



## Broadcasting Regulatory Policy CRTC 2010-629

PDF version

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### Criteria for assessing applications for mandatory distribution on the digital basic service

*The Commission announces the criteria that it will use in assessing applications for mandatory distribution on the digital basic service pursuant to an order issued under section 9(1)(h) of the Broadcasting Act. Dissenting opinions by Commissioners Michel Morin and Suzanne Lamarre are attached.*

#### Introduction

1. Over the course of the last few years, the Commission has engaged in several reviews<sup>1</sup> of the regulatory frameworks governing the relationships between broadcasting distribution undertakings (BDUs) and programming undertakings with a view to ensuring that the regulation of these relationships is as flexible as possible and permits BDUs to respond to the demands of viewers for greater choice and control over their viewing options.
2. The Commission acknowledges the need for more flexibility in the digital environment and recognizes that in this environment consumers expect greater latitude in choosing the services to which they wish to subscribe, while distributors are under pressure to offer the most attractive and competitive service possible. Nevertheless, as stated in Broadcasting Public Notice 2006-23 (the Digital Migration Framework), the Commission is of the view that there may be certain services for which mandatory basic carriage could be justified in a digital environment. The distribution of such services as part of the basic service ensures that they have access to a reasonably reliable revenue stream, thereby enabling them to meet meaningful programming obligations and contribute to the achievement of the objectives of the *Broadcasting Act* (the Act). Accordingly, in the Digital Migration Framework, the Commission indicated that it would be prepared to entertain, on an exceptional basis, applications for mandatory distribution on the digital basic service pursuant to distribution orders issued under section 9(1)(h) of the Act. The Digital Migration Framework also set out criteria to be used in assessing whether a programming service should be granted mandatory distribution.

#### Call for comments

3. As detailed in Broadcasting Notice of Consultation 2009-732 (the Call for comments), the Commission has approved several applications for mandatory

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<sup>1</sup>See, for example, Broadcasting Public Notices 2006-23 and 2008-100.

distribution on the basic service pursuant to distribution orders issued under section 9(1)(h) of the Act. In the Call for comments, the Commission indicated that before considering further such applications, it wished to strengthen the criteria used in assessing whether a programming service should be granted such status. The Commission thus proposed revisions to the criteria set out in the Digital Migration Framework. These revisions focus on the assessment of the exceptional importance of a programming service. In addition, the Commission expressed concern with granting indefinite orders in light of the dynamism of the sector, the rapid technological change and the increasing availability of alternative platforms for delivery. Finally, the Commission stated that applicants would be required to supply evidence to support the proposed timeframe for the mandatory distribution of the service.

4. The public record for this proceeding closed on 2 March 2010 and may be consulted on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings."
5. The Commission received a wide range of comments. In general, broadcasters who commented in this proceeding did not support the proposed revisions. They were of the view that the proposed revisions made the criteria too restrictive and did not focus enough on how the services would fulfill the objectives of the Act. S-Vox expressed concern that the services that currently have mandatory carriage on basic would not be granted such carriage under the revised criteria. However, a number of broadcasters, including Pelmorex Communications Inc. and the Canadian Broadcasting Corporation, stated that they agreed with the Commission's desire to establish more clarity and transparency in the rules used to assess applications for mandatory distribution on the basic service.
6. For their part, BDUs generally supported the Commission's proposed revisions, arguing that strengthening the criteria is important to ensure that mandatory distribution orders are granted sparingly. They were of the view that adding services to the basic service goes against consumer demand for more choice and control of personal viewing. Bell Canada stated that the Commission's strengthened criteria were a timely and appropriate response to these demands.
7. Shaw Communications Inc., however, argued that the proposed revisions would not introduce a higher threshold for mandatory distribution status. It stated that the revisions would actually increase the subjectivity and that the only criterion that should be considered is whether the applicant has demonstrated the exceptional importance of its service to the achievement of the objectives of the Act. Finally, some BDUs, including Telus Communications Company and Rogers Communications Inc., submitted that no services should be considered for mandatory distribution on the basic service until after 1 September 2011 to permit the industry to assess the changes to the broadcasting system that will result from the transition to a digital distribution environment.
8. The parties also provided specific comments pertaining to each of the individual criteria. Below is a brief summary of their comments and how the Commission has taken them into consideration when revising the criteria:

