



Ottawa, Tuesday, July 25, 2006

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Dear Ms. Rhéaume,

Broadcasting Public Notice 2006-78

Application no 2006-0667-6: Application by Bell Canada to amend the licences of its cable distribution undertakings to distribute satellite radio services on its digital cable service

Who we are and why we want to intervene:

1. For more than 60 years, the Canadian Conference of the Arts (CCA) has been a dominant voice for the Canadian cultural sector. The CCA is an umbrella organization bringing together hundreds of thousands of Canadian artists and creators, cultural producers, exhibitors, presenters, distributors, heritage institutions, professional cultural organizations in every arts discipline and trade associations in all cultural industries. CCA members encompass the rich diversity of Canada's cultural communities and both official languages.

CCA advocates for the needs of the community at large and is an authority on public policy in the arts and culture. CCA's objective is to create an environment conducive to the arts and culture, through public policies and programs which can ensure a vibrant and dynamic Canadian presence throughout the arts and cultural industries. CCA seeks appropriate opportunities for Canadian stories and music, and access for Canadian artists and cultural producers to Canadian and global audiences. These objectives guide CCA's public policy work and this intervention.

2. CCA fully endorses the objectives of the *Broadcasting Act*, foremost among which are that the system is Canadian owned and controlled, and that the *programming provided must be predominantly Canadian*, be varied and comprehensive, and come from a variety of sources. CCA strongly believes that in the case of this application and of the debate surrounding it, the CRTC must be guided in its analysis and decision-making by the spirit of the *Broadcasting Act* rather than by legal wrangling about regulatory definitions or by specious arguments.

3. In recent interventions in the CRTC Commercial Radio Policy Review process and against a Rogers Cable's application similar to the one at hand, the CCA expressed its belief that it is imperative for the CRTC to level the playing field for all broadcasters. We said the CRTC can do this only by addressing, at the earliest opportunity, the serious threat to the integrity of Canadian content regulations created by its 2005 Satellite Subscription Radio decision, and by moving expeditiously to introduce appropriate regulations for Internet service providers and other new commercial public media. The pervasiveness of this threat is illustrated perfectly by Bell itself in this application: "It is important to note that SSR services, though widely considered to be targeted for listeners in vehicles, are already available to subscribers in their homes. Consumers are now able to purchase portable satellite radio receivers from a growing list of mainstream electronics manufacturers which can be plugged into separate docks to accommodate both car and home use. Relatively inexpensive home kits can be purchased to allow reception of satellite radio in any home audio system. More devices for home use are being introduced on a regular basis. Further, the Canadian SSR licensees are likely to follow the U.S. lead in providing free access to their subscribers though the Internet, increasing the value of the service but likely not its subscription cost." (Bell application, May 29/06, p. 3, para. 9)
4. The current application by Bell on behalf of its cable division and the legal debate underway around it illustrate clearly the nefarious precedent the CRTC Satellite Radio decision set last year for Canadian musicians. While Rogers and now Bell are both silent on the subject, it is obvious that the likely result of both applications will be the replacement of the current truly Canadian pay audio services they distribute with two satellite radio services **that are only nominally Canadian**. The interest already shown by companies like Bell ExpressVu in the outcome of these applications and the ensuing applications surely to come from all other BDUs show clearly the precarious situation Galaxie and Max Trax would find themselves in if this application were granted.
5. The CCA, and the **co-signatory organizations at the bottom of this submission**, therefore wish to intervene against the application by Bell to amend the licences of its cable distribution undertakings in order to distribute one or both satellite radio services on its digital cable service. Our position is based on the serious mid and long-term consequences this request, if it were to be granted, would have for the distribution of Canadian music, for Canadian musicians and for the Canadian music industry. *For the record, we repeat here whole sections of our previous intervention against the Rogers application and address a number of issues raised by the arguments put forward by Bell.*
6. The CCA urges the Commission to reject outright both applications. Failing that, we once again press the CRTC to defer any decision until it has held public hearings on the impact of different distribution technologies, the blurring of lines between BDUs and Broadcasters and the impact these developments may have on making available Canadian cultural products in general and Canadian music in particular. Any other course of action will mean that the seemingly innocuous decision to licence the marginally Canadian satellite radio services will indeed have been the beginning of the end for Canadian content regulation.

