sponsored for inclusion on the lists. At the same time, it began to deny Telelatino access to the programming of its main service, despite a 20-year agreement to provide such programming.
49. The CAB submits that the possibility of direct-market entry may have contributed to RAI International's decision to forgo its existing joint venture agreements with Telelatino. Furthermore, the Commission noted in PN 2004-50 that it was not convinced that RAI International would not deny Canadian services access to its programming by exercising exclusive programming rights for the Canadian market.
50. The CAB submits that the actions of RAI International were such that the Commission was right to deny the proposal to add RAI International to the lists. Moreover, the CAB urges the Commission to confirm its preference for joint ventures over a direct market entry approach. Joint ventures enable access by Canadians of diverse ethnic backgrounds to programming from their countries of origin, along with Canadian programming and coverage of Canadian issues in their language of comfort, while ensuring a direct economic contribution to the broadcasting system by those services.

The consequences of approving additional non-Canadian third-language services for carriage in Canada

51. The CAB submits that when assessing requests to add third-language non-Canadian generalist services to the lists, the Commission needs to bear in mind the impact that such services would have on established, analog Canadian third-language specialty services, on licensed Category 2 third-language services, and on approved but unlaunched Category 2 third-language services.

(i) Programming rights

52. In PN 2004-50, the Commission outlined its analysis and determinations with respect to the request to add RAI International to the lists.
53. In denying the request, the Commission cited RAI International's recent withdrawal of programming from Telelatino as a factor in its determinations: "...based on the record of this proceeding, the Commission is not persuaded that RAI International

would not hold, obtain, nor would it exercise preferential or exclusive programming rights to at least some of its programming if its service were added to the digital list. In light of the above, the Commission denies” the request to add RAI International to the lists.

54. The CAB reiterates that the possibility of direct access to the Canadian market could provide an incentive for a non-Canadian programming service to forgo program supply agreements with licensed or approved Canadian programming services. The implication of RAI International’s recent actions, for example, is that the very possibility of direct market entry was enough to cause the foreign broadcaster to exercise exclusive program rights in the Canadian market – an implication borne out by the Commission’s analysis of the record in this case.
55. Another implication of RAI International’s decision to withhold Canadian programming rights is the precedent it could set for English-language services. Were the Commission to subsequently authorize RAI International for carriage in Canada, the message to foreign broadcasters would be that withholding the rights to broadcast popular programming in Canada is a successful strategy in leveraging access to the lists.
56. The CAB submits that non-Canadian third-language services being considered for inclusion on the lists should be required to undertake not to acquire program rights for the Canadian market in any language other than their main language(s) of operation, and should – as a condition of their continued inclusion on the lists – be required to broadcast in their main language(s) of operation 100% of the time. Moreover, they should not be permitted to acquire exclusive rights for the Canadian market.

(ii) Fragmentation of the subscriber base

57. Market forces dictate that where subscribers have a choice between two or more like products, some will choose to consume both, but most will choose one over the other. Where that choice is between a Canadian programming service that makes a direct and substantial contribution to the Canadian broadcasting system, and a non-Canadian programming service that makes no contribution to the Canadian broadcasting system, the migration of even a relatively small number of subscribers from the Canadian service to the non-Canadian service will have a devastating impact on the ability of the Canadian service to continue to make a valuable contribution to the Canadian system, and in some cases, will undermine its continued viability.

(iii) Fragmentation of viewership

58. Given ongoing difficulties faced by most Canadian third-language services in securing carriage on Canadian BDUs, most are heavily reliant on advertising sales in those markets where they are able to secure carriage.

59. The 2003 statistical and financial summaries for pay and specialty services indicate that the eight reporting analog third-language services derived 51.9% of their overall revenues from advertising, whereas the average for all specialty services was 39.6%.
60. Given their above-average reliance on advertising sales to meet their Canadian content requirements, it is clear that attrition of viewership as a result of increased carriage of non-Canadian services would have a serious impact on the continued viability of Canadian third-language services, in terms of their ability to command fair advertising rates.

