

**BEFORE THE CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION**

**IN THE MATTER OF AN APPLICATION BY THE PUBLIC
INTEREST ADVOCACY CENTRE (“PIAC”) and THE CONSUMERS’
ASSOCIATION OF CANADA (“CAC,” with PIAC, “PIAC-CAC”)
(APPLICANTS)**

REGARDING CRAVETV

**PURSUANT TO PART 1 and SECTION 3 AND 11 OF THE *CRTC RULES
OF PRACTICE AND PROCEDURE*; SECTIONS 7, 24, 27, 28, 47, 55(c),
and 56 of the *TELECOMMUNICATIONS ACT*; SECTIONS 9, 10 and 12
of the *BROADCASTING ACT*; SECTIONS 3, 5 and 7 of the *DIGITAL
MEDIA EXEMPTION ORDER*; SECTION 9 of the *BROADCASTING
DISTRIBUTION REGULATIONS*; and the *REGULATORY FRAMEWORK
RELATING TO VERTICAL INTEGRATION***

DIRECTED TO

**BELL MEDIA INC., BELL CANADA, BCE INC.
(RESPONDENTS)**

6 February 2015

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1. NATURE OF APPLICATION

- 1) The Public Interest Advocacy Centre (“**PIAC**”¹) and the Consumers’ Association of Canada (“**CAC**,”² collectively “**PIAC-CAC**”) file this Application with the Canadian Radio-television Telecommunications Commission (the “**Commission**” or the “**CRTC**”) under Sections 7, 24, 27, 47, 55(c), and 56 of the *Telecommunications Act*,³ Section 9(4) of the *Broadcasting Act*,⁴ Sections 3, 5 and 7 of the *Digital Media Exemption Order* (the “**DMEO**”),⁵ and the *Regulatory framework relating to vertical integration* (the “**VI Framework**”),⁶ as well Part 1 and sections 3 of the *CRTC Rules of Practice and Procedure*⁷, regarding the “CraveTV” service offered by Bell Media Inc. (“**Bell**” or “**Bell Media**”) and distributed through several broadcasting distribution undertakings (“**BDUs**”).
- 2) Bell Media, and its telecommunications affiliate Bell Canada, are each owned by BCE Inc.
- 3) For the reasons which follow, PIAC-CAC contend that Bell is offering the CraveTV service in a manner which unduly prefers Bell and other BDU distribution services, and unjustly discriminates against standalone competitive providers of internet service (“**IS**” and “**ISPs**”) and in a manner designed to circumvent rules in place to promote competition and consumer choice and to mitigate against the harmful effects of vertical integration.
- 4) PIAC-CAC contend that while CraveTV may appear, when accessed via IS, to be an exempt Digital Media Broadcasting Undertaking (“**DMBU**”) under the DMEO, the link between CraveTV access and a BDU subscription renders CraveTV an extension of the licensed system, in which case, CraveTV requires a license and should be held to the relevant conditions of licence and contribution requirements.
- 5) PIAC-CAC further contend that the tied sale of online streaming services to a BDU service is contrary to the Canadian broadcasting policy objectives, and to sanction that tied selling would also be contrary to the Canadian broadcasting policy objectives.

¹ PIAC is a non-profit organization that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services. See Public Interest Advocacy Centre, online: <<http://www.piac.ca>>.

² CAC is an independent, non-profit, volunteer-based charitable organization with a mandate to inform and educate consumers on marketplace issues, to advocate for consumers with government and industry, and work with government and industry to solve marketplace problems. See Consumers' Association of Canada, online: <<http://www.consumer.ca/index.php4>>.

³ S.C. 1993, c. 38.

⁴ S.C. 1991, c. 11.

⁵ Broadcasting Order CRTC 2012-409 - Amendments to the *Exemption order for new media broadcasting undertakings* (now known as the *Exemption order for digital media broadcasting undertakings*) (26 July 2012).

⁶ Broadcasting Regulatory Policy CRTC 2011-601 - *Regulatory Framework for Vertical Integration* (21 September 2011).

⁷ SOR/2010-277.

- 6) PIAC-CAC contend that to sanction the tied selling of CraveTV and BDU services would be anti-competitive, anti-consumer, and inconsistent with the broadcasting policy objectives.
- 7) PIAC-CAC therefore request that the Commission require Bell to apply for a licence for the CraveTV service. Alternatively, if the Commission determines that CraveTV is an exempt DMBU under the DMEQ, then the Commission should confirm that tied selling of online streaming services with BDU services is a violation of the exclusivity rules, or in the alternative undertake expanding the DMEQ's exclusivity provision to include BDU distribution.

2. ALLEGED FACTS

- 8) In this Section PIAC-CAC outlines the alleged facts on which this Application is based. Specifically, PIAC-CAC describe the relevant terms and conditions of the CraveTV service, and the way the programs are marketed and billed to customers.

(a) CraveTV

- 9) Beginning as early as Bell's first attempt to purchase Astral, Bell has been telling the Commission that it intended to launch a protective response to Netflix.⁸

⁸ Transcript of Proceeding, Volume 1, 10 September 2012 - To consider the broadcasting applications listed in Broadcasting Notice of Consultation CRTC 2012-370 and 2012-370-1 (emphasis added):

164 [MR. BIBIC]: I think that will be one of the most interesting evolutions over the next five years; how that plays out. We think today's transaction puts the Canadian broadcast system in a much stronger position in terms of **making sure Canadians have an OTT service that a Canadian broadcaster could bring to the market. And what is really important about that is we see the equal system is distributing that through the current BDU's.**

602 MR. BIBIC: I don't think I was hedging my bets. We didn't come before you today in the context of this transaction to say, look, **there's this threat from over-the-top providers, global competitors who are acquiring content and competing in Canada,** for the purpose of saying, therefore, you must impose regulatory rules on them and on everyone else; that is not what our position is here today. In fact, our position is that is an inescapable fact. **Our viewership is significant to those services;** as we say in our opening statement: 11 million hours a week of viewing to these services, and then stats to back that up are in the monitoring reports. What we are saying is it is inevitable; **the consumers love this type of content; they love the flexibility.** So what are we going to do? **We are going to step forward and we are going to compete;** and we are going to give Canadian consumers back to - Mr. Chairman - to the point about the consumer and reading the letters from the consumers is very important. **We will compete** and offer a made-in-Canada service, national, bilingual - French and English - **available through the distributor of their choice.**

- 10) On 30 October 2014 Bell announced it would soon launch an “on-demand subscription service,” “designed to enhance the value of the subscription television ecosystem,” “available to every TV provider in Canada.”⁹
- 11) Originally code-named “Project Latte,” the service would launch on 3 December 2014 as “CraveTV.”¹⁰
- 12) Described at launch by Bell as “Canada’s premium subscription on-demand video streaming service,” priced at \$4 per month, Bell stated that it had, or would soon, conclude “distribution partnerships” with TELUS Optik TV, Bell Fibe TV, Bell Aliant FibreOP TV, and Bell Satellite TV, Eastlink, Northwestel and other Canadian Cable Systems Alliance (CCSA) members. In the CraveTV FAQs, Bell states that Bell is “in talks with all television service providers to get it in your hands.”¹¹
- 13) PIAC-CAC are unable to confirm if CraveTV will be available to all BDUs in Canada, or only those selected by Bell, and furthermore, when CraveTV will be made available to those BDUs, and whether Bell is negotiating commercially reasonable terms. PIAC-CAC cannot ascertain if Bell intends to make CraveTV available to *all* BDUs, or only certain ones who meet criteria defined by Bell. PIAC-CAC are also unable to ascertain if Bell is gaining any competitive advantage due to unreasonable commercial behaviour in the making available of CraveTV to other BDUs.
- 14) In order to have online access to CraveTV, Bell customers must purchase BDU service from a BDU with whom Bell has concluded a distribution agreement. The current eligibility requirements for accessing CraveTV are provided in Figure 1.

⁹ Bell press release, “Bell Media to Launch New Streaming Service Devoted Exclusively to Exceptional TV” (30 October 2014), online: <<http://www.bellmedia.ca/pr/press/bell-media-to-launch-new-streaming-service-devoted-exclusively-to-exceptional-tv/>>.