- Interveners commented that the use of the term “in other words” in several of the criteria was unclear and expanded on the criteria rather than clarified them. The Commission agrees with those comments and has accordingly replaced the phrase with clearer language.
  - The Commission had proposed a criterion requiring applicants to demonstrate that their programming would contribute to a diversity of voices on the basic service and that the programming is not in any way currently provided on the basic service. This criterion has been removed as the Commission agrees with the comments of those interveners who stated that it would be extremely difficult to prove that a service’s programming is “not in any way currently provided on the basic service.”
  - Some interveners objected to including the notion of viability in the criteria as they felt that it should not be a factor in the selection process and could potentially become a “self-fulfilling criterion.” They also objected to the criterion requiring the applicant to provide evidence as to why the service must be made available to Canadians through traditional BDUs given the availability of other technological means for distributing content. The Commission is of the view that both of these criteria relate to an important issue, which is that the service must prove that it requires mandatory distribution on the basic service in order to fulfill its programming objectives and by extension achieve the objectives of the Act. The Commission has accordingly merged the proposed criterion pertaining to a service’s business plan and the proposed criterion dealing with other technological means of distribution as they both address this issue.
  - The criterion pertaining to the Morin model has been removed as the Commission agrees with the comments of those interveners who stated that many of the same issues were already addressed in other criteria.
  - Some interveners commented that the criterion which would have allowed applicants to make a case as to why their programming service could not meet some of the criteria weakened the criteria as a whole. The Commission agrees with these comments and has accordingly removed the criterion.
9. Taking into consideration the comments received, the Commission has set out the revised criteria below.

### **Criteria for mandatory distribution on digital basic**

10. In the Commission’s view, the composition of the digital basic service should be informed by the policy objectives of the Act with a view to ensuring that subscribers have access to a basic service that among other things:
- serves to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;

- is varied and comprehensive, providing a balance of information and entertainment programming at an affordable cost;
- is drawn from local, regional, national and international sources;
- includes educational and community programs; and
- reflects and contributes to Canada's linguistic duality and ethno-cultural diversity, including the special place of Aboriginal peoples in Canadian society.

11. Accordingly, any applicant submitting an application for mandatory distribution on the digital basic service needs to demonstrate that its programming service meets the following criteria:

- The applicant must provide evidence demonstrating the exceptional importance of its service to the achievement of the objectives of the *Broadcasting Act* (the Act).
- The applicant must demonstrate that having mandatory carriage on the digital basic service will enable its service to contribute in meaningful ways to fulfilling the policy objectives of the Act. In particular, the applicant must:
  - a) provide evidence that the programming of its service makes an exceptional contribution to Canadian expression and reflects Canadian attitudes, opinions, ideas, values and artistic creativity. Specifically, the applicant must demonstrate that the contribution it intends to make to Canadian expression and reflection significantly exceeds that normally made by a Category A service,<sup>2</sup> thus justifying its exceptional status under a 9(1)(h) order.
  - b) provide evidence as to how the programming of its service contributes, in an exceptional manner, to the overall objectives for the digital basic service, as summarized above, and how it specifically contributes to one or more objectives of the Act, such as Canadian identity and cultural sovereignty; ethno-cultural diversity, including the special place of Aboriginal peoples in Canadian society; service to and the reflection and portrayal of persons with disabilities; or linguistic duality, including improved service to official language minority communities.
  - c) provide evidence that the service is making exceptional commitments to original, first-run Canadian programming in terms of exhibition and expenditures. Specifically, the applicant must demonstrate that the commitments it intends to make to original, first-run Canadian programming through exhibition and expenditures justify its exceptional

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<sup>2</sup> Category A services are defined in Broadcasting Public Notice 2008-100.

status under a 9(1)(h) order. An “original, first-run program” is defined as the “original exhibition of a program that has not been distributed by another broadcasting undertaking licensed by the Commission.”

- d) provide evidence, such as surveys of the prospective audience, demonstrating that there is extraordinary need among the intended audience for the proposed service.
- e) provide evidence that its business plan and implementation of its specific commitments are dependent on receipt of broad national distribution on the digital basic service, given the availability of other technological means for distributing content, and that the service would not be able to fulfill its programming commitments without mandatory distribution on the basic service.
- f) provide evidence of the likely impact of the proposed wholesale rate on the price of the basic package to consumers and of its widespread acceptability to Canadians.
- g) provide evidence to support the proposed timeframe during which its service should have exceptional status under an order pursuant to section 9(1)(h) of the Act.

### **Timing of consideration of new applications for mandatory distribution on the basic service**

12. As noted by several interveners, the transition to digital television will result in significant shifts within the broadcasting industry, including economic, technological and regulatory changes. In particular, extensive regulatory changes have been put in place by the Commission over the past few years to better position the industry for the digital transition. The Commission is of the view that the industry will need time to adapt to this new environment and that the introduction of further changes through the issuance of new mandatory distribution orders would not be prudent at this time. Accordingly, the Commission has determined that it will not consider applications for mandatory carriage on the basic service until soon after 1 June 2012. Parties who wish to be considered for such carriage should file applications by that date. The Commission intends to return any applications currently before it so that interested parties may determine whether they wish to resubmit applications that address the criteria set out above.
13. As noted in the Call for comments, the Commission is also concerned with granting indefinite distribution orders (i.e. orders without any expiry date). Accordingly, as set out in the criteria above, applicants requesting mandatory distribution on the basic service will have to include evidence to support the proposed timeframe for such distribution.
14. Further, the Commission has determined that existing services that have been granted mandatory distribution on the basic service pursuant to distribution orders issued

under section 9(1)(h) of the Act will be required to justify such continued carriage status with reference to the new criteria as part of their licence renewal.

