

**CABLE SPECIALTY SERVICES:
THE CONSUMER PROTEST OF EARLY 1995**

**Susan Alter
Law and Government Division**

January 1995



Library of
Parliament
Bibliothèque
du Parlement

**Parliamentary
Research
Branch**

The Parliamentary Research Branch of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Research Officers in the Branch are also available for personal consultation in their respective fields of expertise.

**CE DOCUMENT EST AUSSI
PUBLIÉ EN FRANÇAIS**

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	2
THE TECHNOLOGICAL ENVIRONMENT	2
THE REGULATORY ENVIRONMENT.....	3
A. The 1993 Structural Hearing	3
B. Key Rules Governing Cable Specialty Services.....	4
1. Basic and Discretionary Cable Services.....	4
2. The CRTC's Distribution Rules	6
C. Fees for the New Services and their Regulation.....	7
D. The Marketing of the New Specialty Services.....	8
CONCLUSION	10
SELECTED REFERENCES.....	10



CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

CABLE SPECIALTY SERVICES: THE CONSUMER PROTEST OF EARLY 1995

INTRODUCTION

In 1994 the Canadian Radio-television and Telecommunications Commission (CRTC) licensed six new English-language and two new French-language specialty services: Bravo!, The Country Network, The Discovery Channel, Lifestyle Television, Showcase, YOU: Your Channel, Le Réseau de l'information, and "Arts et Divertissement." In doing so, the Commission's two primary objectives were: (1) to strengthen the Canadian presence in the Canadian broadcasting system, especially in anticipation of invasions by American direct-to-home satellite services (the infamous "deathstars") and (2) to ensure that the widest possible selection of new Canadian services would be available at a reasonable cost.

The first day of January 1995 marked the début of the new line-up of cable specialty services. But, much to the apparent surprise of the industry and the CRTC, they were not warmly welcomed everywhere. The new channels, which were added in most cases to subscribers' existing discretionary service for an additional monthly fee, aroused many viewers' ire, not their interest. Sparking much of the angry protestation was the marketing strategy employed, mainly by Rogers Cablesystems, the country's largest cable operator, to "sell" the new services: negative-option marketing. Higher fees and the repackaging and repositioning of channels also fuelled the dissension.

By the fifth day of January, Rogers Cablesystems had partly capitulated, apologizing for its mistake in not presenting the new services as a separate, discretionary package. It offered customers the choice of keeping only their current package of discretionary specialty channels, at the old price, or of adding the new package of specialty services at an additional fee. The much-reviled negative-option-marketing scheme used to launch the new line-up, however, remained firmly in place, leaving the onus on the consumer to refuse the new package.

Although it is too soon to tell, some commentators have suggested that the protesters may have won a pyrrhic victory. Their resolute assertion, now, of freedom to choose their cable packages could jeopardize the range of Canadian choices available to everyone in the multi-channel, pick-and-pay universe of the future.

This background paper will describe the technological and regulatory environments in which the cable revolt unfolded and discuss some of its implications.

THE TECHNOLOGICAL ENVIRONMENT

The capacity of the multi-channel universe has grown exponentially over the last few years, from 100 to 200 and then 500 channels. For channel surfers, however, this bountiful choice is simply science fiction, not yet having graced their living rooms. Interactive technology, as well, which will ultimately provide users with a cornucopia of video games, videotext and interactive television services, is currently more dream than reality, existing largely as field trials in selected communities.

The current analog system of signal transmission must evolve to a digital system before the promise of pick-and-pay and interactive multimedia cable services can be delivered. The evolution is set to begin with the distribution of special set-top boxes, called digital video compression boxes or DVC boxes, to cable subscribers. DVC technology allows cable companies to squeeze more services on to the space now occupied by one channel and then to transmit them, in digitized form, to homes where DVC boxes translate the compressed, digitized signals back into analog format, receivable by subscribers' TV sets.

The cable industry's move from analog to digital transmissions -- in other words, from the world of basic and discretionary tiers of service, pay TV and pay-per-view, to the world of pick-and-pay and interactive multi-media cable services -- is slated to be completed only around the turn of the century. Thus, television and the cable industry are currently in a period of transition; program selection is increasing but the technology to give viewers real choice has not yet arrived.

THE REGULATORY ENVIRONMENT

A. The 1993 Structural Hearing

Mindful of the dramatic changes on the horizon for the broadcasting system, in 1993 the CRTC held a hearing on cable television (“the structural public hearing”). The purpose of this hearing was to help the Commission design a regulatory framework appropriate for ushering in the new generation of television. In the words of Keith Spicer, Chairman of the CRTC, “Our main objective was to build a regulatory framework that will serve as a bridge for the Canadian broadcasting system as it prepares for this consumer-driven market of the year 2000.”