¹⁰ Bell press release, “Introducing CraveTV(TM): All You Can Watch for \$4/Month” (3 December 2014), online: <<http://www.bellmedia.ca/pr/press/bell-media-to-launch-new-streaming-service-devoted-exclusively-to-exceptional-tv/>>.

¹¹ CraveTV Help/FAQs, “I *really* want to subscribe, but I don't see my television provider listed. What gives?” (Accessed 4 February 2015) online: <<http://help.cravetv.ca/>>.

Figure 1. Minimum Sign-up Requirements for CraveTV¹²

BDU	Prerequisite Services	Entry-level Pricing	Available Platforms
Bell	<ul style="list-style-type: none"> Bell TV (satellite) <ul style="list-style-type: none"> Does not have Crave on demand channel¹³ 	<ul style="list-style-type: none"> \$48.95/month <ul style="list-style-type: none"> +\$4/month Crave = \$52.95/month 	<ul style="list-style-type: none"> TV – set top box on demand channel Laptop, desktop – CraveTV website Mobile device – CraveTV iOS/Android App Coming soon <ul style="list-style-type: none"> Samsung Smart TV app Xbox 360/One app Windows Phone app Windows 8 app Chromecast support Roku support AppleTV app (maybe)¹⁴
	<ul style="list-style-type: none"> Bell Fibe TV + Fibe Internet 	<ul style="list-style-type: none"> \$108/month <ul style="list-style-type: none"> +\$4/month Crave = \$112/month 	
Bell Aliant NorthernTel	<ul style="list-style-type: none"> Bell (Aliant) FibreOP TV <ul style="list-style-type: none"> Need not include Internet 	<ul style="list-style-type: none"> \$56.95/month <ul style="list-style-type: none"> +\$4/month Crave = \$60.95/month 	
TELUS	<ul style="list-style-type: none"> TELUS Optik TV <ul style="list-style-type: none"> Essentials package 	<ul style="list-style-type: none"> \$34/month <ul style="list-style-type: none"> +\$4/month Crave = \$38/month 	
Eastlink	<ul style="list-style-type: none"> Eastlink “video service” 	<ul style="list-style-type: none"> No pricing info on website for single service <ul style="list-style-type: none"> Estimated cost: >\$78.85¹⁵ +\$4/month Crave >\$82.85/month 	

¹² Notes:

- Prices are not including any promotional discounts.
- Does not appear possible to get CraveTV with only TELUS Satellite TV service
- Does not appear possible for Eastlink subscribers to get CraveTV via set-top box; website/apps only (see online: <<http://www.newswire.ca/en/story/1462041/media-update-cravetvm-ctv-go-and-tsn-go-apps-now-available-to-eastlink-customers-on-computer-tablet-or-smartphone>> and Eastlink’s twitter customer support notes they are working on it, online: <<https://twitter.com/eastlink/status/554687074314764291>>)
- Eastlink does not have any promotional material related to CraveTV on their website

¹³ A press release says Bell is going to offer CraveTV on select set-top boxes in early 2015 (likely newer boxes not yet released): Bell Canada, “CraveTV™ available now for Bell Fibe TV and Bell Aliant FibreOP TV subscribers” (11 December 2014), online: <<http://www.newswire.ca/en/story/1462201/cravetvm-available-now-for-bell-fibe-tv-and-bell-aliant-fibreop-tv-subscribers>>.

¹⁴ Michael Oliveira, “Bell Media says Apple not allowing Crave app for Apple TV” (21 January 2015), online: <<http://www.theprovince.com/Bell+Media+says+Apple+allowing+Crave+Apple/10748169/story.html>>.

¹⁵ Eastlink’s website does not provide the cost of a BDU subscription, but provides pricing for 3 bundles: TV+Internet (\$138.80), TV+landline (\$114.85) and Internet+landline (\$95.95). Assuming the bundle discount is the same for each, solving for the cost of TV: $(138.80 + 114.85 - 95.95)/2 = \$78.85 + \text{bundle discount}$.

(b) IPTV bundled, inextricably, with Internet Service

- 15) In at least one case, the case of Bell provisioning CraveTV to Bell subscribers, it appears the provisioning of TV service (Fibe TV) is linked to the provisioning of internet service (Fibe Internet): with FibeTV comes, automatically, Fibe Internet, not as a bundle, but as a co-requisite service – the consumer has no choice but to take the Bell IS with the Bell BDU service. (see Figure 2).

Figure 2. Bell Fibe TV includes Fibe Internet¹⁶



- 16) It is not clear, based on PIAC-CAC’s research in Figure 1 above, whether other BDUs’ TV offerings are co-requisite with IS, and PIAC-CAC invites the Commission to determine those facts.

(c) VI Entities versus Netflix

- 17) Bell is not the only vertically integrated (“VI”) entity to launch an online streaming service tied to a specific distribution service or distribution technology. Rogers and Shaw, as a joint venture, and Vidéotron have each launched online streaming services. The Rogers-Shaw online streaming service, Shomi, is the subject of a Part I application filed concurrently with this application. PIAC-CAC understand that access to Vidéotron’s

¹⁶ Online: <<http://www.bell.ca/Fibe-TV>>.

streaming service, Illico (formerly known as Club Illico Unlimited) is available without having to subscribe to any affiliated internet service or BDU service.¹⁷

18) A table comparing the VI entities' online streaming services to Netflix is provided below.

Figure 3. VI Entities' Online Streaming Services versus Netflix

Service	Monthly Price	Currently Available To	Competitive Differentiation
Netflix	\$8.99	Anyone with Internet connection	More content, newer movies
Shomi (Rogers)	\$8.99	Rogers and Shaw Internet or TV customers	Emphasis on user interface and video-store clerk-like curation of content
Shomi (Shaw)			
CraveTV (Bell)	\$4.00 (additional packages up to \$15)	TV customers of Bell or Bell Aliant, TELUS, Eastlink (Bell FibeTV also requires Fibe Internet) Bell Satellite TV customers	Emphasis on TV (less about movies, no kids TV)
Club Illico (Vidéotron)	\$9.99	Anyone with Internet connection STB access reserved for Vidéotron subscribers with a "new generation" STB	French content

¹⁷ According to Vidéotron's FAQs, online: <<http://support.videotron.com/residential/television/faq-club-illico>>:

▼ I am not a Videotron customer. Can I still benefit from the Club illico offer?

- **Online and via the illico.tv app for the iPad and Android tablet: yes.** On illico.tv, you'll have access to all our Club illico content. The rate remains the same at \$9.99/month, taxes not included.
- **On your TV: no.** In order to access Club illico on your TV, you must be a Videotron customer with a new generation terminal.

A PIAC representative telephoned Vidéotron customer service on 21 January 2013 and confirmed that once a person signs up for Club Illico, they receive an account number which they can then use online at illico.tv or on the Android/iPad apps to access the content. There is no need to have a TV subscription or a Vidéotron internet service in order to access content via illico.tv or the mobile device apps.

- 19) PIAC-CAC contend, for reasons explained in the following section, that Bell is engaged in anti-competitive tied selling by tying CraveTV access to subscription to a BDU service.
- 20) While PIAC-CAC believe that this exclusivity is prohibited by the DMEQ, if it is not, PIAC-CAC contend it should be, and therefore PIAC-CAC request that the Commission undertake amending the DMEQ to explicitly address tied-BDU selling.
- 21) PIAC-CAC also contend that when the tied BDU service is inextricably linked to an affiliated IS (as it is in the case of Bell's FibeTV which includes Fibe Internet), then Bell in its telecommunications capacity is also violating the *Telecommunications Act* prohibition against undue preferences and unjust discrimination.
- 22) PIAC-CAC further content that even where CraveTV is offered by a BDU that does not require include IS with its BDU service, by favouring the BDU access system as a whole, this harms competition, the business case of independent ISPs, and consumers who wish to fine-tune their viewing experience and the access platform of their choosing, and reduce their monthly communications expenses. The requirement to purchase one form of broadcasting access, in the face of increasing consumer demand for alternative, on-demand access via different modes of access, is detrimental to consumer choice and competition, and contrary to the broadcasting policy for Canada.