Secretary General

**Related documents**

- *Call for comments on proposed revisions to the criteria used to assess applications for mandatory distribution pursuant to an order under section 9(1)(h) of the Broadcasting Act*, Broadcasting Notice of Consultation CRTC 2009-732, 30 November 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory policy*, Broadcasting Public Notice CRTC 2008-100, 30 October 2008
- *Digital migration framework*, Broadcasting Public Notice 2006-23, 27 February 2006

## **Dissenting opinion of Commissioner Michel Morin**

Because the Commission did not adopt an objective test based on the Broadcasting Act (the Act), the new rules established to determine a specialty service's eligibility for mandatory carriage on the basic service of broadcasting distribution undertakings (BDUs) remain completely subjective and arbitrary. Under these rules, both discretionary services and consumers remain completely at the mercy of the Commission's decisions, whose new criteria for granting mandatory carriage may be interpreted differently over time and based on changes in the Commission's composition.

### **The Morin model was the objective test**

During the 2008 hearings on regulatory frameworks, I presented a model that was based on the Act. One of the aims was to allow a limited group of discretionary services to "objectively" earn a place on the basic service of BDUs, independent of the Commission's subjective decisions or those of cable or satellite BDUs. The model, which Commission staff dubbed "the Morin model," proposed a point system that took into account the percentage of Canadian content broadcast, Canadian programming expenditures and the price paid by consumers for these discretionary services. This was the first objective but most importantly holistic model relating to the regulatory frameworks for BDUs and discretionary services ever proposed to the Commission in 42 years and it was subsequently adopted.

The model boiled down to a simple equation:  $A + B - C = \text{Score}$ .

A simple, but oh so fundamental equation! A formula based on objective data, where A stands for the percentage of Canadian content broadcast, B for the percentage of Canadian programming expenditures, C for the price paid by the consumer and the resulting score for the number of points obtained by the service. Objective data that would have ensured that our broadcasting system had a truly Canadian flavour... or not.

There is nothing magical about the formula: it was simply a question of thinking about it. Data compiled, added or subtracted produced a score that positioned a discretionary service relative to all other specialty services available in the broadcasting system. From the regulator's perspective, it was an objective test that could be used to assess the service proposed for mandatory carriage in all its aspects (with the help of an overall score). I refer you to the resulting table appended to this opinion and, if need be, to the opinion published in October 2008 in the appendix to Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008, so that you may be fully aware of all the tables and graphs that were included in this 50-page minority opinion, the longest in the Commission's history!

For the owners of discretionary services, the Morin model most certainly represented a mandatory checkpoint that constrained them to tighten up their proposals, but that also

allowed them to change their business plans, their content, their expenditures and their prices, if they wanted to be eligible for mandatory distribution. On the other hand, the owners of specialty services were protected from arbitrary decision-making by the Commission or the BDUs. And more generally, the model allowed them to look forward to a Commission decision with confidence and serenity, the purpose being to justify their place in the Canadian system by means of an “overall score.” Is this not what the Act wants us to do? To create champions of Canadian content at an affordable price? With the Commission’s current decision, better wish all the participants good luck!

For consumers, the Morin model simply recognized their importance in the system. Yes to Canadian content on the airwaves and yes to Canadian programming expenditures, but beware of high prices for the consumer, because the total number of points awarded for content and expenditures alone did not absolutely guarantee eligibility for mandatory carriage. For example, under the model, RDI, a French-language news service operated by the Canadian Broadcasting Corporation (CBC), would have been excluded from the basic service (which is not currently the case) because even though it has high levels of Canadian content and Canadian programming expenditures, the price of the service (\$1 per month) makes it, apart from the sports services TSN and RDS, as well as Discovery HD and adult specialty services, the most expensive service in the entire Canadian system, French and English combined, and that despite access to advertising and funding to the CBC by the Canadian government. Other news services that broadcast Canadian content – sometimes even at a higher level – such as LCN, CTV Newsnet, Pulse 24 and CBC Newsworld, to name only a few, qualified for mandatory carriage on the basic service because they cost subscribers two to seven times less than the RDI service billed to cable and satellite subscribers. In other words, RDI did not pass the Morin model test. Objective reality can be hard, can’t it? It should be noted that despite the Commission’s decision to require mandatory carriage of this public service and despite the fact that RDI benefits from subscriber contributions three times higher than those of its closest competitor (LCN, at 30 cents a month), RDI’s audience share today is lower than that of the private service (4.1% as compared to 2.8%). In short, beyond the general objectives of a public service, the Morin model did not forget the consumer, because the consumer was one of its essential components. Let us add that to be eligible for mandatory distribution on the basic service, a discretionary service had to show that its advertising revenues represented at least 33% of its revenues. This was a way for the Commission to ensure that the service was rooted in the Canadian broadcasting system.