The CRTC decision issuing from the structural hearing process, released in June 1993, unleashed a number of regulatory reforms, many of which were implemented through the approval and introduction of the new line-up of cable specialty services in the latter half of 1994. For example, through these public processes, negative-option-marketing strategies were debated and tacitly approved, and refinements to the rules governing the distribution and packaging of specialty services were engineered.

In light of cable-subscribers' revolt in January 1995, the soundness of the CRTC's regulatory framework has been challenged. Consumer advocates, in particular, have been calling on the government to amend the *Broadcasting Act* to force the CRTC to protect consumer interests, not just cultural interests, when regulating the cable industry monopoly. Nevertheless, as of mid-January, the Commission remained resolute in its regulatory vision for the transition of television, defending its decision to license the newest fleet of Canadian specialty services, standing by its rules for distributing and packaging cable programming, and deflecting complaints about the marketing, cost and channel alignment for the new services, for the most part, onto the cable companies themselves.

The CRTC's plans to help empower cable consumers appear to have only a long-range dimension. Speaking to cable industry players at the May 1994 annual convention of the Canadian Cable Television Association, CRTC Chairman Keith Spicer acknowledged that television consumers want more control; however, he also indicated, they would not have it until after the year 2000:

They want, deserve, and will increasingly settle for nothing less than the maximum control possible over which services they select and pay for. As a consumer and CRTC Chairman, I agree one hundred

percent with this goal. Full pick-and-pay, beyond a few rock bottom, common national-interest services, can come only after this decade; but I believe it must come.

In the meantime, the Chairman is looking after cable subscribers' interests by simply urging cable operators to pay more attention to cable consumers' demands:

Over the long term, competitors will develop the means to offer virtually the same services, and the regulator will not block consumers from gaining access to competing sources of the services they want to buy. That's why it's vital for cable to articulate a strategic industry vision, to adapt your technology as fast as possible and, I would triple underline, to listen to consumers very carefully, treating them with the greatest sensitivity and respect.

B. Key Rules Governing Cable Specialty Services

The CRTC's convoluted rules governing the distribution and packaging of cable services are at the heart of the specialty services dilemma. An explanation of these rules is therefore necessary to an understanding of the circumstances that spawned the cable subscribers' rebellion.

1. Basic and Discretionary Cable Services

The rules governing the distribution and packaging of cable services in Canada have evolved and become more intricate as the services available have increased. In 1983, as the number and range of cable programming services grew, the CRTC was faced with deciding how to manage their volume and cost. The Commission decided to divide cable services into two levels or tiers: basic and discretionary (*Public Notice CRTC 1983-245: Cable Television Service Tiering and Universal Pay Television Service*).

Basic cable service is the standard package of services that all cable companies must provide to all subscribers in their service area for a basic monthly fee. The carriage of some programming in the basic package is mandatory, while other programming may be provided on an optional basis. Section 9 of the CRTC's *Cable Television Regulations, 1986* prescribes the programming that must be carried as part of the basic service. For example, it says the basic service must include the CBC English and French network services, local and regional stations, provincial educational television services, and a community channel. The programming services that are optional to the basic service include most of the Canadian specialty services and the major American networks.

Some specialty services, however, are not allowed to be included in the basic

service. They include Chinavision, Talentvision (formerly Cathay), Telelatino, and any single or limited point-of-view religious specialty service. They must be offered as part of the discretionary services.

A **discretionary service** is any programming service that is not included in the basic service. Therefore, discretionary services may include specialty, pay TV and pay-per-view channels, as well as other existing Canadian and foreign services not included in the basic service. They are programming services provided to cable subscribers for an extra fee, over and above what is paid for the basic cable service, to which one must subscribe to receive discretionary services. Discretionary services are offered to cable subscribers in the form of programming packages or “discretionary tiers.”

The make up of each discretionary tier or package is partly governed by the CRTC's “linkage rules” which restrict how many foreign (generally meaning American) satellite services can be bundled together with Canadian specialty and pay TV services in the tier. New linkage rules with respect to Canadian specialty services came into play 1 January 1995; these require that each channel allocated to carry a Canadian specialty service within a discretionary tier be linked with no more than one channel allocated to carry a foreign satellite service. In other words, as a result of the linkage rules, no more than one non-Canadian satellite service can be offered on a discretionary tier for every Canadian specialty service placed there. Previously, the linkage ratio of non-Canadian to Canadian was 2:1.

The signals for discretionary services can either be unscrambled or scrambled (requiring the subscriber to have a decoder to receive the transmission). In the recent past, large cable companies operating outside Quebec have typically distributed their discretionary packages in both forms, sending out a discretionary tier called the “extended tier” in unscrambled form while scrambling pay TV and pay-per-view services. Cable companies have usually distributed the unscrambled, extended tier to all households, including those subscribing only to the basic service, and have then removed the extended tier service at basic-service-only households using a trap or filtering device installed outside the premises. Due to the high market penetration of the extended tier, which reaches over 90% of cabled households, this approach was the most cost-efficient way to deliver the service.

