



Ottawa, Monday, June 12, 2006

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

Dear Ms. Rhéaume,

Broadcasting Public Notice 2006-58

0196-5 Application by Rogers Cable Communications Inc. 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 the voice of Canadian artists, cultural producers and the heritage community, and of their organizations, and an active participant in public policy debates on arts and culture. 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.

3. In its recent intervention in the CRTC Commercial Radio Policy Review process, 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 Radio decision, and by moving expeditiously to introduce appropriate regulations for Internet service providers and other new commercial public media.
4. The current application by Rogers Cable and the legal debate under way around it illustrate clearly the nefarious precedent the CRTC Satellite Radio decision set last year for Canadian musicians. While Rogers is silent on the subject, it is obvious that the intent of this application is to replace the current truly Canadian pay audio services it distributes with two nominally Canadian satellite radio services. The interest shown by companies like Bell ExpressVu in the outcome of this application shows clearly the precarious situation Galaxie and Max Trax would find themselves in if this application were granted.
5. The CCA, and the co-signatories at the bottom of this submission, therefore wish to intervene against the application by Rogers Cable 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 on the distribution of Canadian music, on Canadian musicians and on the Canadian music industry.

The spirit of the *Broadcasting Act*

6. Before getting into the specific reasons for which the CCA is opposed to Rogers Cable's applications, it is appropriate to address some of the issues raised by other parties in the debate surrounding this application.
7. The CCA is aware of the exchange of correspondence between various parties surrounding the re-distribution of satellite services by other Broadcasting Distribution Undertakings (BDUs). We are particularly preoccupied with the positions taken by Bell ExpressVu that the decision to redistribute satellite radio rests solely with BDUs and does not require an amendment to its existing licence. Without getting involved at this time in the legal interpretations of specific existing definitions, the CCA is deeply concerned that we are currently dismantling, through piecemeal decisions, a regulatory system that has made an essential and fundamental contribution to the development and health of Canadian culture. Without the CRTC and its regulations of broadcasters, Canada would literally not have been able to create a domestic music and video artists and 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 is 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 evolved over the years set of regulations to ensure that Canadian voices, music and drama are made available to Canadians and, eventually, to the world. Canadian content regulations adopted over 30 years ago have led to the creation of a very successful Canadian music industry and to the emergence on the world stage of remarkable Canadian artists.
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 with in the analog universe, is to ensure that Canadian artists and works are still made 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 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 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 in and 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 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 *Broadcast Act* and the CRTC Canadian content 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 pay audio services.
14. The other concern with the satellite radio decision is that it has established a Canadian content ghetto, since the bulk of the Canadian material is played on dedicated Canadian channels. We believe 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.

15. 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.**
16. 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).
17. 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%
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	

18. The CCA also wishes to note that there is and should be a 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.

¹ Does not include payments to CMRRA/SODRAC

Conclusion:

19. In its application, Rogers states that “the carriage of these services would significantly enhance the quality and diversity of the audio programming available on its cable systems on a digital basis and would enable it to satisfy the audio programming needs of its customers. Rogers also considered that the addition of one or both of these services to its digital offering would act as an important catalyst to encourage its customers to migrate from an analog to a digital distribution environment.”

The applicant recognizes implicitly the contribution made by pay audio over the past several years to its marketing effort and supports the popularity of those services. It is significant that Rogers Cable couches its 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.

20. Much is said these days about “consumer choice” and this application from Rogers is no different in that respect. The CCA submits respectfully 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 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 on the menu.
21. Given the fundamental issues raised, the CCA urges the CRTC to reject the Rogers application.
22. However, should the CRTC be inclined to accept the Rogers application, and given the position taken by Bell ExpressVu in this file, the CCA 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,



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