3. ISSUES AND GROUNDS OF APPLICATION

- 23) In the view of PIAC-CAC, the marketing and provisioning of CraveTV raise a number of regulatory issues:
 - Issue 1. What is CraveTV?
 - Issue 2. What rules apply to CraveTV?
 - Issue 3. On what technical and regulatory basis is it appropriate for CraveTV, when accessed via a set-top box, to be treated differently for billing purposes than when CraveTV is accessed via a wireless or internet connection?
 - Issue 4. On what technical and regulatory basis is there for Bell to offer their CraveTV exclusively to BDU customers?
 - Issue 5. Is CraveTV being structured, marketed and provisioned in a manner that circumvents rules in place to promote competition and consumer choice and to mitigate against the harmful effects of vertical integration?
 - Issue 6. Is tying the sale of CraveTV to a BDU subscription consistent with the broadcasting policy objectives?

Issue 7. If the structuring, marketing and provisioning of CraveTV is technically compliant with current Commission frameworks, should the Commission undertake reform?

- 24) It is PIAC-CAC's contention that CraveTV is an online streaming service that is tied to the consumption of BDU services (and in Bell's case, also IS), invoking several different regulatory frameworks.
- 25) It is PIAC-CAC's further contention that the regulatory frameworks invoked by CraveTV contain prohibitions on undue preferences and tied selling, and that Bell is in violation of those rules.
- 26) It is PIAC-CAC's contention that there is no technical or regulatory basis for Bell to be treating BDU-access to CraveTV differently than ISP-access to CraveTV content. Furthermore, there is no technical or regulatory basis for Bell to be restricting access to CraveTV content on the basis of a subscription to a BDU service.
- 27) Ultimately, it is PIAC-CAC's contention that Bell (like Rogers, Shaw and Shomi) is structuring its online streaming service in a manner designed to circumvent rules meant to promote competition and consumer choice and to mitigate against the harmful effects of vertical integration.
- 28) PIAC-CAC address each of these issues below.

Issue 1. What is CraveTV?

- 29) It is PIAC's contention that ***CraveTV is a subscription-based online streaming service tied to a class of BDU services***. Furthermore, at least one BDU service (Bell's) is inextricably *tied to IS*. Accordingly, a range of regulatory requirements attach to the structuring, marketing and provisioning of the CraveTV service, as discussed in the next section.

Issue 2. What rules apply to CraveTV?

- 30) The second issue, related to the first one, is ***What rules apply to CraveTV?*** It is the contention of PIAC-CAC that Bell's provisioning of CraveTV invokes several different regulatory frameworks.
- 31) Because Bell's Fibe IS, a telecommunications service, is co-requisite with Bell's Fibe TV, the *Telecommunications Act* is engaged. In particular, the prohibition against undue

preference and unjust discrimination applies, having not been forborne by the Commission.

- 32) As PIAC-CAC and COSCO argued in the Mobile TV undue preference proceeding (leading to Broadcasting and Telecom Decision CRTC 2015-26)¹⁸, a broadcasting affiliate of a converged and vertically-integrated entity's telecommunications affiliate cannot claim cover under the *Broadcasting Act* as a way to violate the *Telecommunications Act*. No matter which direction these entities turn, they face the doctrinal prohibition against undue preference and unjust discrimination that has been given legal effect in the *Telecommunications Act*, the DME0 and VI Framework.

Broadcasting Act

- 33) Bell owns and operates both "programming undertakings" and "distribution undertakings" and is therefore governed by the *Broadcasting Act*, regulations and rules made thereunder.
- 34) The *Broadcasting Distribution Regulations*¹⁹ "apply to persons licensed to carry on a distribution undertaking." Section 3 of the BDU Regulations states that "A licensee shall not distribute programming services except as required or authorized under its licence or these Regulations." Section 9 contains a prohibition against undue preference or disadvantage.²⁰
- 35) CraveTV, as a programming service accessed via STB, is also bound by rules for VOD services. PIAC-CAC believe that CraveTV, when accessed via STB, will be provisioned as a VOD service, though PIAC-CAC have not seen any Bell application for such a licence, or an application for an extension. If CraveTV obtains the appropriate VOD authorization, then STB CraveTV (as distinguished from IS CraveTV) will be bound by conditions of

¹⁸ Broadcasting and Telecom Decision CRTC 2015-26 - *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv* (29 January 2015) [**Mobile TV**].

¹⁹ SOR/97-555.

²⁰ *Broadcasting Distribution Regulations*, SOR/97-555, s. 9:

9. (1) No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

(2) In any proceedings before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

licence, and subject to certain expectations and encouragements.²¹ Section 10 of the VOD COLs include a prohibition against undue preference or disadvantage.²²

VI Framework

- 36) Bell Media is an affiliate within a “vertically integrated” entity²³ (owning both programming and distribution assets), and thus subject to the *VI Framework* promulgated under the *Broadcasting Act*.
- 37) In the VI Framework decision, the Commission expressed concerns about consumer harm and reduced competition were VI entities able to exercise exclusivity on new media (*i.e.*, online) over programming designed primarily for services including VOD services (emphasis added):

21. In light of the above, the Commission considers that permitting VI entities to exercise exclusivity with respect to the distribution on new media platforms of programming designed primarily for conventional television, specialty, pay and VOD services would result in harm to consumers and the competitiveness of the industry. The Commission further considers that the same harm would result if industry players that are not VI entities exercised such exclusivity.

22. Accordingly, the Commission has decided that no person operating under the Exemption order for new media broadcasting undertakings (New Media Exemption Order) may offer programming designed primarily for conventional television, specialty, pay or VOD services on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service. Rights for such programming shall be acquired on terms that allow them to be made available to competitors as part of a licensing agreement, or other such arrangements, thereby ensuring the availability of the programming to consumers of competing distributors on fair and reasonable terms. The Commission considers that this approach will ensure that the most popular programming is available to consumers subject to normal commercial terms and that consumers will be able to receive their preferred programming from a variety of distributors.

²¹ Appendix to Broadcasting Regulatory Policy CRTC 2011-59 - Standard conditions of licence, expectations and encouragement for VOD undertakings.

²² Appendix to Broadcasting Regulatory Policy CRTC 2011-59 - Standard conditions of licence, expectations and encouragement for VOD undertakings, S. 10:

<p>10. The licensee shall not give an undue preference to any person, including itself, or subject any person to An undue disadvantage. In any proceedings before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that has given the preference or subjected the person to the disadvantage.</p>

²³ BCE Inc. owns Bell Canada which owns Bell Canada and Bell Media Inc. BCE Ownership Chart, online: <<http://www.crtc.gc.ca/ownership/eng/cht143.pdf>>.

23. However, to encourage innovation in programming, the Commission finds that exclusivity may be offered for programs that are created specifically for new media platforms.

- 38) The Commission recently repeated these concerns in the *Mobile TV* decision.²⁴
- 39) In PIAC-CAC's view, it would be artificial and disconnected from the converged and vertically integrated nature of Bell (and more broadly, the communications market in Canada) to find, based on inappropriately literal interpretations of the relevant rules, that it is acceptable to tie access to an online streaming service to a specific mode of access (BDU service in this case) only to protect the entity's licensed businesses.

Digital Media Exemption Order

- 40) CraveTV, when consumed via IS (as an online streaming service), may be characterized to some extent as a "digital media broadcasting undertaking" ("DMBU") under the DMEO.
- 41) A DMBU is defined in the DMEO as an undertaking that provides broadcasting services, in accordance with the interpretation of "broadcasting" set out in *New Media*, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, 17 May 1999, that is: a) delivered and accessed over the Internet; or b) delivered using point-to-point technology and received by way of mobile devices.

²⁴ *Mobile TV* at paras. 55, 58-59:

55. The Commission acknowledges that no complaints or interventions were filed by competing service providers. It nevertheless considers that Bell Mobility's and Videotron's arguments are not persuasive: not only do they fail to address the impact of the significant difference in data charges on consumers, they also do not address the potential for significant harm in the future to other audiovisual content services accessible on subscribers' mobile devices that are subject to data caps. Given the considerable difference in the data charges in question, the Commission is not convinced by the arguments provided by Bell Mobility and Videotron that there has been no material impact, or that such an impact is unlikely in the future, either on consumers or on the growth of other services.