2. The CRTC's Distribution Rules

The CRTC's distribution rules determine whether a specialty service is carried as part of a cable company's basic service or in a discretionary package. The latest official rules were published in the CRTC's June 1994 *Public Notice CRTC 1994-60: Distribution and Linkage Requirements*. The *Cable Television Regulations, 1986*, November 1994 amendment, now incorporate these rules by reference in section 10.

Essentially, these rules provide that, aside from those specialty services that can *only* be carried as part of a discretionary service, all the other specialty services have double status; thus, depending on the circumstances, they can be carried either as part of the basic cable service or as part of a discretionary tier. The CRTC has assigned certain specialty services to the basic cable package and other specialty services to a discretionary tier. Either by consent or agreement, however, a specialty service can be re-assigned or re-located from its designated position on the basic service to a position on a discretionary service or vice versa.

Specifically, *Public Notice CRTC 1994-60* assigned the following pre-existing and new specialty programming services to be part of the basic cable service, *unless* the company originating the specialty service consents in writing to its distribution on a discretionary tier: CBC Newsworld, Vision, YTV, MuchMusic, TSN, Canal Famille, MétéoMédia/Weather Now, Musique Plus, Réseau des Sports, TV5, Le Réseau de l'information (RDI), and The Country Network. Thus, for example, Rogers Cablesystems is obliged to distribute RDI in its basic cable package, unless the CBC consents in writing to bump it to a discretionary tier.

The notice further stipulates that a cablesystem having 6,000 or more subscribers may elect to distribute the following new specialty programming services: Showcase, Bravo!, Lifestyle Television, The Discovery Channel, Arts et Divertissement, and YOU: Your Channel. When does the cable operator chooses to do so, it is required to distribute the services as part of a discretionary package, *unless* it and the specialty programming service operator agree to distribution as part of the basic cable service. Thus, for example, The Discovery Channel would automatically be placed on a cable company's discretionary tier of services unless if the owners of Discovery and the cable operator agreed to put it in the basic cable package.

Given the apparent flexibility in the distribution rules, the ultimate configuration of a cable company's basic and discretionary service packages appears to depend partly on what

arrangements (by consent or agreement) it makes with a particular specialty service operator. The obligation to meet the CRTC's linkage requirements, discussed above, is another factor that determines the ultimate configuration of a discretionary tier.

In spite of the apparent flexibility, the CRTC has not been shy in letting cable companies know how it would like them to configure their new services. In *Public Notice CRTC 1994-59*, the CRTC decision announcing the approval of the latest line-up of specialty services, the Commission stated that it would prefer all the new English-language specialty services to be distributed as part of one or more high-penetration discretionary tiers, rather than being included in the basic service. It gave two reasons: first, putting these services on a discretionary tier would keep down the cost of the basic service; second, since the services provided on the discretionary tier are optional for all cable subscribers, consumers would be given greater choice in whether to subscribe to them.

C. Fees for the New Services and their Regulation

Considering the wide range of programming available to cable subscribers on the basic service and the fact that all discretionary services are provided on an optional basis, the Commission long ago decided it would regulate the fees only for the basic service and not for discretionary services (*Public Notice CRTC 1983-245: Cable Television Service Tiering*). Consequently, the fees it sets for specialty services pertain only to the services when they are distributed on the basic tier, not when they are placed on a discretionary tier.

The Commission announced the regulated cost of the new specialty services for basic cable subscribers in *Public Notice CRTC 1994-59*. The rate for the package of six new English-language specialty services was set at \$1.70 per month, before taxes; for the package of two new French-language services it was set at \$1.61 per month, before taxes.

At the same time, the Commission announced that it expected that the new English specialty services distributed on the “extended tier” would have a corresponding retail price, before taxes, not exceeding \$3.00. Apparently, the Commission, though it does not regulate prices for services on the discretionary tier, is not averse to declaring unofficially what it would regard as a reasonable price to charge subscribers.

D. The Marketing of the New Specialty Services

The Commission has never regulated or attempted to regulate cable companies' use of negative-option marketing techniques for promoting discretionary cable services. It appears to have chosen deliberately not to pronounce publicly on the appropriateness of such marketing practices. After all, it is cognizant of the fact that they have contributed to the successful launch of other specialty services and helped to fulfil the Canadian cultural development objectives of the *Broadcasting Act*. It is also aware that the *Broadcasting Act*, which requires it to supervise and regulate the implementation of the broadcasting policy, does not direct it to protect cable consumers from unpopular marketing ploys.