The implementation of this objective test, this point system, did not entail any additional expense. Thanks to the annual returns filed with the Commission, all of these numbers are already available and have been available for 40 years. The test was transparent and strictly based on the objectives of the Act and on some of the most important data in the system, both for undertakings and for subscribers.

This is not the first time that the Commission has abruptly changed its opinion

In 2008, in the decision on regulatory frameworks, the Commission revised the Morin model by adding a fourth variable to the equation: high-definition content broadcast by



the discretionary service applying to qualify for mandatory carriage. I myself supported this during the hearings. By its nature, the model was meant to evolve as per the general objectives put forth by the Commission or any amendment to the Act. But the fact that the Commission abruptly reconsidered its decision (though not unanimously) before the model was even applied is a perfect illustration of the Commission's lack of predictability and the danger of arbitrary flip-flopping. Yet, before it was adopted in 2008, the model had been the subject of extensive industry interventions and a 25-page submission at the close of the hearings. Why reconsider now a decision made less than 24 months earlier?

I have to admit that I'm not really surprised. For example, since 2006 the Commission has said no two times to the value for conventional television signals, only to end up saying yes in 2010. Yet it had in front of it a system that has been working perfectly for 19 years south of the border.

If I am bringing up this fact, it is not because I have a propensity for self-flagellation. I simply want to show that subjective decisions are common at the Commission and that this is the very essence of a regulated system. Sometimes during hearings, the Commissioners talk about the "wisdom of the Commission," for lack of a better expression. Personally, I would prefer that the Commission used objective and measurable models and that is exactly why I proposed what was dubbed the Morin model.

### **The new arbitrary rules**

Despite the Commission's good intentions, the new rules are a veritable minefield for programming undertakings. One even wonders how they will be able to pursue their objective to be eligible for mandatory carriage on the basic service. Why? Because from the outset, they will not be able to rely on an objective and transparent score available to all players, one that the Commission could use to give serious consideration to their application for mandatory carriage.

Allow me to give you some examples, and I warn you, the list is far from exhaustive!

1. First, let's look at the French version of the decision. It contains the word "EXCEPTIONNEL" 11 times. How will this exceptional character be defined? No definition is given in the decision. The English version goes as far as using the term "EXTRAORDINARY NEED" (paragraph 11(d)), whereas the term "BESOIN DE NATURE EXCEPTIONNELLE" issued in the French version. I'll bet that the undertakings will have to get up early in the morning if they want to be eligible for mandatory carriage in both languages! They will not be able to use the Morin model to justify objectively their presence not only in terms of their intrinsic qualities but also in terms of their relative position in the system when measured against the Act's objectives of "Canadian content" and "affordable rates." Furthermore, since the French version states 11 times that the service

should be “exceptionnel,” why not simplify things? Why not ask an applicant to explain how its service is “exceptionnel”? The Commission could then make a decision. That is what Shaw Communications proposed. I agree completely, but with a twist: the adoption of an objective holistic test like the Morin model.

2. Second, does the decision mention any numbers? No. Not one. No thresholds for Canadian content or expenditures (which would have brought us closer to the Morin model), and most importantly, no overall score based on an equation that would use a certain number of factors to determine whether a service qualifies for mandatory distribution.
3. Third, arbitrariness is not avoided by adding criteria, particularly when it is only a question of quality as opposed to quantity. Let’s look at some examples.

The undertaking must “provide evidence that the service is making exceptional commitments to original, first-run Canadian programming in terms of exhibition and expenditures” (paragraph 11(c)). Where are the established thresholds (as in the Morin model)? Who will decide if objectives are achieved? A handful of commissioners chosen by the Chairman? That is certainly not consistent with the goals of transparency and predictability. This means that consumers could be denied a service to which they could be entitled on the basis of Canadian content and affordability.

Here is another example:

Each undertaking shall “provide evidence that the programming of its service makes an exceptional contribution to Canadian expression and reflects Canadian attitudes, opinions, ideas, values and artistic creativity” (paragraph 11(a)).

And another:

The undertaking must also “provide evidence as to how the programming of its service contributes, in an exceptional manner, to the overall objectives for the basic service, as summarized above, and how it specifically contributes to one or more objectives of the Act, such as Canadian identity and cultural sovereignty; ethno-cultural diversity, including the special place of Aboriginal peoples in Canadian society; service to and the reflection and portrayal of persons with disabilities; or linguistic duality, including improved service to official language minority communities” (paragraph 11(b)).

It is not a menu one can pick and choose from! All of these criteria must be considered for each application. The applicant will not be able to choose. The decision clearly requires that the programming service “meet the following criteria” and specifies that “in particular, the applicant must...” It is simply social engineering, when our basic concern should be Canadian content, Canadian programming expenditures and subscriber access. In my view, a regulator should avoid citing endless objectives when introducing regulatory measures, particularly when it refuses to quantify its objectives.

