



Broadcasting Decision CRTC 2003-475

Ottawa, 26 September 2003

Showcase Television Inc.
Across Canada

*Application 2002-0709-4
Broadcasting Public Notice CRTC 2003-5
7 February 2003*

Showcase – Licence amendment

*The Commission **approves** the application by Showcase Television Inc. to amend a commitment not to air any first-run broadcasts of programs produced by a Showcase shareholder. Showcase will now be subject to a condition of licence specifying that it shall license from independent producers no less than 75% of its original, first-run Canadian content hours.*

Background

1. In “*Showcase*” – *Approved*, Decision CRTC 94-280, 6 June 1994, the Commission approved an application by Phillis Yaffe, on behalf of a company to be incorporated and now known as Showcase Television Inc. (Showcase Television), for a licence to operate an all-fiction specialty programming service consisting of the best of independently produced movies, drama, comedy and mini-series from Canada and around the world. At that time, the Commission noted the applicant’s commitment to “not air any first-run broadcasts of programs produced by a Showcase shareholder.” In addition, the Commission imposed a condition of licence requiring Showcase to spend, over the licence term, not less than \$3.75 million on licence fees to independent producers who were not Showcase Television shareholders for the production of 15 half-hour original Canadian programs.¹
2. In *Showcase*, Decision CRTC 2001-153, 28 February 2001, the Commission renewed Showcase Television’s licence from 1 March 2001 to 31 August 2007. In its licence renewal application, the licensee had requested to be relieved of its commitment not to air any first-run broadcasts of programs produced by a Showcase Television shareholder and proposed to increase to \$12 million the amount it would spend on original drama programs from independent producers.

¹ The condition was later changed from 15 half-hours to 15 or more drama programs in *Licence amendments for Showcase*, Decision CRTC 97-289, 3 July 1997.

3. A number of intervenors expressed concern at that time about the proposal that Showcase air first-run programs produced by a shareholder. Given Showcase's primary role as an exhibitor of second-window programming, the Commission denied the request for Showcase to be relieved from the commitment. The Commission also imposed as a condition of licence the licensee's proposed \$12 million spending commitment.

The application

4. In the current application, Showcase Television proposed to change the commitment not to air any first-run broadcasts of programs produced by a shareholder to the following:

Showcase Television is committed to licensing from independent producers no less than 75% of its original, first-run Canadian content hours. Showcase [Television] confirms that this flexibility in sourcing original Canadian programming will not alter Showcase's primary mandate as a second-window exhibitor of Canadian drama or Showcase's requirement to provide access to its specialty service for independent producers.

5. Showcase Television indicated that it would be prepared to accept the above commitment as a condition of licence.
6. In support of its request to amend its commitment, Showcase Television presented three main arguments. First, it stated that other broadcasters are permitted to air first-run broadcasts of programs produced by their own shareholders and that there should be parity in the system. More specifically, Showcase Television stated that by expecting CTV and Global to ensure that at least 75% of all Canadian priority programming that they broadcast is produced by independent producers, the Commission has set a standard for related party transactions between vertically integrated broadcasters and producers. Showcase Television added that, given the CTV and Global decisions, "maintaining a total prohibition of original programming from related companies for Showcase would be unfair and discriminatory."
7. Beyond conventional services, Showcase Television also noted that Teletoon has been permitted to acquire 75% of its Canadian programming from related parties, although it is expected to decrease this amount to 50% over the licence term. Furthermore, Showcase submitted that some Alliance Atlantis Communications Inc. (Alliance Atlantis) services are allowed to acquire varying amounts of programming from Alliance Atlantis.