The spirit of the *Broadcasting Act*

7. As mentioned in its previous intervention against the Roger's application, the CCA is deeply concerned that we are currently witnessing the dismantling, through piecemeal decisions, of a regulatory system that has been fundamental to the development and health of Canadian culture. We can only repeat here that, without CRTC's regulation of broadcasters, Canada would not have been able to create a domestic music and video industry that is not only enriching the lives of all Canadians today, but has earned these artists and cultural industries both respect and significant audiences (and therefore income) from around the world. This dismantling is happening without

consideration of the bigger picture of what is going on and without sufficient consideration of existing cultural legislation, its rationales and intents. This is why we submit that the CRTC should, in this case, refer to the *spirit* of the *Broadcasting Act* to guide its actions in the broadcasting sector, rather than to the wording of current specific regulations.

8. The objectives for Canada's broadcasting system are provided in the *Broadcasting Act*. Foremost among these are that the system be Canadian-owned and controlled, that ***programming should be predominantly Canadian*** and that listeners should be provided with varied and comprehensive programming from a variety of sources. The *Act* also states that programming should be of a high standard, balanced on matters of public concern, relevant to local communities and reflect Canada's rich cultural diversity. Services must be provided in English and French.
9. In order to realize the objectives of the *Act*, the CRTC has developed over the years a set of regulations to ensure that Canadian voices, music and drama are made available to Canadians and, eventually, to the world. Canadian content regulations (CanCon) adopted over 30 years ago have literally led to the creation of a very successful Canadian music industry and to the emergence on the world stage of remarkable Canadian artists. This being said, as successful as that industry has been, it should not be assumed its strength is sufficient to withstand the kind of onslaught being proposed by Bell and other BDUs. The CCA respectfully submits that the Commission should not lose sight of the fact that the interests of the applicants are overwhelmingly commercial and not cultural in the least, whereas the Canadian Content regulations were designed to meet *both* industrial and cultural objectives.
10. Airplay (in the broadest sense of the word) and programming streams remain two of the most important ways to expose audiences to music and artists. Technological changes in production and distribution, coupled with globalization of trade, are putting increasing stress on the basic concepts around which Canadian Content regulations are built. Whereas for years Canadians could count essentially on radio, recordings and touring to get access to music, technological enhancements and the development of new media has given them much broader access to music offerings. Satellite Broadcasting Undertakings and digital cable services have introduced pay audio services offering currently up to 67 channels of continuous music in all genres. Satellite radio has boosted this offering to over 200 channels and the number of music streams and radio stations available through the internet is apparently limitless. The problem with these new distribution undertakings, as was the case in the analog universe, is to ensure that Canadian artists and works remain accessible to the Canadian public in a manner which reflects how people actually consume music.
11. In this era of convergence, where it is becoming increasingly difficult to distinguish between distribution undertakings and cultural content providers, the CCA considers that it is essential to return to basic principles and to examine any request, such as that of Bell or Rogers Cable, in the context of the cultural preoccupations of the *Broadcasting Act* itself. ***It is our view that the CRTC must regulate all types of Canadian "broadcasters" with respect to the content they offer on whatever platform they use, in a manner similar to the regulation in place for traditional broadcasting undertakings.***

The cultural contribution of satellite radio vs that of Canadian pay audio services

12. In its 2005 decision on satellite radio, the CRTC issued licenses to three applicants. Two of these, Sirius Canada and Canadian Satellite Radio, have now launched their subscription services, both of which essentially provide U.S. content, along with a token level of Canadian content far below the threshold mandated by the *Act* and the CRTC to date for "traditional" Broadcasting Undertakings. In its decision, the CRTC requires that eight out of every 100 channels provided on the services must be Canadian and that these channels must have a CanCon level of at least

85%. The third applicant, whose service proposed a much more substantial proportion of Canadian content, does not appear to be in a position to launch.