The Morin model used a simpler, more comprehensive and less arbitrary assessment. In this decision, the Commission is refusing to adopt an objective model, to break it down into several quantified components using a comprehensive approach that takes into account the performance of other players in the system through an overall score that confirms the applicant’s more or less exceptional value. There is nothing like that in this decision.

## **Conclusion**

Who needed the Morin model? Certainly not Corus, Canwest, Astral, CTV or Global, since they have their specialty services and are in a position to negotiate with the large BDUs operating in several provinces, such as Bell, Rogers, Shaw, Cogeco, Eastlink or Quebecor.

Who was afraid of the Morin model? You can tell by rereading the comments in the public file. Mainly the same names as in the paragraph above: Quebecor, Astral, Bell, Shaw and a specialty service, TV5, that posts one of the lowest scores for Canadian content in the attached table. (TV5 is a unique service funded partially by the federal government and nothing would have prevented the Commission from sinning by exception concerning its mandatory distribution.)

In fact, the Morin model was designed mainly for the system’s small players, who are often unique and creative but who obviously are not in the same league as the large broadcasters when it comes to negotiating with distributors of specialty services.

During this proceeding, as in the 2008 proceeding on distribution rules, it is the specialty services Score, Pelmorex and S-Vox, associations of artists like ACTRA and the CEP, and the Friends of Canadian Broadcasting, an organization whose mission is to defend and enhance the quality and quantity of Canadian programming, who appeared before the Commission to state that they were fundamentally in agreement with the transparent objectives of the Morin model. It is worth remembering that barely a half-dozen discretionary services passed the Morin model test! We could have left it at that. It was the Commission who would have determined the thresholds to be met in the English- or French-language markets and even the number of additional points to award for drama, documentary and children’s programs, which are more costly to produce but which would have enriched the basic service.

The Morin model was a demanding but transparent test that could have helped to enhance and breathe new life into the system by encouraging broadcasters to champion Canadian content, just like the companies Research in Motion (RIM), Bombardier, Sensio or Cirque du Soleil, to name but a few, in non-regulated sectors.

In terms of content, the Canadian broadcasting system is probably the most regulated system in the world. But all too often, as is the case in this decision, it is the result of subjective and unquantified assessment, with no thought for the consumer or for the performance of other players in the system in all their diversity. Even in broadcasting, it would be advisable for the Commission to use models that help rebalance the system's players, particularly between the large and small players, models that are based on the Act itself. It has elected not to do this in this decision. These are the reasons for my dissenting opinion concerning the review of the criteria for the assessment of applications for mandatory distribution on the basic digital service pursuant to section 9(1)(h) of the Act.

## Appendix to the dissenting opinion of Commissioner Michel Morin

### Results for discretionary services based on the Morin model

Type	English	French	Service	Canadian content (%)	CPE (%)	Rate (c)	Morin score	Revenues from market
A	X		<b>CTV Newsnet</b>	100	66 (e)	15	<b>151,35</b>	36 %
A	X		<b>Slice</b>	83	71	33	<b>120,50</b>	55 %
A	X		<b>Pulse 24</b>	90	59 (e)	30	<b>119,15</b>	78 %
A		X	<b>Le Canal Nouvelles</b>	100	49 (e)	30	<b>118,99</b>	50 %
A	X	X	<b>Météomédia/ The Weather Network</b>	100	37	23	<b>114,00</b>	38 %
A	*	*	CPAC	90	34 (e)	11	112,97	<b>0 %</b>
A	X		<b>The Score</b>	80	45	14	<b>111,00</b>	59 %
2	X		<b>World Fishing Network</b>	35	75 (e)	3 (e)	<b>106,63</b>	38 %
2	*		Gol TV	35	75 (e)	5 (e)	105,24	<b>6 %</b>
1		*	Argent	85	52	35 (e)	101,97	<b>9 %</b>
A	*		CBC Newsworld	90	75 (e)	63	101,96	<b>19 %</b>
1	*		bold	80	51	30 (e)	100,52	<b>2 %</b>
A	*		Business News Network	75	50	25	100,00	<b>27 %</b>
A	X		<b>Vision TV</b>	65	47	12	<b>100,00</b>	48 %
A	X		<b>MTV</b>	71	36	10 (e)	<b>97,04</b>	58 %
A	X		<b>HGTV Canada</b>	50	50	7	<b>93,00</b>	78 %
2	*		The Pet Network	35	75 (e)	21 (e)	88,50	<b>11 %</b>
A	X		<b>MuchMore Music</b>	60	31	3	<b>88,00</b>	73 %
A	X		<b>MuchMusic</b>	60	31	3	<b>88,00</b>	73 %
A	*		Canadian Learning Television	60	42	15	87,00	<b>11 %</b>
A	X		<b>Star!</b>	50	42	5	<b>87,00</b>	33 %
1	*		Documentary	75	47	35 (e)	86,70	<b>2 %</b>
A	*		TreeHouse	70	36	20	86,00	<b>19 %</b>
1	*		travel+escape	70	53	42 (e)	80,75	<b>8 %</b>
2		*	Avis de recherche	35	52 (e)	6	80,61	<b>0 %</b>
2	*		bpm:tv	35	56 (e)	11 (e)	79,76	<b>1 %</b>
A	X		<b>Food Network Canada</b>	50	44	14 (e)	<b>79,60</b>	72 %
1		*	Info-Sports	80	51	52 (e)	79,02	<b>17 %</b>
A	X		<b>Outdoor Life Network</b>	50	41	13 (e)	<b>78,30</b>	45 %
A	X		<b>Country Music Television</b>	60	22	4 (e)	<b>77,60</b>	84 %
A	X		<b>The Comedy Network</b>	65	45	33 (e)	<b>77,26</b>	55 %
A		X	<b>MusiMax</b>	60	31	15	<b>76,00</b>	34 %
A		X	<b>MusiquePlus</b>	60	33	17	<b>76,00</b>	57 %
A	X		<b>W</b>	70	41	35	<b>76,00</b>	61 %
1	*		ichannel	65	37	29 (e)	72,86	<b>1 %</b>
2	*		TFN–The Fight Network	35	75 (e)	37 (e)	72,71	<b>24 %</b>
A	X	X	<b>Teletoon</b>	60	47	35	<b>72,00</b>	57 %
A	X		<b>Showcase</b>	60	42	32	<b>70,00</b>	52 %