8. Second, Showcase Television stated that while the overall supply of second-window Canadian drama is decreasing, there is an increased demand for it. Showcase Television argued that, since it was originally licensed in 1994, the Canadian television system has changed significantly, especially with the addition of new analog specialty services in 1996 and, more recently, of new digital specialty services. As a result, several new players now compete for the same second-window rights. Showcase Television expects this increased demand for second-window Canadian drama to grow as Canadian content levels increase on Category 2 digital channels.
9. Showcase Television further submitted that the establishment of requirements for priority programming under *Building on Success – A policy framework for Canadian Television*, Public Notice CRTC 1999-97, 11 June 1999 (the Television Policy) would likely result in insufficient amounts of new Canadian drama being produced for it to fulfil its requirements for second-window product in the future. To make up for this shortfall, which Showcase Television estimated at an average of 400 hours per year, it will rely increasingly on first-run drama. Showcase Television estimated that, given this year's funding and conventional program line-up announcements and without the programming produced by Alliance Atlantis, Showcase will have access to considerably less than 200 hours each year of first-run programs.
10. Third, Showcase Television argued that it should not be prohibited from acquiring programming from Alliance Atlantis since the latter "is the largest producer of television programming in Canada, and the largest producer of drama programming." It further stated that "at a time when many are decrying the lack of original Canadian drama being produced, Showcase [Television] respectfully submits that the broadcast system will also reap the benefits if this flexibility is granted."

Interventions

11. The Commission received two interventions related to this application. The Canadian Film and Television Production Association (CFTPA) supported the application conditionally, and CHUM Television (CHUM), a division of CHUM Limited, opposed it.
12. The CFTPA stated that it "cannot emphasize enough the significance of the 'second window' exhibition role in the financing of Canadian drama productions." It argued that Showcase plays a unique role within the system, not only with regard to financing, but also because it provides Canadians with other opportunities to view Canadian drama.

13. In addition, the CFTPA expressed concern about the impact the approval of the Showcase Television application could have on unaffiliated independent producers. According to the CFTPA, if the application is approved, the benefits of vertical integration could provide “unfair advantage for the financing and licensing” of Alliance Atlantis productions, and unaffiliated independent producers would then have decreased access to Showcase’s schedule. As a result, the CFTPA supported the Showcase Television application provided that safeguards were put in place to ensure the fair treatment of unaffiliated independent producers.
14. The CFTPA recommended several measures to ensure the fair treatment of unaffiliated independent producers. According to the CFTPA, Showcase should be required to reinstate its Fairness and Access Committee; to file annual reports on the commissioning and acquisition of “original” productions, including information related to the licence fees paid to the related party and unaffiliated producers; and to participate in a continuing dialogue with independent producers, with built-in mechanisms for the annual review of issues and concerns. The CFTPA is of the view that this last measure is imperative and that it can be done through a terms of trade agreement.
15. CHUM opposed the application for several reasons. CHUM stated that approval of the application would be contrary to the commitments made by Showcase Television at the competitive hearing that resulted in the granting of the licence. According to CHUM, Showcase Television’s commitment not to air first-run broadcasts of programs produced by its affiliates is “at least as necessary [now] as it was nine years ago.”
16. Furthermore, CHUM argued that the applicant’s three main arguments do not support the requested change to its commitment. With respect to Showcase Television’s statement that there should be parity between broadcasters, CHUM noted that specialty services occupy a unique niche and that Showcase Television cannot compare its service to that of conventional stations. Conventional stations, such as CTV and Global, have significant obligations in many areas, including news, priority programming, described video, etc. None of these obligations apply to Showcase. In CHUM’s view, comparisons between Showcase and conventional stations are “specious.”
17. CHUM further submitted that comparisons between Showcase and other specialty services are also unhelpful. CHUM argued that each specialty service, by definition, is unique; and therefore, to compare a single requirement between various services without consideration of each one’s nature of service is a “disservice to the careful and full consideration given by the Commission during the original licensing process.”
18. With respect to Showcase Television’s submission that it will rely increasingly on first-run Canadian drama, CHUM pointed out that Showcase Television was licensed as a second-window broadcaster whose programming would also include 18 half-hour “Showcase Originals” over the licence term. According to CHUM, if the modest amount of first-run programming originally approved by the Commission has grown to 200 hours, the nature of service that was licensed would also fundamentally change.