(iv) Undermining the launch of new Canadian third-language services

61. The CAB submits that there is a direct correlation between the difficulty faced by many unlaunched Canadian third-language programming services in securing carriage on Canadian BDUs, and the presence of competitive non-Canadian services operating in the same language in the Canadian market.
62. For example, although the Commission has approved Category 2 services in Polish, Filipino, Arabic, Japanese and German, none of those services have been able to secure carriage on a Canadian BDU, despite (or perhaps, because of) the fact that there are currently non-Canadian services being distributed by BDUs in each of those languages².
63. While the Commission noted in PN 2004-50 that there was a significant degree of support from some communities for additional choice of third-language non-Canadian programming services, the CAB submits that, if such authorizations result in the loss of Canadian programming services, Canadian ethnic communities will be denied access to services that reflect their concerns as Canadians and that provide relevant information to help them navigate in Canadian society.
64. The CAB reiterates that such losses could be mitigated, or avoided altogether, by the promotion of joint ventures that lead to “Canadianized” versions of non-Canadian third-language services, rather than frequent additions to the lists.

The CAB’s proposals

65. The CAB submits that there is no compelling public policy argument to change the existing policy that a non-Canadian service should not be added to the lists where it

² In Public Notice CRTC 2004-50 the Commission noted the statement by the Hispanic Canadian Congress that “the addition of non-Canadian Spanish-language services would undermine any existing Canadian service that has been approved, but is as yet unlaunched. Further, the HCC stated that, if the Commission were to add these non-Canadian services when Canada’s own third-language communities are not ready to be licensed and produce content themselves, it would effectively silence the voice of the Canadian Hispanic community.” The CAB submits that this example holds true for many other unlaunched third-language Category 2 services as well.

- is wholly or partially competitive with existing licensed or approved Canadian programming services.
66. In addition to the material harm that the presence of competitive non-Canadian third-language programming services on the lists can inflict on licensed and approved Canadian third-language programming services, a change to the Commission's policy in this respect could also have serious consequences for English- and French-language programming services.
67. As the Commission assesses the appropriateness of maintaining its policy prohibiting a wholly or partially competitive service from being added to the lists, the CAB submits that there are two fundamental questions that need to be addressed: (i) what constitutes a wholly or partially competitive service, and (ii) what should the policy be with regard to approved but unlaunched Category 2 services?
68. The CAB agrees with the Commission's reasoning in PN 2004-50 that niche programming services such as all news or all music videos should not be considered to be competitive with Canadian generalist services.
69. With regard to general interest non-Canadian third-language services, the CAB submits that, **where a Canadian third-language service devotes 25% or more of its programming schedule to a generalist approach in any one language, any general interest non-Canadian service in that same language should be considered directly competitive with the Canadian service in question.**
70. The CAB recognizes that applying the competitiveness test to unlaunched Canadian programming services presents a more difficult issue. The CAB submits that a non-Canadian service (or a Canadian sponsor of such a service) should not prevent the launch of a Canadian service by either withholding program rights or by encouraging Canadian BDUs to not launch the Canadian service in question.
71. The CAB proposes that **the competitiveness test should continue to apply equally to services that have been approved but have yet to launch. The CAB acknowledges, however, that there should be a mechanism to ensure that the unlaunched Canadian service does not unreasonably prevent the inclusion of additional non-Canadian services on the lists.**
72. In this regard, the CAB submits that any Canadian service that wished to object to the addition of a new non-Canadian service to the lists would be required to demonstrate the positive steps that it had taken to secure carriage on a Canadian BDU. Such steps could include programming contracts or negotiations with foreign program suppliers, licence fees paid to Canadian content suppliers, the development of a viable business plan, and evidence of having approached BDUs to negotiate carriage. Where necessary, this information could be provided to the Commission on a confidential basis.