A	X		<b>The Discovery Channel</b>	60	45	36	<b>69,00</b>	49 %
1	*		OutTV	65	49	45 (e)	68,80	<b>7 %</b>
2	*		Cool TV	35	75 (e)	42 (e)	68,11	<b>2 %</b>
A	X		<b>Bravo!</b>	60	33	25	<b>68,00</b>	45 %
A	X		<b>TVTropolis</b>	50	43	25	<b>68,00</b>	61 %
1	*		One: The Body, Mind & Spirit Channel	60	41	34 (e)	67,21	<b>3 %</b>
1	*		The Independent Film Channel	60	37	30 (e)	66,64	<b>8 %</b>
1	*		Razer	60	43	37 (e)	66,26	<b>8 %</b>
A	X		<b>History Television</b>	50	40	25	<b>65,00</b>	41 %
A	X		<b>YTV</b>	60	40	35	<b>65,00</b>	61 %
A		*	RDI	90	75 (e)	100	65,00	<b>20 %</b>
1	*		Mystery	60	43	39 (e)	63,53	<b>12 %</b>
1	*		Fashion Television	50	41	37 (e)	54,01	<b>11 %</b>
1	*		Book Television – The Channel	50	40	36 (e)	53,77	<b>5 %</b>
2	X		<b>GameTV</b>	35	18 (e)	0 (e)	<b>53,46</b>	100 %
1	*		Bio	50	40	38 (e)	51,62	<b>9 %</b>
A		*	ARTV	60	46	55	51,00	<b>11 %</b>
A	X		<b>Space: The Imagination Station</b>	40	40	29	<b>51,00</b>	59 %
A		X	<b>Canal Vie</b>	60	50	60	<b>50,00</b>	42 %
1	*		Men TV	50	39	40 (e)	49,15	<b>5 %</b>
A		X	<b>Ztélé</b>	50	48	50	<b>48,00</b>	40 %
A		*	Canal Évasion	50	46	49	47,00	<b>15 %</b>
1	*		G4techTV	50	40	43 (e)	46,68	<b>15 %</b>
2	*		SexTV	35	37 (e)	28 (e)	44,68	<b>7 %</b>
2	*		BBC Kids	35	31 (e)	25 (e)	41,07	<b>7 %</b>
A		*	VRAK-TV	60	41	60	41,00	<b>15 %</b>
2	*		National Geographic Channel	35	26 (e)	21 (e)	39,45	<b>19 %</b>
2		X	<b>Ciné-pop</b>	35	4 (e)	0 (e)	<b>39,03</b>	100 %
2	X		<b>The Christian Channel</b>	35	4 (e)	0 (e)	<b>39,03</b>	100 %
A	X		<b>SportsNet</b>	60	54	78	<b>36,00</b>	37 %
2	X		<b>Leafs TV</b>	35	75 (e)	76 (e)	<b>33,65</b>	50 %
2		*	Prise 2	35	58 (e)	60 (e)	33,12	<b>23 %</b>
2	*		Fox Sports World Canada	35	31 (e)	33 (e)	32,60	<b>6 %</b>
2	*		PunchMuch	35	19 (e)	21 (e)	32,52	<b>20 %</b>
2	*		Fine Living	35	21 (e)	24 (e)	32,49	<b>11 %</b>
A		*	Historia	45	35	48	32,00	<b>22 %</b>
2	X		<b>MuchVibe</b>	35	6 (e)	9 (e)	<b>31,95</b>	38 %
2	*		Discovery Civilization Channel	35	16 (e)	20 (e)	30,79	<b>28 %</b>
1	*		Discovery Health Network	35	20	25 (e)	29,52	<b>18 %</b>
2	X		<b>Animal Planet</b>	35	14 (e)	21 (e)	<b>28,30</b>	38 %
A		X	<b>TV5</b>	15	40	28	<b>27,00</b>	30 %
2	*		ESPN Classic	35	15 (e)	23 (e)	26,71	<b>16 %</b>
2	X		<b>BBC Canada</b>	35	17 (e)	27 (e)	<b>25,20</b>	35 %