19. With regard to Showcase Television's argument that it should not be denied access to the largest producer of television programming in Canada, CHUM noted that, in fact, conditions of licence regarding independent production "ensure the health of the independent production sector." CHUM stated that approval of the Showcase Television application would only further consolidate the production industry into Canada's largest producer of television programming.
20. Finally, CHUM argued that approval of the application would help Alliance Atlantis to access more Canadian Television Fund (CTF) funding at a time when this funding has been reduced to the extent that it cannot meet the demand from truly independent producers.

The applicant's replies

21. In reply to the CFTPA's intervention, the applicant submitted that a terms of trade agreement should be a project taken up by the Canadian Association of Broadcasters (CAB), and not by Showcase Television. The applicant also noted that the annual reporting on the fulfilment of its conditions of licence is included in the annual return it files each year with the Commission.
22. In reply to CHUM's arguments, the applicant stated that its application would not fundamentally change the nature of its service because it has made dollar and hour commitments to independent producers over the licence term. It also emphasized its commitment that 75% of all original programming, including repeats, would come from unaffiliated independent producers. The applicant stated that it could not "see how these commitments jeopardize the foundation of the Showcase licence."

The Commission's analysis and conclusion

23. After reviewing the interventions and the applicant's replies, the Commission considers that there are two main issues: the extent to which approval of this application would significantly alter Showcase's nature of service commitment and the effect approval would have on independent producers' access to Showcase. Other secondary issues are also addressed below.

Nature of service

24. The Commission notes, while Showcase's primary purpose is to provide a second-window for programming, it is also permitted to broadcast first-run programming. The only limit is that first-run broadcasts cannot be produced by Showcase Television shareholders.

25. The Commission acknowledges CHUM's concern with respect to the number of hours of first-run programming that Showcase Television indicated its service will require. However, the Commission notes that the 400 to 600 hours of first-run programming mentioned by Showcase Television would appear to comprise less than 10% of Showcase's program schedule, leaving over 90% of the program schedule for second-window programs.
26. Finally, the Commission acknowledges that Showcase Television confirmed in its application that approval of its request "will not alter Showcase's primary mandate as a second window exhibitor of Canadian drama."
27. In light of the above, the Commission is of the view that the amendment of this commitment would not materially change the type of service provided by Showcase, nor would it constitute a significant change in Showcase's nature of service, as submitted by CHUM.

Access for independent producers

28. The Commission acknowledges the concerns expressed by both intervenors regarding the impact that the approval of Showcase Television's application could have on unaffiliated independent producers. However, the Commission notes that Showcase will continue to play an important role in the financing of independent productions through the purchase of second-window rights. The Commission further notes that the cost of producing original Canadian drama will also limit the amount of original, first-run drama that Showcase Television can commission and, therefore, Showcase will continue to provide primarily second-window programming.
29. Most importantly, the Commission notes that Showcase Television's proposed commitment ensures that unaffiliated independent producers would retain access to at least 75% of its first-run hours. In other words, if Showcase were to air 400 hours of first-run programming, independent producers would produce at least 300 of those hours.
30. In light of the above, the Commission considers that the impact of the proposed amendment to the access of independent producers on Showcase's schedule will be minimal.

Other issues

31. The Commission acknowledges the CFTPA's suggestions for safeguards to ensure the fair treatment of unaffiliated independent producers. As noted in the section entitled "Interventions," the CFTPA requested that the Fairness and Access Committee established in Showcase Television's first licence term be reinstated; the CFTPA stated that this committee had disbanded.