[...]

58. In light of the above, the Commission finds that the preference given in relation to the transport of Bell Mobility's and Videotron's mobile TV services to subscribers' mobile devices, and the corresponding disadvantage in relation to the transport of other audiovisual content services available over the Internet, will grow and will have a material impact on consumers, and other audiovisual content services in particular. As an example, it may end up inhibiting the introduction and growth of other mobile TV services accessed over the Internet, which reduces innovation and consumer choice.

59. The Commission also considers it significant that Bell Mobility and Videotron are in a position to treat the transport of their mobile TV services in such a significantly different fashion when compared to other audiovisual content services, given the leverage that comes from owning both the means of transport and the rights to the content.

- 42) When accessed via IS, CraveTV appears to meet that definition, and therefore, PIAC-CAC make submissions under the DMEO. On the other hand, because access via IS to CraveTV is tied to the purchase of a BDU service, PIAC-CAC believes the argument could be made that CraveTV is an extension of a traditional broadcasting service, and therefore must be licensed, and must abide by all of the licensing requirements imposed on programming services *and* distribution services. By virtue of being tied to a subscription to a BDU service, PIAC-CAC believe that CraveTV could appropriately be categorized as a broadcasting service, and thus subject to the full force of the *Broadcasting Act* and regulations made thereunder.

CraveTV accessed via IS as a DMBU

- 43) While exemption under the DMEO has the effect of exempting broadcasting undertakings that provide broadcasting services delivered and accessed over the Internet from some of the requirements of Part II of the *Broadcasting Act* and regulations made thereunder, that is not to say that DMBUs have no obligations.
- 44) The original *New Media Exemption Order* was amended in 2009²⁵ to include an undue preference provision, then in 2012 to give effect to decisions made in the *VI Framework* decision, notably prohibitions on “anti-competitive head starts” and certain types of exclusivity.
- 45) The DMEO has a prohibition against undue preferences (Section 3), against exclusivity (Sections 5-6), and against anti-competitive “head starts” (Section 7).

DMEO prohibition against undue preference

- 46) As is found in each other applicable statute and regulatory framework applicable to Bell in this instance, the DMEO also contains a prohibition against undue preference. The undue preference provision states:

3. The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

- 47) The *New Media Exemption Order* (as it was then titled) was amended in 2012 to implement determinations made by the Commission in the *VI Framework* decision.

²⁵ Broadcasting Order CRTC 2009-660 - *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings* (22 October 2009).

Anti-competitive “head start” rule

- 48) The 2012 DMEO update introduced a prohibition against anti-competitive “head starts” – the “no head start” rule.
- 49) The Commission describes anti-competitive “head starts” as “situations where a programming service is launched on a given broadcasting distribution undertaking’s (BDU’s) distribution platform prior to the service having been made available for distribution to other BDUs on commercially reasonable terms.”²⁶
- 50) The “no head start” rule reads as follows (underscore added).

7. An undertaking that has acquired exclusive rights to television programming from a new programming service shall, when ready to provide access to that programming in a manner that restricts access based on a consumer’s subscription to a specific mobile or retail Internet access service, make all television programming from that new programming service to which it itself provides access available to all other undertakings operating over the same broadcasting platform that have communicated an intent to provide access to the television programming, notwithstanding the absence of a commercial agreement.

- 51) The DMEO defines “television programming” and “new programming service” as follows:

“television programming” means programming designed primarily for conventional television, specialty, pay or video-on-demand services.

“new programming service” means a licensed pay television or specialty service that has not previously been distributed in Canada and includes, but is not limited to, a high definition version or a new multiplex of an existing programming service.

- 52) Leaving aside for the moment the concern with Bell’s tied selling, PIAC-CAC believe it remains to be seen if Bell is offering commercially reasonable terms to *all* interested BDUs, and if there are certain BDUs who have been denied access, or given delayed access, to CraveTV, in a way that has given Bell (and perhaps other select BDUs) an anti-competitive head-start, at least in respect of “new programming services.”
- 53) In the 2012 DMEO update, however, the Commission emphasized that the exclusivity rule captured VOD services:

The Commission agrees with those interveners that stated that the application of the “no head start” rule should be restricted to programming from pay and specialty undertakings. In the Commission’s view, this would be in keeping with

²⁶ Broadcasting Order CRTC 2012-409 at para. 8.

the determinations set out in Broadcasting Regulatory Policy 2011-601. The Commission notes that, notwithstanding the above, the prohibition surrounding exclusivity of access over mobile and retail Internet platforms, which is discussed below, captures programming designed primarily for conventional television and VOD services.²⁷

54) The exclusivity rule is explained in the next section.

Exclusivity

55) The 2012 DMEO update introduced the following prohibition against exclusivity.

5. Subject to paragraph 6, the undertaking does not offer television programming on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service.

6. The undertaking does not acquire, exercise, renew or otherwise extend rights to television programming on an exclusive or otherwise preferential basis unless:

(a) the undertaking is not prevented, directly or indirectly, from making that television programming available to subscribers of all service providers providing access to the same platform over which the undertaking broadcasts the programming; or

(b) such rights were acquired prior to 8 March 2011 and such rights are not exercised further to an extension of contractual term, by renewal or otherwise, taking effect after 7 March 2011.

56) PIAC-CAC note that Section 7 of the DMEO prohibits exclusivity in relation to “access based on a consumer’s subscription to a specific mobile or retail Internet access service,” and that there is no reference to BDU service. However, PIAC-CAC contend that the absence of the reference to BDUs in the exclusivity rule does not allow Bell to unduly prefer itself, or a class of broadcasters, and to disadvantage those service providers outside that class, and customers of those service providers. Activity which may not be expressly forbidden under the exclusivity provision of the DMEO does not mean it cannot be engaged in without any regard for the anti-discrimination provision.

CraveTV accessed via IS as something other than a DMBU

57) PIAC-CAC contend that CraveTV is not a DMBU given Bell’s explicit linking of access to CraveTV to the closed BDU system, and statements made by Bell executives about using tied access as a way to preserve the regulated system. In PIAC-CAC’s view, this takes

²⁷ Broadcasting Order CRTC 2012-409 at para. 12.

CraveTV out of the DMEO and puts it back squarely into the Commission's licensing regime.

- 58) CraveTV therefore should be licenced and adhere to the relevant conditions of licence and contribution requirements.

Telecommunications Act

- 59) Bell, as a provider of IS, is governed by the *Telecommunications Act*, and Commission decisions thereunder, most notably, the prohibition on unjust discrimination and undue preferences in section 27(2).
- 60) When the alleged unjust discrimination and undue preference is in relation to the transmission of programs, section 28 of the *Telecommunications Act* requires the Commission to "have regard to the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act*.²⁸
- 61) CraveTV, to the extent that access to it is conditioned on the purchase of IS (as it is in the case of Bell's Fibe TV which inextricably includes Fibe Internet) is therefore not solely a DMBU.
- 62) Bell and its affiliates (as the Commission recently affirmed in the *Mobile TV* decision) are required not to unduly prefer themselves, and unjustly discriminate against non-affiliates and other customers.
- 63) When access to CraveTV is linked to the purchase of an affiliated IS (as it is in Bell's own offering of Crave to its BDU customers because Bell Fibe TV is inextricably linked to Bell Fibe IS), then Bell is violating the *Telecommunications Act* prohibition against undue preferences.

²⁸

Broadcasting Act, s. 28:

Transmission of broadcasts

28. (1) The Commission shall have regard to the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act* in determining whether any discrimination is unjust or any preference or disadvantage is undue or unreasonable in relation to any transmission of programs, as defined in subsection 2(1) of that Act, that is primarily direct to the public and made

(a) by satellite; or

(b) through the terrestrial distribution facilities of a Canadian carrier, whether alone or in conjunction with facilities owned by a broadcasting undertaking.