73. In some cases, a Canadian general interest third-language programming service may believe that it is in its interest to be distributed as part of a package of Canadian and non-Canadian services in its language of operation. As has been the case for analog and digital English- or French-language services, the provision of a package of services at a reasonable cost could prove an effective method of attracting subscribers to a new package of services, or to expand the penetration of an existing Canadian service.
74. Accordingly, the CAB proposes that **where an operational Canadian third-language service sponsors a non-Canadian service that operates in its genre and language(s) for inclusion on the lists, the Commission should authorize that service without regard to the competitiveness test, unless the sponsored service would be competitive with an existing Canadian service unaffiliated with the sponsor. Subsequently, the continued authorization of the non-Canadian service would be dependent on its adherence to the packaging arrangements proposed by its Canadian sponsor at the time of its authorization, or as later amended with the consent of the sponsor.**
75. The Commission has provided a three-year window for Category 2 programming services to secure carriage on a Canadian BDU before their approval expires. The CAB submits that the air of uncertainty resulting from proposals to add additional non-Canadian services to the lists has made it difficult for new services to negotiate carriage as distributors are waiting for the “dust to settle” on this issue.
76. In general, the CAB agrees that a three-year period should normally provide sufficient time for a service to negotiate secure carriage on a Canadian BDU. However, the CAB proposes that, **given current market uncertainties with respect to proposals to add non-Canadian third language programming services to the lists, the Commission should immediately suspend any imminent deadlines for the commencement of operations of approved Category 2 third-language services. Furthermore, the Commission should extend the final date for the commencement of operations of such services to one year after the date of the issuance of its determinations in this proceeding.**
77. In the past, the Commission’s approach to assessing requests to authorize additional non-Canadian programming services for inclusion on the lists was underpinned by a wish to provide packaging partners for Canadian programming services to ensure cost-effective and attractive programming options are available to Canadian subscribers.
78. The CAB notes that some non-Canadian BDUs offer packages of non-Canadian services to their subscribers, providing a wider diversity of third-language services. The CAB believes that the addition of complementary non-Canadian third-language services to the lists, bundled with Canadian services in the same language of operation, could provide a wider diversity of programming to Canadians.

79. Consequently, the CAB proposes that **where there is a licensed or approved Canadian service offering programming in a particular language of operation, no non-Canadian service operating in that language be approved for distribution on a stand-alone basis, and that BDUs be required to carry all complementary Canadian services before it can carry the non-Canadian service in question.**
80. Finally, as an incentive to encourage BDUs to enter into mutually satisfactory affiliation agreements with Canadian third-language programming services, the CAB proposes that **the Commission should introduce a mechanism whereby the consent of a Canadian third-language service is required before that service is distributed in a package that includes non-Canadian services, or before any realignment or repackaging of the Canadian service can occur.**

CAB responses to the Commission's questions in PN 2004-53

Does the Commission's existing approach, which involves the assessment of partial and total competitiveness, strike the appropriate balance between ensuring that there is an adequate level of service to third-language communities and fostering Canadian third-language services, in light of the objectives set out in the Act? If not, what other test might be appropriate?

81. As indicated above, the CAB believes that the Commission's existing policies have resulted in a Canadian third-language programming sector that has consistently served the needs of Canadian ethnic communities. Many Canadian ethnic communities are now served by Canadian third-language programming services that provide a combination of high quality programming from their countries of origin, as well as information and entertainment of relevance to the ethnic communities in the Canadian context.

If a non-Canadian third-language general interest service targets one of the linguistic groups served by a Canadian third-language general interest service that provides programming in two or more languages, what factors other than that overlap, if any, should be taken into account for the Commission to find that the non-Canadian service is competitive with the Canadian service?

82. Where a Canadian third-language service devotes 25% or more of its programming schedule to a generalist approach in any one language, any general interest non-Canadian service in that same language should be considered directly competitive with the Canadian service in question.
83. Where a non-Canadian service operates in a niche programming category, for example music videos or news, the Commission should verify that there is no Canadian service dedicating a minimum of 25% of its schedule to similar programming in that language.

84. For example, some Canadian third-language services provide a significant amount of play-by-play sports. The addition of non-Canadian sports service in the same language of operation as a Canadian service could increase the Canadian service's difficulty of acquiring Canadian programming rights and contribute to subscriber and audience fragmentation.
85. An exception to this policy would be made if a Canadian third-language service were the sponsor of the non-Canadian service in question.