13. Like many others in the cultural sector, the CCA was and still is extremely concerned about this decision. Some Canadian artists receive some airplay on the 92 non-Canadian satellite channels, since some of them are now global stars (thanks, in large part, to the *Broadcasting Act* and the CRTC CanCon regulations). On the other hand, the Canadian channels are permitted to broadcast 15% non-Canadian content. Balancing these two factors with the core requirement, one must still conclude that the decision of the CRTC effectively creates a CanCon level overall on satellite radio which *might eventually* reach 10%, well below the levels required to be programmed by Canada's conventional commercial radio broadcasters and by the pay audio services, Galaxie and Max Trax.
14. Although Bell Canada claims that a benefit of amending its Conditions Of Licence to carry the SSR services would be greater exposure for Canadian recording artists, this statement is misleading to say the least:
 - a) The satellite radio decision has *de jure* established a Canadian content ghetto, since the bulk of the Canadian material is played on a small number of dedicated Canadian channels. It is an established fact that the most effective way of marketing and promoting Canadian artists and music, indeed all Canadian cultural products, is by integrating them with foreign works. Canadian jazz music should be available on the jazz channel and Canadian classic rock music should be played alongside artists working in this genre from other countries, and so on.
 - b) Entire genres of Canadian music therefore stand little to no chance of being played on the SSR services as currently licensed and programmed. Unless Canadian country, folk, roots, blues, Celtic, adult contemporary, Aboriginal, R&B, Hip Hop, dance, pop, jazz, and classical artists attain a certain level of success and awareness in the United States, they are very unlikely to be found on the SSR services. The Canadian-produced channels on both services do not include music from these genres, and without sufficient profile in the U.S.A. they are unlikely to be included on the U.S. programmed, genre-specific channels where their music would fit the classification.
 - c) Additionally, the U.S. version of the SIRIUS service does not even carry all of the Canadian-produced channels, and one of the channels not being made available to American subscribers is a Canadian-produced music channel.
15. In its answers to deficiencies, Bell states that "In the case of SSR services, the Commission has the opportunity to authorize a Canadian service, rather than a non-Canadian service, that a BDU could use as an incentive to encourage penetration of digital television services" (Bell June 21 letter, p. 3, para. A3). Bell also notes that "pay audio offers 35% Canadian content on Canadian-produced channels with as little as 17.5% overall." (Bell June 21 letter, p. 5, para. A6). Bell goes on to say: "It is Bell's understanding that the Canadian SSR licensees have indicated publicly that they will be increasing their total number of channels. As their total grows so will the number of Canadian-produced channels and the number of Canadian music channels as a result of their existing conditions of license. (...) By availing themselves of distribution on BDUs, Canadian SSR services can realize revenue growth. This in turn allows them to grow their offering to remain competitive with the U.S. counterparts. And of course as revenue grows so does the number of Canadian channels which receive pan-Canadian and U.S. distribution and the monies available to create and produce Canadian music and other domestic radio programming." (ibidem)
16. The CCA unequivocally refutes Bell's argument that Satellite Radio services are just as Canadian as the two existing pay audio services. Our opposition to such unfounded statements is based on consideration of the following facts:

- a) While it is theoretically true by the conditions of licence granted to Galaxie and Max Trax that they could offer as little as 17,5% CanCon by linking a foreign produced channel for every channel produced here, this is simply not the case, both services offering exclusively Canadian produced channels. Their real CanCon overall stands at 35%+ to SSR services' less than 5%.
- b) Of XM Canada's 100 channels, only one plays English-language Canadian music. *The Verge* exclusively programs rock and alternative music from emerging Canadian artists;
- c) SIRIUS Canada's English-language music programming is only marginally better. Iceberg programs Canadian Rock Hits and CBC Radio 3 programs predominantly, but not exclusively, emerging Canadian artists;
- d) Despite the Commission's expectations regarding the number of Canadian-produced music channels, when increasing the number of Canadian channels available on each service, neither XM Canada nor SIRIUS chose to increase the number of Canadian-produced English or French-language music channels. Rather than add a Canadian-produced music channel, SIRIUS instead chose to add a Canadian weather channel, which facilitated the addition of three more U.S.-produced music channels (none of which have a Canadian content requirement). XM also passed on the opportunity to add a Canadian-programmed music channel when it recently increased the number of channels the Canadian service would carry.
17. Over almost 10 years of existence, the two current pay audio services licensed by the CRTC have made a very significant contribution to the dissemination of Canadian music and to the financial health of the industry, through the programming they offer, the royalties they pay and the financial contribution they make to Canadian talent development. Instead of ghettoizing Canadian content in a handful of limited "Canadian" channels, those services offer a total of 67 channels in all genres, where Canadian musicians are programmed alongside the best the world has to offer. **Combined, Galaxie and Max Trax play each week more Canadian artists, more Canadian musical items in more genres than all commercial radio stations combined, and hundreds of times as much as the new satellite radio services offer. As for French-language channels, Canadian pay audio services offer 11 channels vs Satellite Radio's 4 channels.**
18. Over the past ten years, the Canadian pay audio services have contributed millions of dollars to Canadian musicians and to the Canadian music industry, both in terms of Royalties paid to SOCAN, NRCC/SOGEDAM, CMRRA/SODRAC and in terms of contributions to Canadian talent development (CTD).
19. The respective contributions of Canadian pay audio services to Canadian culture vs. that of satellite radio and the impact of pay audio's eventual demise can be summarized in the following table:

CONTRIBUTION	PAY AUDIO	SATELLITE RADIO
Contribution to CTD in % of Gross Revenue	4%	5 %
Number of channels offered	67	210
Number of Canadian music channels	67	8
French-language channels offered	11	4
CanCon as % of all music broadcast	35%	5%
Copyright payments in % of Gross revenue	18% ¹	Currently proposing 10%

¹ Does not include payments to CMRRA/SODRAC

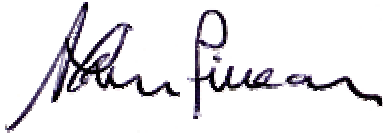
IMPACT OF DEMISE OF CANADIAN PAY AUDIO SERVICES	
Number of Canadian Music Channels	Loss of 59 Canadian music channels
French-language channels offered	Loss of 7 French-language channels
CanCon as % of all music broadcast	Reduction from 35% to 5%
Copyright Payments	Loss of approximately \$3M per year

20. The CCA considers that granting this Bell application (and the similar one from Rogers) would put the two Canadian pay audio services in great danger and would therefore have a very negative impact on Canadian musicians and particularly on emerging artists who find there a much better platform than that available through the ghettoized Canadian content on Satellite Radio. While it is possible for applicants to argue each time that the impact on existing truly Canadian services, whether they be commercial radio or pay audio services, will be negligible, the domino cumulative effect they will create is far from negligible.
21. CCA's concerns are enhanced by the fact that Bell is not ready to give a clear answer to the CRTC's question concerning the fees it would pay for the satellite radio signals. This makes it all the more difficult to assess the impact on existing truly Canadian services. Since Bell's arguments are all related one way or another to free market, bottom line and free choice considerations rather than to cultural ones, it can be argued that they will be able to negotiate relatively low fees for what is essentially the dumping of a foreign cultural product and simply drop their current carriage of truly Canadian music services or, at best, make them a pricey optional package with limited penetration.
22. Another hint at Bell's intentions may be found in its opposition to a proposed condition of licence which would strive to protect truly Canadian services: "Bell does not support the imposition of new regulations or conditions of licence that would require carriage of pay audio services. Like Category 2 and SSR services, pay audio services should remain optional for BDUs. Because their revenues do not depend on the number of listeners, granting pay audio services quasi must-carry status might allow them to become complacent and unresponsive to changing market conditions; they would simply become inexpensive income generators for their owners. Bell's view is that market forces should take a greater role in determining what services are offered on BDUs, and the Commission should refrain from further imposition of must-carry and linkage obligations."
23. It is CCA's view that this opposition by Bell clearly illustrates the dangers these applications pose for Canadian artists and music industry. As for the argument that pay audio services *may* "become complacent and unresponsive to market conditions", we would argue that it is incumbent upon Bell to establish if that has been the case over the past nine years that those services have been in existence. As for their becoming "inexpensive income generators for their owners", the CCA would suggest that must-carry and dual status already exist within the system and are complemented with price regulation.
24. Finally, the CCA notes that the CRTC should establish a stronger relationship between Canadian content levels and the obligation to promote Canadian talent development. Any licensee with a relatively lower level of CanCon should have a correspondingly much greater obligation to support CTD. In the case of Satellite Radio vs pay audio services, this should lead to CTD levels of 20 to 25% of gross revenue.