Criticisms of the Commission's failure to regulate negative-option marketing, especially prior to the latest launch of new specialty services, have been officially registered. At the structural public hearing in 1993, some participants raised concerns about the difficulty of understanding cable bills and the subscription options available, and specifically denounced the use of negative-option marketing techniques. Further to these discussions, the Commission required the cable companies to be more forthright in explaining the nature and cost of their services to customers.

In the public notice issuing from the structural hearing, the Commission announced that cable companies must henceforth clearly identify, in plain and easily-understood language, those services that are part of their basic package and those that fall into the discretionary tier, the fee for each service or package of services, and the actions the subscriber must take to subscribe to or discontinue the services. Furthermore, the Commission insisted that in providing this information the cable companies should avoid using misleading or confusing marketing terms such as "Full Cable Service," "Extended Basic Service," and "Extended Basic Tier," which had sometimes led subscribers to think that they had no choice in receiving these services.

In the regulatory revisions flowing from the structural hearing, however, the Commission avoided expressly condoning or condemning negative-option marketing, simply acknowledging that this subject had been discussed. This silence, coupled with the introduction of requirements for greater billing clarity, has been interpreted by some as tacit Commission approval of negative-option marketing techniques for cable services.

Some uncertainty exists as to whether or not the Commission even has the jurisdiction to regulate or prohibit such negative-option marketing. Two provinces, Nova Scotia

and Quebec, have already asserted jurisdiction under their respective *Consumer Protection Acts* by generally outlawing the sale of any services using negative-option techniques. And, at least three other provinces, British Columbia, Manitoba and Ontario, have indicated in the press that they are considering banning such marketing of services.

Thus, some provinces have already asserted jurisdiction. An argument could, however, be made for federal jurisdiction over the negative-option marketing of cable services, if the federal government could establish that CRTC's regulation of the marketing of cable services is essential to the regulator's fulfilling its mandate and achieving the objectives of the *Broadcasting Act*. As Professor Hogg has pointed out in his treatise on the *Constitutional Law of Canada*, with respect to the subject of consumer protection, neither level of government has unequivocal jurisdiction (third edition, p. 564). He notes that the phrase "consumer protection" is too broad and vague to serve as a "matter" for the purposes of locating it under either the federal or provincial heads of power. He observes that, like inflation, pollution or health, consumer protection must be broken into smaller, more distinct concepts, before it can be determined which of its aspects properly fall under federal or provincial jurisdiction.

CONCLUSION

Reactions to the cable subscribers' new year's revolt, have come in two forms -- defences of and attacks on the aggressive measures used to introduce the new specialty services. The defenders summon cultural, economic and technical arguments to justify the approach taken by the Commission and the cable companies. For example, they say that the Commission acted in keeping with the *Broadcasting Act's* requirement for it to help build a stronger Canadian broadcasting system; that offering the new specialty services in established and highly subscribed discretionary packages bolsters their chances of success and spreads out their costs, making them more affordable; and that packaging the new services separately in the unscrambled discretionary tier would cause too many subscribers to opt out, thus forcing the cable companies to incur huge expenses for filtering out the unwanted new package.

The attackers criticize the approach used to introduce the new services on the grounds of fairness and the consumer's right to choose. They argue that consumers should have the right to select the brand of programming they want, rather than having it imposed on them by a paternalistic regulator and monopolistic industry; that negative-option marketing favours

corporations and disempowers consumers; and that the *Broadcasting Act* is too one-sided in requiring the CRTC to protect only Canadians' cultural interests, not their consumer concerns.

Such is the debate. Cable viewers and others are staying tuned to see which point of view, if either, will triumph in the end.

SELECTED REFERENCES

Canadian Radio-television and Telecommunications Commission (CRTC). *Public Notice CRTC 1993-74: Structural Public Hearing*. CRTC, Ottawa, 3 June 1993.

CRTC. *Public Notice CRTC 1994-59: Introductory Statement - Licensing of New Specialty and Pay Television Services*. CRTC, Ottawa, 6 June 1994.

CRTC. *Public Notice CRTC 1994-60: Distribution and Linkage Requirements*. CRTC, Ottawa, 6 June 1994.

CRTC. *Fact Sheet: The Evolution to Digital, Pick-and-pay Cable Service*. CRTC, Ottawa, 1994.

CRTC. *Fact Sheet: Distribution of Cable TV Services in Canada*. CRTC, Ottawa, 1994.

CRTC. *Fact Sheet: Distribution and Cost of New Specialty and Pay TV Services*. CRTC, Ottawa, 1994.

Stencel, Sandra, ed. "The Future of Television." *CQ Researcher*. Vol. 4, No. 48, Congressional Quarterly Inc., Washington, D.C., 23 December 1994.