Is there any other information, in addition to that currently required by the Commission for proposals to authorize distribution of non-Canadian third-language services...that the Commission could obtain from sponsors and consider when applying the competitiveness test? If so, what additional information should the Commission obtain?

86. The CAB strongly believes that proposals for the addition of non-Canadian third-language services should not have a negative impact on existing programming supply agreements between Canadian and non-Canadian services. Accordingly, the CAB suggests that the CRTC should require that any non-Canadian third-language service proposed for inclusion on the lists provide to the Commission, in confidence, copies of any program supply agreements in place with Canadian programming services. In addition, non-Canadian programming services should continue to be required to make specific commitments not to exercise exclusive programming rights for the Canadian market, on the condition that the exercise of exclusive programming rights would be sufficient cause for their removal from the lists.

Should the Commission, when applying the competitiveness test, continue to take into account Canadian Category 2 third-language services that have been approved but have not been launched, after a certain period of time? If so, what should such a time period be? What impact would this have on the potential for such services to launch?

87. The CAB submits that Category 2 third-language services should have every available opportunity to secure carriage on at least one Canadian BDU. The recent decision by RAI International to forgo its joint venture with Telelatino – which effectively precluded the launch of an approved Category 2 Italian-language service – is clear evidence that the launch of approved Category 2 services can be jeopardized by proposals to add non-Canadian third-language services to the lists. These types of business practices essentially give non-Canadian programming services and program providers a right of veto over the launch of Canadian Category 2 third-language services.
88. As indicated above, the CAB submits that the onus should be on the approved but unlaunched Canadian third-language programmer to provide proof of a positive effort to secure carriage when opposing the inclusion of a non-Canadian third-language service to the lists.

89. Generally, the Commission gave new Category 2 services a three-year window in which to secure carriage and begin operation. The CAB agrees that on a going forward basis, this period should prove sufficient for new Category 2 services to prepare for launch and to negotiate carriage. However, given the general air of uncertainty that has resulted from numerous requests to add non-Canadian third-language services to the lists, the CAB recommends that the Commission should immediately suspend any imminent deadlines for the commencement of operations of approved Category 2 third-language services. Furthermore, the Commission should extend the final date for the commencement of operations of such services to one year after the date of the issuance of its determinations in this proceeding.

Should the Commission scrutinize the financial impact of a non-Canadian third-language service on a Canadian service when applying the competitiveness test, in order to determine whether there is likely to be a material financial impact? If so, what factors and what information should be taken into account when making such an assessment?

90. While the CAB believes that the addition of non-Canadian services could have an impact on Canadian ethnic services as outlined in this submission, it is impossible to quantify the impact of a hypothetical case. In particular, when a Canadian Category 2 service has not launched, there are no hard data from which to project financial impact.
91. At the same time, allowing the entrance of a non-Canadian service absent such a calculation creates a prejudice for the Canadian service. As noted in this submission, one possible consequence is that the Canadian service will never be able to obtain programming rights or negotiate carriage once a non-Canadian service is available to BDUs.

Should the amount of revenue garnered by the Canadian service from the language group that would be served by the non-Canadian service be taken into consideration?

92. The CAB submits that such a calculation would be impossible to make. In general BDUs do not permit services access to their customer lists. Consequently it is impossible to determine how much of the subscriber revenues generated by a multilingual ethnic service comes from any one of the languages in which it operates. Further complicating this calculation is the fact many members of ethnic communities are functional in multiple languages from the countries or regions of origin.
93. While a service might be able to quantify the amount of revenues it receives for local advertising for a given language, the national portion would be more difficult as advertisers buy 'run of schedule' plans.
94. Most importantly, it is not clear to the CAB the relevance of such a calculation even were it possible to calculate.

What level of adverse impact should be sufficient to trigger denial? How should adverse impact be measured?

95. The CAB submits that precise levels of adverse impact are difficult to calculate. For example, how does one calculate adverse effects of not being able to secure carriage on any Canadian BDUs as a result of the addition of a competitive non-Canadian service to the lists? In that case, the adverse effect is total: 100% of the service's ability to generate revenues has been adversely impacted. The impact of the exercise of exclusive programming rights by a non-Canadian programming service is similarly difficult to quantify: how does one calculate the value of programming that is not available in the Canadian marketplace?