32. The Commission notes that, in its licence renewal application, Showcase Television stated that the Fairness and Access Committee would meet on an ad hoc basis. However, it did not reply to the CFTPA's statement that the committee had been disbanded; and therefore, the Commission is unclear as to the committee's current status. The Commission further notes that this committee was important in the initial licensing of Showcase Television because it helped to ensure that unaffiliated producers would have fair access to Showcase's schedule.
33. Consistent with Showcase Television's original commitment, the Commission expects Showcase Television to reconvene the Fairness and Access Committee in the event of a complaint, and to ensure that throughout the licence term, a minimum of five of the committee's nine members are Canadian independent producers that are not shareholders of Showcase Television.
34. With respect to the CFTPA's request that Showcase Television file annual reports on Showcase's commissioning and acquisition of "original" productions, the Commission notes that the broadcast portion of the 25% commitment can be monitored through the current logging systems. The licensee also files financial information in its annual returns. On the other hand, the Commission notes that reporting of financial data, such as licence fees, raises confidentiality concerns, particularly if such reports were to be made public.
35. The Commission is of the view that there is not enough evidence to suggest that Showcase Television should be subject to more stringent reporting requirements. Nonetheless, the Commission considers that any complaints could be addressed on a case-by-case basis, through which the licensee would be asked to provide detailed information where appropriate.
36. With respect to the CFTPA's suggestion that Showcase Television enter into a terms of trade agreement with the CFTPA, the Commission notes that in the decisions renewing CBC,² CHUM Limited,³ and Craig Broadcasting Systems Inc. and Craig Broadcast Alberta Inc.,⁴ it stated that it considered that terms of trade agreements between broadcasters and the CFTPA would benefit all elements of the broadcasting system. The Commission considers that Showcase Television's assertion that such an agreement would be better addressed at a general level by the CAB is inconsistent with past encouragements that it has given to conventional broadcasters. Moreover, the Commission is of the view that it would be of benefit to the broadcasting system if individual broadcasters worked with the CFTPA to develop terms of trade; since the structure and strategy of each broadcaster is different, the terms of trade will be as well.

² *Licences for CBC English-language television and radio renewed for a seven-year term*, Decision CRTC 2000-1, 6 January 2000

³ *Licence renewal for seven CHUM Limited television stations*, Broadcasting Decision CRTC 2002-323, 21 October 2002

⁴ *Licence renewals for four Craig television stations*, Broadcasting Decision CRTC 2002-304, 11 October 2002

37. The Commission therefore encourages Showcase Television to enter into discussion with the CFTPA aimed at developing a terms of trade agreement with that association.
38. Finally, with regard to CHUM's concern that Alliance Atlantis will have increased access to the CTF if the application is approved, the Commission notes that Alliance Atlantis has limited access to each Licence Fee Program envelope, as provided by the *Canadian Television Fund Guidelines*. The Commission indicates that while addressing CHUM's concern is beyond its role, it notes that the safeguards put in place by the CTF appear to be sufficient to limit Alliance Atlantis' access to the fund.
39. In light of all of the above, the Commission finds that approval of the application would provide Showcase with appropriate flexibility with respect to the sources from which it obtains original first-run programming to be scheduled on its service while ensuring that independent producers still have access to the majority of the first-run portion of Showcase's schedule. Accordingly, the Commission **approves** the application by Showcase Television Inc. to amend its commitment not to air any first-run broadcasts of programs produced by a shareholder, by replacing the commitment with the following **condition of licence**:

The licensee shall license from independent producers no less than 75% of its original, first-run Canadian content hours. For the purposes of this condition, original, first-run means programming that has not previously been aired on any other specialty or conventional channel, regardless of whether the program was commissioned by Showcase Television.

40. The Commission notes Showcase Television's commitment that flexibility in sourcing original Canadian programming will not alter its primary mandate as a second-window exhibitor of Canadian drama or its requirement to provide access to its specialty service for independent producers.

Secretary General

This decision is to be appended to the licence. It is available in alternative format upon request, and may also be examined at the following Internet site: <http://www.crtc.gc.ca>