A		X	<b>Canal D</b>	45	45	65	<b>25,00</b>	38 %
2	*		Movieola (données : 2006)	35	19 (e)	32 (e)	22,63	<b>0 %</b>
1		*	Mystère	40	40	59 (e)	20,70	<b>12 %</b>
2	*		Discovery Kids	35	10 (e)	25 (e)	19,46	<b>10 %</b>
2	*		MuchLoud	35	4 (e)	20 (e)	19,36	<b>19 %</b>
2	X		<b>Showcase Diva</b>	35	11 (e)	28 (e)	<b>17,93</b>	38 %
2	X		<b>Showcase Action</b>	35	11 (e)	28 (e)	<b>17,73</b>	39 %
2	*		MuchMore Retro	35	3 (e)	21 (e)	16,68	<b>5 %</b>
2	*		Drive-In Classics	35	9 (e)	27 (e)	16,60	<b>7 %</b>
2	*		CourtTV Canada	35	10 (e)	30 (e)	15,54	<b>14 %</b>
2	*		Xtreme Sports	35	11 (e)	32 (e)	14,58	<b>5 %</b>
2	*		Scream	35	10 (e)	31 (e)	13,96	<b>27 %</b>
2	*		TV Land	35	2 (e)	23 (e)	13,66	<b>16 %</b>
2	*		DejaView	35	6 (e)	28 (e)	12,47	<b>21 %</b>
2	*		Lonestar	35	6 (e)	29 (e)	11,87	<b>24 %</b>
2	*		Bite Television	35	13 (e)	36 (e)	11,52	<b>20 %</b>
2	*		The NHL Network	35	30 (e)	57 (e)	8,62	<b>20 %</b>
A		X	<b>Séries+</b>	30	22	45	<b>7,00</b>	56 %
2	*		HPItv Canada	35	0 (e)	29 (e)	6,42	<b>1 %</b>
2	*		Raptors NBA TV	35	23 (e)	53 (e)	4,82	<b>31 %</b>
2	X		<b>Wild TV</b>	35	1 (e)	34 (e)	<b>1,93</b>	79 %
A	X		<b>TSN</b>	60	44	107	<b>-3,00</b>	45 %
A		X	<b>RDS</b>	65	50	121	<b>-6,00</b>	49 %
2	*		Silver Screen Classics (données : 2006)	35	13 (e)	65 (e)	-16,83	<b>0 %</b>
2	*		Rush HD	35	9 (e)	65 (e)	-20,97	<b>0 %</b>
2	*		Oasis HD	35	8 (e)	66 (e)	-22,59	<b>0 %</b>
2	*		Equator HD	35	4 (e)	65 (e)	-26,03	<b>0 %</b>
2	*		Treasure HD	35	4 (e)	66 (e)	-26,72	<b>0 %</b>
2	X		<b>AOV Clips</b>	35	9 (e)	99 (e)	<b>-54,81</b>	84 %
2	*		Discovery HD	35	48 (e)	198 (e)	-115,15	<b>2 %</b>
2	*		ATN Cricket Plus	15	20	166 (e)	-131,47	<b>0 %</b>
2	X		<b>Red Light District</b>	35	29 (e)	276 (e)	<b>-211,57</b>	87 %
2	*		The Hustler Channel	35	18 (e)	372 (e)	-318,69	<b>26 %</b>
2	*		HARDtv	35	1 (e)	408 (e)	-372,38	<b>0 %</b>
2	*		AOV Adult Movie Channel	35	9 (e)	423 (e)	-379,71	<b>18 %</b>
2	*		ATN Caribbean TV	20	30	535 (e)	-484,90	<b>11 %</b>
2	*		ATN NDTV	15	20	586 (e)	-551,00	<b>0 %</b>
2	*		AOV Maleflixxx	35	8 (e)	641 (e)	-598,30	<b>27 %</b>

### Legend and notes:

X: service passes 33% threshold for revenue earned from market.

\*: service does not pass 33% threshold for revenue earned from market.