- 64) Allowing Bell to tie access to CraveTV to subscription to a BDU service unduly prefers those services, and impairs Canadians' choice of ISP when faced with the prospect of having to purchase Internet services through one affiliated with a CraveTV-distributing BDU in order to access that streaming content.
- 65) In requiring the Commission to have regard for the *Broadcasting Act's* broadcasting policy for Canada in assessing undue discrimination in the context of terrestrial carriage by a Canadian carrier, Section 28 of the *Telecommunications Act* explicitly contemplates the possibility of broadcasting carriage being used in a way to violate the *Telecommunications Act*.
- 66) In the recent *Mobile TV* decision, the Commission decided that one carrier, preferring its affiliate's content

might support certain objectives of the broadcasting policy. However, the disadvantage to consumers in accessing other Canadian programs on their mobile devices, and to these other programs, could not be said to further these objectives. Accordingly, the Commission considers that the preference or disadvantage cannot be justified in regard to the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*.²⁹

- 67) In PIAC-CAC's view, as explained under Issue 6 below, in the case of Bell's CraveTV, the tied selling of access to CraveTV with BDU services *might* support certain objectives of the broadcasting policy; however, the disadvantage to consumers, more broadly than just Bell's subscribers, cannot be viewed as furthering the objectives.
- 68) PIAC-CAC further contend that in preferring licensed BDU services, to the detriment of customers of other ISPs wishing to access that online content, Bell is impairing the development of a competitive market for telecommunications services and broadcasting content.

Issue 3. On what technical and regulatory basis is it appropriate for CraveTV, when accessed via a set-top box, to be treated differently for billing purposes than when CraveTV is accessed via a wireless or Internet connection?

- 69) PIAC-CAC contends that the distinction between access modes is increasingly becoming irrelevant, and in the context of converged VI entities, a distinction that increasingly appears to favour a certain class of customers that chooses affiliated BDU service offerings, at the harm of customers of independent ISPs.

²⁹ *Mobile TV* at para. 60 (emphasis added).

- 70) PIAC-CAC believe that although there may be differences in some of the content available on CraveTV when accessed via STB versus CraveTV when accessed via IS, Bell is taking advantage of the distinction to try to “add value” to the purchase of a BDU subscription which, in an environment where Canadians want to be more in control of what they watch, actually results in consumers paying more than they might otherwise wish.

Issue 4. On what technical and regulatory basis is there for Bell to offer CraveTV exclusively to BDU customers?

- 71) It is the contention of PIAC-CAC that there is no technical basis for making the offer exclusive, and that the record of previous CRTC proceedings indicate that the explicit purpose of tied-selling CraveTV and BDU services is to protect the legacy TV distribution models.
- 72) Bell explicitly stated in its appearance before the Commission in Bell-Astral I,³⁰ Bell-Astral II,³¹ and TalkTV³² that it would launch a streaming service tied to a BDU subscription. For example, BCE CEO George Cope stated this multiple times during Bell-Astral I:³³

91 [MR. COPE] This is why, following the transaction, I am pleased to announce today that we will launch a service to compete with foreign competitors like Netflix, a made-in-Canada service, available in French and English everywhere we have rights, to all Canadians, importantly, through the cable, satellite or IPTV provider of their choice.

[...]

223 ...benefits for Canadians that they would see in the marketplace that benefits the broadcast system and I would say that benefit all BDUs because again the strategy around this product, which again sharing that strategy and we would love to do it in private we are not allowed to, will distribute that product through the BDUs, so our plan of course should make this make this private to allow Rogers to tell us to COGECO to Quebec Corp to everyone so that they can sell it to their customers in Canada and that product will compete directly with the Netflix product and other.

- 73) Again, in Bell-Astral II, Bell indicated its plans to offer a tied streaming-BDU offer.³⁴
- 74) Bell was more explicit about its plans during TalkTV (emphasis added):³⁵

³⁰ Broadcasting Notice of Consultation CRTC 2012-370.

³¹ Broadcasting Notice of Consultation CRTC 2013-106.

³² Broadcasting Notice of Consultation CRTC 2014-190.

³³ CRTC 2012-730 Transcript, Volume 1, 10 September 2012, paras 91, 223. See similar statements at paras 92-93, 164-165, 357-360.

³⁴ CRTC 2013-106 Transcript, Volume 1, 6 May 2013, paras 249, 630-640.

4994 MR. BIBIC: And we think that that's going to -- I think we believe it should be our decision to decide, do we go head-to-head with a foreign unauthenticated service, with a Canadian unauthenticated service, which could be Shomi, or an authenticated one? That's a judgement [judgment] for our own players to make.

4995 But if Bell takes the view that the authenticated one is the way to go, because we actually want to preserve the ecosystem and use that as the leverage point in a comparative –

[...]

5012 [MR. CRULL]: Our game is to use the system, the system as it is today, and build all the multiplatform and all the consumer benefits on top of that.

- 75) Rogers was similarly explicit at TalkTV.³⁵
- 76) As far as PIAC-CAC are aware, the legitimacy of such an arrangement has not yet been called in to question by the Commission, any other party to a Commission hearing, or by the Competition Bureau.
- 77) PIAC-CAC believe that, similar to Rogers and Shaw and their Shomi Partnership, the reason Bell is not providing open access to its online streaming service is two-fold: (i) to prefer Bell's own BDU service (which in Bell's case includes Bell's Fibe IS); and (ii) to prefer those service providers who have BDU business divisions, at the expense of independent ISPs.

Issue 5. Is CraveTV being marketed and provisioned in a manner that circumvents rules in place to promote competition and consumer choice and to mitigate against the harmful effects of vertical integration?

- 78) It is PIAC-CAC's contention that Bell (like Rogers and Shaw with their Shomi joint venture) are structuring their online streaming service in a manner designed to circumvent rules

³⁵ CRTC 2014-190 Transcript, Volume 3, 10 September 2014, paras 4994-4995, 5012. See similar statements at paras 3993, 4003-4004, 4988-4990.

³⁶ CRTC 2014-190 Transcript, Volume 4, 11 September 2014, paras. 8151-8162 (emphasis added):

8151 MR. PURDY: So Keith and Rogers Media and Shaw Media created Shomi. **We felt within the cable company that it was really important to use Shomi to try and add value to our television offering**, but we were focused on these millennial youth that weren't taking our TV offerings. So we ground Keith quite hard in our negotiations saying, "We want to be able to ad Shomi to an ISP account."

8153 MR. PURDY: Obviously, our desire would be to **sell that person television as well**, but we felt if we couldn't at least get them Shomi, that we couldn't **bring them back to the television offering**.

meant to promote competition and consumer choice and to mitigate against the harmful effects of vertical integration.

79) In the VI Framework decision, the Commission expressed the view that the situation where “most Canadians have access to programs that have been acquired on an exclusive basis. This serves to implement the objectives set out in section 3(1)(d) of the *Broadcasting Act*(the Act).”³⁷

80) The Commission was clear in the DMEO decision that:

[...] digital media broadcasting undertakings can exercise exclusive rights to programming designed primarily for conventional television, specialty, pay or VOD services without having to make such programming available to competing digital media broadcasting undertakings, provided that they do not restrict access to that programming on the basis of a consumer’s specific mobile or retail Internet access service, as the case may be.³⁸

81) In PIAC-CAC’s view, Bell is discriminating against customers of unaffiliated ISPs, which is precisely the type of harm the Commission was concerned about in its decision to adopt the *VI Framework*.

19. The Commission considers that the record of this proceeding demonstrates that VI entities have both the opportunity and incentive to give undue preference by providing themselves with exclusive access, on various distribution platforms, to content that they control. As a result, a consumer would have to subscribe to the distribution platform owned by the VI entity to have access to the exclusive content. The potential increase in the market share of the distribution services that form part of the VI entity would provide an incentive for a VI entity to deny competing distribution systems access to popular programming.