Would it be appropriate to permit the distribution of a totally or partially competitive non-Canadian third-language service under the condition that it be packaged with the existing Canadian third-language service with which it would compete? If so, under what conditions could such a packaging approach operate to ensure greater access to non-Canadian services?

96. The CAB recognizes that the provision of cost effective and diverse program packages in third languages may be an excellent way to serve the ethnic communities and could result in some cases in increased penetration for ethnic broadcasters. However, it has a number of concerns about how such arrangements would operate.
97. First, the addition of wholly or partially competitive services to the lists could result in the loss of access to programming and in subscriber and audience fragmentation, impacting both subscription and advertising revenues. Accordingly, the CAB submits that the only acceptable terms under which a totally or partially competitive non-Canadian service should be added to the lists is where a Canadian programming service operating in the same language sponsors the service in question.
98. Second, Category 2 services have no negotiating power when attempting to secure carriage on a Canadian BDU. There is no compelling regulatory incentive for a BDU to distribute Category 2 services or to provide them with reasonable terms of carriage. The CAB also notes that in some cases, popular Canadian third-language services see no upside in being packaged with non-Canadian services, particularly where that packaging results in an increase in cost for the communities they have been serving for years. Consequently, the CAB recommends that the programmer's consent be required with respect to any packaging or repackaging decisions.

What criteria should be applied to determine the Canadian third-language service or services with which a competitive non-Canadian third-language service would be packaged?

99. Competitive non-Canadian third-language services should only be packaged with Canadian third-language services that provide a preponderance of programming in the common language(s) in which they operate.

What would be the impact of such a packaging scenario on licensed Canadian third-language services, in terms of the potential impact on subscriber revenues, advertising revenues and the costs of acquisition of non-Canadian programming?

100. Any such calculation would be hypothetical at best. There are few such packages available and where they exist, they have not been available for a significant period of time. In addition, some of the packaging decisions illustrate the need for greater input from the affected Canadian services.

Are broadcasting distribution undertakings offering Canadian third-language services licensed prior to 2000 (i.e. Telelatino, Fairchild, Talentvision, SATV and Odyssey) in a manner that optimizes opportunities for access to those services?

If not, and should the Commission decide to change the existing competitiveness tests with respect to non-Canadian third-language services, should the Commission also consider changes to distributors' obligations with respect to the carriage of the Canadian third-language services licensed prior to 2000?

101. In its 1985 Ethnic Broadcasting Policy (PN 1985-139), the Commission noted with concern an unreasonable reluctance on the part of some cable licensees to carry Canadian third-language specialty services in markets where a high concentration of ethnic communities appeared to justify the provision of such broadcasting services.
102. The CAB submits that since that time, significant progress has been made with respect to the provision of Canadian third-language services licensed prior to 2000 in those communities where there is demonstrable market demand. In some cases, BDUs distribute these services as part of a high-penetration analog tier.
103. However, despite a proven track record of success on the part of Telelatino, Fairchild, Talentvision, SATV and Odyssey, some cable BDUs have elected to not carry these services at all, or to carry them in manner consistent with newly launched digital services.
104. Accordingly, the CAB urges the Commission to exercise caution when considering applications for the approval of additional non-Canadian services to the lists, where those services would be wholly or partially competitive with Canadian third-language services, particularly those licensed prior to 2000.

Conclusion

105. Given the direct and meaningful contributions made by Canadian third-language services to the communities they serve and to the Canadian broadcasting system in general, the CAB submits that the Commission must ensure that they do not suffer material harm through the addition of non-Canadian third-language services to the lists.
106. To that end, the CAB has recommended in this submission that the Commission amend its competitiveness test with respect to third-language services, extend the deadline for commencement of operations for those unlaunched Category 2 third-language services whose approvals would otherwise expire in the near future, and ensure that carriage and packaging arrangements continue to favour the ability of Canadian third-language services to make a unique and substantial contributions to Canadian society.
107. The CAB appreciates the opportunity to provide its comments with respect to this proceeding.

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