Conclusion:

25. In its application, Bell states that “benefits (to the Canadian Broadcasting system) include increasing not only the diversity and comprehensiveness of programming choices available to Canadians, but also the exposure and monetary support for Canadian musicians, particularly new and emerging artists.” Bell adds that “given the excitement in the market related to SSR services, their presence on Class 1 digital BDUs would generate more interest from the existing base of Class 1 analog BDU subscribers, thereby encouraging them to subscribe to a digital distributor”. Bell goes on to say that should their application be denied, this could lead to an increase in black or grey markets of US Satellite services, which carry the Sirius and /or XM Radio signals.
26. The applicant recognizes implicitly the contribution made by pay audio over the past several years to the marketing efforts of another one of its divisions, ExpressVu, and supports the popularity of those services. It is significant that, like Rogers before it, Bell couches its current application only in terms of a hypothesized and self-serving “consumer demand,” and makes no mention whatsoever of the “public interest” in this context – a public interest that is, in fact, the *raison d’être* of the very regulatory body to which it is submitting its application.
27. Much is said these days about “consumer choice” and this application from Bell is no different in that respect. The CCA submits respectfully that ***if this application is granted, the result will be a restriction of choices for consumers, as existing pay audio services, whose carriage is optional, will be at best marginalized or dropped entirely. Preventing Canadians from having access to their own artists is, we submit, not a sign of being preoccupied by “consumer choice” : there is no meaningful “consumer choice” inherent in Rogers or Bell offering three times as many US made channels with hardly any significant Canadian content included within them, on any other terms than coincidentally. What this application and others like them ignore is that consumers cannot “choose” something that is not is not on the menu.***
28. Given the fundamental issues raised, the CCA therefore urges the CRTC to reject the Bell as well at the previous Rogers applications. The rationalisation for imposing very low Canadian content conditions on the so-called Canadian Satellite Radio services was based on the consideration that those services were relying on foreign based infrastructures for distribution and that being niche market services, their impact on existing truly Canadian services would therefore be minimal. If those services are now to gain access to mass markets by being redistributed via other BDUs, the initial Conditions of Licence for SIRIUS and Canadian Satellite Radio (CSR/XM Canada) must be reopened and readdressed, and similar conditions to other pay audio offerings available to Canadians via BDUs must be assured. With the removal of the delivery mechanism barrier, the satellite subscription radio services should automatically be subject to the provisions of the Broadcasting Act and be required to adhere to the terms in Section 3.1(f)
29. Should the CRTC be inclined to accept either or both applications, and given the position taken by Bell ExpressVu in this file, **the CCA strongly urges the Commission to hold a public hearing in which a complete review of the Canadian Content Regulations as they apply to various kinds of broadcasting undertakings, both in the traditional analog world and in the new digital world, will be undertaken in the context of the public intent and spirit of the requirements of the *Broadcasting Act* and the Canadian cultural policies which both underlie it and contextualize it.**

Yours truly,



Alain Pineau, National Director/Directeur général
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