22. Accordingly, the Commission has decided that no person operating under the *Exemption order for new media broadcasting undertakings* (New Media Exemption Order) may offer programming designed primarily for conventional television, specialty, pay or VOD services on an exclusive or otherwise preferential basis in a manner that is **dependent on the subscription to a specific mobile or retail Internet access service**. Rights for such programming shall be acquired on terms that allow them to be made available to competitors as part of a licensing agreement, or other such arrangements, thereby ensuring the availability of the programming to consumers of competing distributors on fair and reasonable terms. The Commission considers that this approach will ensure that the most popular programming is available to consumers subject to normal commercial terms

³⁷ VI Framework decision at para. 17.

³⁸ Broadcasting Order CRTC 2012-409 at para. 24.

and that consumers will be able to receive their preferred programming from a variety of distributors.³⁹

- 82) In PIAC-CAC's view, Bell's marketing and provisioning of CraveTV fail to meet those objectives. Consumers without BDU subscriptions (and customers of any BDU with whom Bell is unwilling to reach a distribution agreement, if those may exist) are forced into one mode of access, when alternative modes of access may be preferred. Furthermore, and as explained in the next section, PIAC-CAC believe that tied-selling is inconsistent with the broadcasting policy objectives.

Issue 6. Is tying the sale of CraveTV to a BDU subscription consistent with the broadcasting policy objectives?

- 83) PIAC-CAC contend that to approve the tied sale of CraveTV to BDU services would be anti-competitive, anti-consumer, and inconsistent with the broadcasting policy objectives.
- 84) The Canadian broadcasting policy objectives include the following:

3. (1) It is hereby declared as the broadcasting policy for Canada that

(d) the Canadian broadcasting system should

(iv) be readily adaptable to scientific and technological change;

(s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,

(i) contribute significantly to the creation and presentation of Canadian programming, and

(ii) be responsive to the evolving demands of the public; and

(t) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

- 85) PIAC-CAC recognize that the licensed broadcasting system, as part of what former Commissioner Cugini⁴⁰ and former Chairman von Finckenstein⁴¹ previously, and current

³⁹ VI Framework at paras. 19 and 22 (emphasis added).

⁴⁰ Speech by Rita Cugini, Regional Commissioner for Ontario, Canadian Radio-television and Telecommunications Commission to the International Institute of Communications' International Regulators Forum, Johannesburg, South Africa (1 October 2011).

Commissioner Shoan recently termed a “regulatory bargain,”⁴² produces Canadian content, and in that production achieves a number of other Canadian broadcasting policy objectives, including Section 3(1)(s)(i) (excepted above), Section 3(1)(d)(iii) and Sections 3(1)(e)-(f).

- 86) What is at issue in this application (and in the concurrently filed application in respect of Shomi), is the appropriateness of licensed broadcasting undertakings taking advantage of their scale and scope to abuse exemption orders in a way to favour their licensed activities, which PIAC-CAC contend is ultimately at the expense of independent ISPs and Canadian consumers.
- 87) The Commission appeared to recognize the implications the consumer shift to online platforms would have on Canadian content (a term which PIAC-CAC use here to connote the largely cultural goals cited earlier), and noted in their *Talk TV* “Working Document for Discussion”⁴³ in some part, the move toward online consumption.

⁴¹ Speech by Konrad von Finckenstein, Q.C., Chairman, Canadian Radio-television and Telecommunications Commission to the International Institute of Communications’ Telecommunications and Media Forum Washington, D.C. (14 December 2011).

⁴² The Library of Parliament described it thus:

The traditional approach to supporting the development of Canadian content and its availability to Canadians has been based on the scarcity of spectrum – the limited availability of radio frequencies. To have access to the spectrum, a broadcaster requires a licence from the CRTC. In return, the broadcaster must adhere to Canadian content regulations, which set minimum levels of spending on Canadian programs and minimum numbers of hours for airing Canadian programs.

Notably, the Library of Parliament observed the following challenges facing the regulatory regime:

When Parliament adopted the *Broadcasting Act* in 1991, many of the technologies that are in widespread use today did not exist. The changes brought about by the adoption of digital technologies have created challenges for implementing the objectives of the Act. While the traditional objectives of the broadcasting policy – Canadian ownership, a mix of public and private broadcasting, the production and distribution of Canadian content, and the use of Canadian creative resources – remain in place, there is on-going debate about how best to achieve these objectives. Technological changes have made the situation more complicated.

Library of Parliament, *Background Paper: Canadian Broadcasting Policy* (26 June 2011, updated 6 August 2014).

⁴³ Broadcasting Notice of Consultation CRTC 2014-190-3 (21 August 2014), Proposal 10:

Proposal: The definition of broadcasting revenues for licensees would be revised to include revenues from programming offered online or on other exempt platforms. Broadcasters would be allowed to count towards Canadian programming expenditures (CPE) their expenditures on original online only programming.

- 88) Bell itself, in its written submission in *Talk TV*, observed that the “current regulatory system ... is breaking,” and that Canadians increasingly expected to be in control: “The Canadian television system does need to adapt to a world where the consumer has a much greater degree of control over their content choices.”⁴⁴ At the same time, Bell argued that many Canadians still preferred linear and appointment television (as opposed to on-demand), and that “the regulatory framework for the Canadian broadcasting system must incent Canadians to subscribe to Canadian services, and watch high-quality Canadian programming.”⁴⁵ In Bell’s view, “what is needed is a regulatory framework that recognizes where television is heading, and removes barriers to getting there, while preserving and customizing the best elements of the current system.”
- 89) While PIAC-CAC question the premise of that latter contention, PIAC-CAC believe that incenting “Canadians to subscribe to Canadian service, and watch high-quality Canadian programming” is not achieved through tying access to online content to the purchase of a BDU subscription. PIAC-CAC believe that the tying of online streaming services to a BDU subscription is, using the words of Bell, “a barrier to getting there.”
- 90) In light of the increasing price of BDU services,⁴⁶ and the clear interest by many Canadians in consuming on-demand streaming service, and having more choice and flexibility, PIAC-CAC contend that there is no compelling reason, in policy, to approve the tied sale of online access to video content with subscription to BDU services (and in the case of Bell’s Fibe TV, to Fibe Internet as well). To do so is to fail to adapt to technological change, and to fail to respond to the evolving demands of the public.
- 91) The Commission itself noted in Broadcasting Notice of Consultation 2014-190:

The increased availability of online and on-demand content has an impact on viewers’ expectations. During Phases 1 and 2, many Canadians called for more control over the content they receive, and stated that they are increasingly seeking out individual programs rather than programming services. As well, the increasing cost of traditional television puts strain on the subscriber-BDU relationship.⁴⁷

What this means for Canadians: For the first time, broadcasters would be allowed to count what they spend on original programming that they produce for the Internet towards what they are required to spend on Canadian programming overall. This would encourage broadcasters to make more Canadian content online.

⁴⁴ CRTC 2014-190, Intervention of Bell Canada (27 June 2014) at para. 29.

⁴⁵ *Ibid* at para. 30

⁴⁶ CRTC 2014-190, Intervention of the Groups for the Public Interest (27 June 2014) at paras. 30-37, 43-44.

⁴⁷ BNC 2014-190 at para. 28.

- 92) In PIAC-CAC's view, it appears that the three largest, converged VI entities' tethering of streaming services to affiliated IS and BDU services fails to deliver the choice and flexibility Canadians want.
- 93) One commentator recently asked, in light of Bell's CraveTV and Rogers-Shaw's Shomi, "why can't Canadian media companies sell streaming services that are untethered from other services, like their Australian counterparts do?"⁴⁸ Another asked why she could not have standalone access to any of these so-called streaming services.⁴⁹
- 94) As the Chairman recently observed, "It's regrettable [...] that English Canada still lacks a true Canadian Internet streaming video-on-demand service that does not require a cable subscription."⁵⁰
- 95) PIAC-CAC contend that it would be equally regrettable if the Commission sanctioned the tied selling of online streaming services to the BDU and IS services of the converged VI entities, preserving and protecting their dominance and their legacy models at the expense of competition and consumer choice.
- 96) Like the *Mobile TV* decision, this is "about all of us and our ability to access content equally and fairly, in an open market that favours innovation and choice."⁵¹

⁴⁸ Alphabeatic, "Australian streaming: no TV, internet subscription needed" (27 January 2015), online: <http://alphabeatic.com/australian-streaming/>.