(e): estimate, based on the following method:

- Except for CPAC, CPE for services without explicit CPE requirements, such as Canadian news services, is estimated based on average Canadian expenditures for 2005, 2006 and 2007;
- Except for CPAC, rate for services without regulatory wholesale rates is estimated by dividing Canadian subscription revenues for 2007 by average Canadian subscribers for 2007 (average of 2006 and 2007 year-end subscribers), then by dividing by 12 (months). Capped at 75.
- CPE and rate for CPAC estimated based on projected figures disclosed in CPAC regulatory filings at last renewal hearing (applications 2002-0127-8 and 2001-0128-6).

**Some observations:**

1. Discretionary services the content of which has a short shelf life are favoured. However, they are at the heart of this country's identity.
2. To guarantee diversity on the basic service, I suggested developing an additional points system. Dramas, documentaries and children's programs could benefit from this system and have access to the basic service. Of course, the industry would be consulted regarding the points system.
3. CTVNewsnet is in the top spot with 151 points, while TSN, another specialty service from the same group, is at the bottom with a score of minus three (-3). The model does not favour one undertaking over another: it is objective. We could cite further examples using the large private French-language broadcaster TVA Group Inc.
4. The table shows that 16 services are 30 points or fewer beneath the 100-point threshold. Hypothetically, it would be possible for them to qualify for distribution on the basic service. On the Francophone side, the 100-point threshold would be more difficult to reach. Accordingly, the Commission could reduce this threshold to perhaps 70 points, as a way to encourage an upward trend in that case as well.



## Dissenting opinion of Commissioner Suzanne Lamarre

1. I support my colleagues in the majority concerning the amendment of the criteria used to assess requests for mandatory distribution on the digital basic service of BDUs. However, I completely disagree with the Commission's decision, set out in paragraph 12 of the majority decision, to postpone to 1 June 2012 the analysis and hearing of such applications. This delay is absolutely unfair and unacceptable.
2. With a couple of exceptions, since the publication of its Broadcasting Decision 2007-246, the Commission has not dealt with applications for orders under section 9(1)(h) of the *Broadcasting Act* to require BDUs to distribute certain programming services.<sup>3</sup> Less than six months following the publication of that decision, new applications were submitted to the Commission. The Commission currently has nine applications in its possession, received between December 2007 and July 2009.
3. The Commission rightly chose to review the eligibility criteria for mandatory distribution, with the present majority decision as the conclusion. Now that the criteria have been defined, applicants with outstanding applications should be allowed to revise their applications as necessary; a call should be issued for new applications based on the new criteria; and all the applications should be processed promptly. I recognize that the Commission has a busy schedule, given the rapid changes in the broadcasting industry, but one category of applicants should not be placed at a disadvantage to the benefit of others.
4. Need I point out that the industry is made up not only of BDUs, but also of programming services – including creators? While BDUs provide distribution of content to a large majority of Canadians, recognizing that content is the heart of the broadcasting system should not be construed as a criticism of those BDUs. Distribution and content are certainly inseparable, but without content, the best distribution system in the world cannot by itself constitute a distinctly Canadian broadcasting system.
5. The delay imposed for pending applications and potential applications is clearly unreasonable. For those who have already filed an application, the situation is clear: some have been waiting nearly three years for their application to be examined, and they are now being told that they will have to wait another two years. It is reasonable to assume that some potential applicants have been waiting for the now-completed revision of the criteria before acting. Today they are finding out that they will have to wait even longer just to file an application. The imposition of this June 2012 date means that several applicants will have waited very nearly five years before a decision is made. I can see no

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<sup>3</sup> The exceptions are Broadcasting Order 2009-340 and Broadcasting Order 2009-542.

valid reason for such a long delay. Part of the delay (from the submission date to the present decision) was necessary so that the criteria might be revised, and is therefore justified. However, any further delay after today that is not expressly related to time for the revision and examination of the applications is not justified.

6. One of the justifications given for waiting until June 2012 is the pace of change in the industry. In my opinion, the pace of change is, on the contrary, a compelling reason to examine the applications as quickly as possible, especially for existing programming services. Beginning 31 August 2011, the distribution rules will differ from what they are today and from what they were in 2007. These rule changes are sure to have positive or negative effects on some programming services. To minimize the consequences of this situation, certain services will try to change their distribution status and, in certain cases, their program offerings. However, they will not be able to take measures before repercussions of these changes are felt. Denying these services the right to be heard before the changes affecting them come into force is tantamount to accepting at the outset that they may suffer harm, without having first assessed the scope and the consequences of that harm, not only for these services, but also for the entire Canadian broadcasting system. In short, we are walking blindly, hoping for the best. The principles of predictability and transparency that the Commission endeavours to support are being set aside here.
7. For the above reasons, I would therefore have:
  - initiated a public proceeding simultaneously with the publication of this decision, first returning the applications now before the Commission to the parties that filed them; and
  - planned, in connection with this public proceeding:
    - the new filing of any applications with the Commission by no later than 30 November 2010;
    - the holding of a public hearing by no later than 1 March 2011; and
    - the publication of a decision before the end of May 2011.