⁴⁹ Kelly Lynne Ashton, "You Can't Always Get What You Want . . ." (12 January 2015), online: Butter Tarts and Brown Drinks (blog), online: <<http://wonktacular.com>>:

I would like to be able to be a Rogers cable, internet and wireless subscriber (well, maybe not but I am anyway) and subscribe to CraveTV. CraveTV is only available to Bell, Telus and a few smaller BDUs and is unlikely to be available to subscribers of their competition. While Shomi and CraveTV are very similar in how they work, and both have lovely interfaces on the mobile platforms (though both were buggy on their web platforms), I would like to have the option to subscribe to CraveTV if I want to and not be locked in to Shomi because of my cable provider.

So, as a Canadian and a lover of television, CRTC regulation and the BDU business models are not working for me right now.

⁵⁰ Speech, Jean-Pierre Blais to the London Chamber of Commerce on Let's Talk TV and the future of television (29 January 2014).

⁵¹ *Ibid.*

Issue 7. If the structuring, marketing and provisioning of CraveTV are technically compliant with current Commission frameworks, should the Commission undertake reform?

- 97) PIAC-CAC believe that the various regulatory frameworks relating to subscription video-on-demand services and digital media broadcasting undertakings and vertical integration may not have expressly contemplated the type of “subscription online streaming service tied to BDU access” which PIAC-CAC contend the CraveTV model represents (nor the “subscription online streaming service tied to a specific ISP or BDU or access technology” model which PIAC-CAC contend Shomi represents).
- 98) PIAC-CAC believe that it may be possible that CraveTV is operating between the contours of two frameworks,⁵² in which case, the Commission should ensure clarity is provided where needed, or that appropriate rules are developed to bring such services within the appropriate regulatory framework. This may be a case where time is of the essence as the undue advantages Bell and other BDU distributors may be gaining from their structuring, marketing and provisioning of CraveTV may be considerable.
- 99) At the same time, PIAC-CAC note the Commission’s previous decisions (Broadcasting Decisions 2012-645⁵³ and 2014-486⁵⁴) in respect of the operation of the *Digital Media Exemption Order*, and concerns expressed about too strict an interpretation of those frameworks in the face of technological and structural change, and favouring one form of business model over another.⁵⁵

⁵² It may be, as Professor Geist has observed, that “the current governing law is ill-suited to address Internet-based video services.” Michael Geist, “CRTC vs. Netflix: Has Canada’s broadcast regulator started a fight it can’t win?” The Toronto Star (22 January 2015), online:

<http://www.thestar.com/news/insight/2014/09/25/crtc_vs_netflix_has_canadas_broadcast_regulator_started_a_fight_it_cant_win.html>.

⁵³ See Broadcasting Decision CRTC 2012-645 - *Application by TELUS Communications Company (TELUS) regarding the distribution by Corus Entertainment Inc. of a new programming service on Shaw Communications Inc.’s services Shaw Cable and Shaw Direct, and not on TELUS’s service Optik on the Go* (27 November 2012).

⁵⁴ Broadcasting Decision CRTC 2014-486 - *Complaint by Leiacomm against Bell Media Inc. alleging undue preference and disadvantage* (22 September 2014), Dissent of Commissioner Shoan.

⁵⁵ See e.g., Commissioner Shoan’s dissent in *Leiacomm*; see also TELUS’s reaction to *Movie Central* (“Why vertical integration in Canada’s communications market should be a concern to Canadians” (26 March), online: <<http://blog.telus.com/public-policy/why-vertical-integration-in-canadas-communications-market-should-be-a-concern-to-canadians/>>):

Shaw was able to exploit a loophole in the CRTC’s vertical integration framework by making its “on the go” service contingent to the “television” subscription to the Movie Central service. In such circumstances, the rules in the [DMEQ] could not apply because the service was not restricted “based on a consumer’s subscription to a specific mobile or retail Internet access service”. Rather, Shaw restricted its Movie Central on the go service to subscribers to the Movie Central service on its cable TV service. TELUS therefore

4. LEIACOMM, TALK TV, AND THE DUTY TO CONSIDER

- 100) In bringing this application, PIAC-CAC wish to draw attention to the Commission's decision in *Leiacomm*.
- 101) The facts of that complaint are straightforward: Leiacomm, a start-up online content provider, asked Bell to license on demand content that was already available on Bell's and other BDUs' mobile TV offerings (e.g., CTV Go, Bell Mobile TV, Rogers Anyplace TV). Bell replied, "...we do not wish to enter into agreements with OTT operators at this time. Please feel free to circle back with us if you decide to pursue and obtain a CRTC license."

The Commission's Decision

- 102) In its decision, the Commission noted that the provision of Bell's content on Bell websites and cell phones, or via the on-line services offered by BDUs, falls under the DMEQ, and that Bell and its BDU partners, in offering such on-line services, are operating digital media undertakings. The Commission found that Bell was treating Leiacomm differently from other digital media undertakings. By providing its content to some digital media undertakings operating under the DMEQ and not to Leiacomm, Bell was granting a preference to itself and certain BDUs over an on-line content provider and was subjecting Leiacomm to a disadvantage, though not an undue one, on the basis that "the impact on the achievement of the objectives of the Act" were "minimal."⁵⁶
- 103) Furthermore, the Commission noted, "while Bell is providing content on its own websites for free and to authenticated BDU subscribers, as well as via its mobile platforms, *it is not providing its content to any content provider operating solely over the Internet*. Therefore, Bell is not providing its content to any provider with the same business model as Leiacomm on an exclusive basis."⁵⁷
- 104) The Commission stated therefore that "while a key principle of the DMEQ and the framework relating to vertical integration is that on-line content should be made broadly available to Canadians and that such content must be available in a way that does not require subscription to a specific mobile or retail Internet service, it does not guarantee that such content will be made available to all on-line content providers."⁵⁸

argued that in the circumstances the Pay Television Regulations should to apply since the Movie Central on the go service was an extension to the Movie Central pay TV service but the CRTC refused to accept this argument and the complaint was denied on very technical grounds leaving the loophole gaping open.

⁵⁶ *Leiacomm* at para. 24.

⁵⁷ *Leiacomm* at para. 26.

⁵⁸ *Leiacomm* at para. 25.

- 105) The Commission therefore considered that Bell's actions did "not violate the principles of the DMEQ and the framework relating to vertical integration and that Bell is not abusing its position as a vertically integrated undertaking."⁵⁹
- 106) In the Commission's view, "Bell's refusal to provide content to Leiacomm [did] not have a material adverse impact on Leiacomm's service. ...[E]ven without Bell's content, Leiacomm could offer an attractive on-line service, as have other on-line content providers that are successfully operating without Bell's programming (for example, Netflix, TOU.TV, etc.)."⁶⁰

Commissioner Shoan's Dissent

- 107) In a dissenting opinion, Commissioner Shoan wrote that "by requiring Internet content distribution entities to subject themselves to the Telecommunications Act in order to access the undue preference/unjust discrimination provisions in the broadcasting context, I am of the view that the Commission has contravened the Act and erred in law."
- 108) In his dissent, Commissioner Shoan highlighted the blurring of the line between broadcasting and telecommunications, in technology and in the perspective of the Canadian consumer; the tensions that this blurring creates between the two related statutes; and how too narrow an interpretation of the statutes can result in the favouring of one mode of access technology over another – thereby violating the technologically neutral emphasis of the *Broadcasting Act*. In Commissioner Shoan's view, in light of that blurring of lines, "it is the Canadian consumer's perspective that should be paramount in this undue preference analysis."⁶¹
- 109) In Commissioner Shoan's view, the effect of the majority's decision was to prefer one business model based on one mode of content access over another.
- 110) In PIAC-CAC's view, a similar effect would follow from a Commission finding that Bell may tie access to CraveTV as an online streaming service to the purchase of a BDU subscription.

PIAC's Request to Adjourn Leiacomm: Core issues about streaming need to be explored

- 111) PIAC intervened in the Leiacomm's complaint to ask the Commission to adjourn determining the Leiacomm application, pending a broader review of the issues in *Talk TV*.

⁵⁹ Leiacomm at para. 27.

⁶⁰ Leiacomm at para. 28.

⁶¹ Leiacomm, Dissenting Opinion of Commissioner Raj Shoan.

112) PIAC argued that Leiacomm's allegations raised "core issues to be explored in the Commission's upcoming review of its approach to television (Phase 3 of Broadcasting Notice of Invitation CRTC 2013-563), including the regulatory treatment of over-the-top television service providers."⁶²

113) Then, at the *Talk TV* hearing in September 2014, it was clear that the DMEO was not up for review.

114) In *Leiacomm*, released in November 2014, the Commission rejected PIAC's request.

With respect to PIAC's intervention, the Commission considers that there is a clear regulatory framework in place governing the matters raised by Leiacomm: the DMEO, the framework relating to vertical integration, and the Code. It therefore finds that it is appropriate to deal with the complaint now rather than waiting for the completion of the Let's Talk TV proceeding.⁶³

115) In other words, the Commission considered the appropriate frameworks sufficient, and furthermore, did not consider the issues raised by Leiacomm to engage broader issues relating to online streaming services.

116) In his dissent in *Leiacomm*, Commissioner Shoan appeared to disagree, stating "I am of the view that the applicability of the Act to online BDUs should be explored in a public process."

117) This lack of consideration of the broader issues leads PIAC-CAC to raise, in the following section, the Commission's duty to consider the within application.

The Commission's Duty to Consider

118) PIAC-CAC contend that the Commission has a legal duty to consider new facts and arguments before it, and to make a fresh exercise of discretion.⁶⁴

119) PIAC-CAC also note that the facts of the CraveTV offering are different, dealing with not just the ability of one potential online content provider to offer Bell content, but with the ability of independent ISPs, unaffiliated with BDUs, to compete fairly with what many are beginning to view as a legacy distribution system and legacy model of broadcasting.

⁶² Intervention of PIAC (24 March 2014) at para. 3.

⁶³ Leiacomm at para. 10.

⁶⁴ See e.g., *Bell Canada v. Canada (Attorney General)*, 2011 FC 1120 (CanLII) at para. 99.

- 120) Furthermore, PIAC-CAC note that the Commission is in no way bound by its previous decisions,⁶⁵ and in this regard PIAC-CAC note that the Commission has been careful to restrict its previous decisions on competitive issues to the particular facts of each case.⁶⁶
- 121) PIAC-CAC believe that the facts of the CraveTV service and arguments are new and different, and that the dissent of Commissioner Shoan contains compelling justification for a broad-based examination of anti-competitive, cross-sectoral behaviour by converged VI entities.
- 122) PIAC-CAC believe the Commission must confirm whether or not online streaming services tied to the consumption of BDU services is acceptable, and if it is acceptable, to justify the acceptability of it in reference to the broadcasting policy objectives.

5. NATURE OF DECISION SOUGHT

- 123) In light of the foregoing, PIAC-CAC request that the Commission:
- (i) confirm that Bell's linking of Fibe TV to Fibe IS invokes the *Telecommunications Act*, generally, and specifically the Section 27(2) prohibition against unjust discrimination;
 - (ii) confirm that tying access to CraveTV and Bell Fibe TV (and therefore Fibe IS) constitutes an undue preference to Bell's IS vis-à-vis other competitive ISPs and their customers who are ineligible to subscribe to CraveTV without purchasing a BDU subscription; and
 - (iii) confirm that the tied selling of CraveTV to BDU services removes CraveTV from eligibility for exemption under the DMEQ and therefore requires Bell to comply with the licensing rules, regulations and commitments.

⁶⁵ *Ibid.*, at para. 89.

⁶⁶ See e.g., Broadcasting Decision CRTC 2012-645 - *Application by TELUS Communications Company (TELUS) regarding the distribution by Corus Entertainment Inc. of a new programming service on Shaw Communications Inc.'s services Shaw Cable and Shaw Direct, and not on TELUS's service Optik on the Go* (27 November 2012) at para. 30:

30. In its intervention, MTS Allstream expressed concerns relating to the consequences of allowing "a vertically integrated distributor to use a related programmer's existing television content for non-linear and/or multi-platform distribution without that content also being made available to competing distributors." In this regard, the Commission notes that the determination set out in the present decision relates strictly to the facts of the present issue, and does not represent a reconsideration of its previous policy determinations set out in the vertical integration framework. Specifically, this determination addresses whether there has been a violation of section 6.3 of the Regulations.

Alternative relief

124) In the alternative, if CraveTV is a DMBU:

- (i). confirm that Bell is granting itself and other BDUs an undue preference under the DMEO vis-à-vis competitive ISPs and their customers who are ineligible to subscribe to CraveTV without purchasing a BDU subscription;
- (ii). confirm that the DMEO prohibition against tied selling also applies to broadcasting distribution, or amend the DMEO accordingly; and
- (iii). require Bell to stop offering and providing CraveTV until all BDUs who wish to offer it are able to offer it on commercially reasonable terms.

125) In the further alternative, if the Commission finds that Bell's provisioning of CraveTV is compliant and consistent with the regulatory frameworks referenced herein PIAC-CAC requests that the Commission undertake a review of the DMEO with a view to (i) prohibiting this undue preference to affiliated BDUs and ISPs, and (ii) enlarging the undue preference prohibition to include preferences to affiliated BDU services.

126) In 2009 the Commission stated it would review the DMEO every 5 years "or such time as events dictate."⁶⁷ PIAC-CAC contend that a review of the DMEO at this juncture, and in light of Commissioner Shoan's concurring opinion in *Mobile TV*, would be timely.

6. COMMISSION'S JURISDICTION

127) PIAC-CAC contends that the Commission has the necessary jurisdiction to grant the relief sought.

128) Section 24 of the *Telecommunications Act* grants the Commission authority to impose any conditions on the offering and provision of any telecommunications service by a Canadian carrier.

⁶⁷ Broadcasting Regulatory Policy CRTC 2009-329 at para. 26:

26. As new media's significance in the Canadian broadcasting system continues to evolve, further consideration of its appropriate regulatory treatment will be warranted. In Public Notice 1996-59 (Policy regarding the use of exemption orders), the Commission indicated that the review of exemption orders will normally take place five years from the date of issuance of the order and will be subject to the Commission's standard public process. Given the pace of change in the new media environment, and in accordance with established policy, the Commission expects to conduct the next review of the broadcasting in new media environment within five years, or at such time as events dictate.

Conditions of service

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

- 129) Despite the Commission's forbearance from the regulation of retail Internet services,⁶⁸ and mobile wireless data services,⁶⁹ the Commission has retained its powers to sanction unjust discrimination under section 27(2) of the *Telecommunications Act*.
- 130) To the extent that, as argued, Bell is tying access to CraveTV to the purchase of its inextricably linked Internet service provided by a Bell affiliate, this provision of the *Telecommunications Act* is engaged.
- 131) Section 9(4) of the *Broadcasting Act*, in requiring the Commission to exempt broadcasting undertakings from any or all the requirements of Part II of the Act where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the Canadian broadcasting policy objectives, gives the Commission discretion to impose "such terms and conditions as it deems appropriate" on any required exemption, and indeed the Commission has conditioned the DMEO on compliance with a prohibition against undue preference, and may amend the DMEO if necessary.

End of Document

⁶⁸ Telecom Order CRTC 99-562 – *Forbearance from retail internet services* (25 June 1999) at para. 40:

In light of the foregoing and consistent with its previous IS forbearance rulings, the Commission will, in the case of carriers that have Utility segment operations and have implemented the Split Rate Base regime, unconditionally:

[...]

- retain its powers under subsections 27(2), 27(3) (except to the extent that that provision refers to powers that are forborne), and 27(4) of the *Act* to provide an additional safeguard against carriers granting any undue preference

⁶⁹ Telecom Decision CRTC 2010-445 - *Modifications to forbearance framework for mobile wireless data services* (30 June 2010) at paras. 7-8: "the offering and provision by Canadian carriers of mobile wireless data services shall be subject to the Commission's powers and duties under section 24 and subsections 27(2), 27(3), and 27(4) of the *Act*."