



Filed via epass

8 May 2008

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Gatineau, Quebec
K1A 0N2

Dear Mr. Morin:

Re: Broadcasting Notice of Public Hearing (“BNPH”) CRTC 2007-10-6, -7

Attached please find the Final Comments of the Coalition of Canadian Audio -visual Unions (CCAUCoalition of Canadian Audio-visual Unions), prepared in connection with the BNPH. For the purposes of this submission, CCAUCoalition of Canadian Audio-visual Unions represents the following Canadian audio -visual unions: ACTRA (the Alliance of Canadian Cinema Television and Radio Artists), the Directors Guild of Canada (DGC), the National Association of Broadcast Employees and Technicians, Local 700 Communications, Energy and Paperworkers Union (NABET), and the Writers Guild of Canada (WGC).

COALITION OF CANADIAN AUDIO-VISUAL UNIONS

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Stephen Waddell
National Executive Director
Alliance of Canadian Cinema, Television
and Radio Artists

A handwritten signature in black ink, appearing to read 'David Hardy', written over a horizontal line.

David Hardy
Business Agent
National Association of Broadcast Employees &
Technicians (NABET)/ Local 700
Communications, Energy & Paperworkers
Union

A handwritten signature in black ink, appearing to read 'Brian Anthony', written over a horizontal line.

Brian Anthony
National Executive Director and CEO
Directors Guild of Canada

A handwritten signature in black ink, appearing to read 'Maureen Parker', written over a horizontal line.

Maureen Parker
Executive Director
Writers Guild of Canada

A) Introduction

1. CCAU appreciates this opportunity to offer these Final Comments. We propose to respond to a number of matters that arose during its appearance and at other points during the Public Hearing. As CCAU has filed comments in all three rounds of this process in addition to its appearance at the hearing, CCAU will rely on its prior filings as its position on those issues not addressed in these Final Comments.

B) The “Morin model” and access.

2. The Morin Model, outlined in Commissioner Morin’s letter of April 24, 2008, addresses the issue of access by programming services to digital basic, and as such is not a central issue for the members of CCAU. However, while the composition of the basic tier may not be a key concern of CCAU, the must-carry status of services that air a significant amount of drama is important.
3. In an ideal world, the Commission would continue to require must-carry status for **all** analog and Category 1 digital services as well as the region and language relevant pay television services. These services all make a contribution to the Canadian broadcasting system and feature licence conditions appropriate to those contributions. Obviously, their ability to make those contributions depends on obtaining access to subscribers and, in many cases, to the advertising revenue that is in turn dependent on such access.
4. If the Commission were to require a shrinking of the basic tier to some sort of “lifeline” or “skinny” basic service as discussed at the public hearing, Canadian services that are currently on basic would be dropped from basic or possibly from BDU line-ups altogether. This is clearly an undesirable outcome.
5. The Morin Model, while it has the virtue of simplicity, does not address in any manner the fundamental shortcoming in the English-language specialty area, namely the dearth of original Canadian dramatic productions. The concern of CCAU is that the Morin Model allows the basic tier to fill up primarily with news and information services, (which will be the genre that will most easily score highly on the Morin scale).
6. Services fulfilling a key role by airing Canadian drama will be short-changed and, in turn, so will the Canadian broadcasting system. Given the circumstances and costs relating to Canadian drama, specialty services airing significant amounts of that category of programming find themselves with lower overall Canadian content expenditure and exhibition figures than do news and

information services. As such, they would be at a disadvantage under the Morin Model when the Commission should be leaning in the other direction, namely to give such services an advantage.

7. CCAU appreciates that a weighting factor could be added to the model to give “bonus” points for the creation or exhibition of Canadian drama, and Commissioner Morin has suggested that this might be done. However, that will add a level of complexity to the model.
8. CCAU is concerned about the issues raised in paragraphs 6 & 7 of the Commissioner’s April 24, 2008 letter. In paragraph 6, Commissioner Morin speaks of the possible motivation to increase Canadian content percentages by adding or repeating Canadian programming of “questionable quality”. The “fix” proposed by the Commissioner appears to insert the Commission into amendments to the programming schedules of broadcasters.
9. This approach regrettably appears to have drawbacks. Schedules are changed frequently, and often on the fly. The fluid nature of the process of scheduling does not lend itself to Commission involvement. The frequency and intrusiveness of the proposed steps seem undesirable and unlikely to have the desired effects.
10. Paragraph 7 of the Commissioner’s letter proposes to provide bonuses for certain types of programming such as children’s programming or drama programming. It speaks of bonuses of “20, 30 or even 40 points” for services offering these types of programming over various lengths of time. If the program were to be implemented, these sorts of bonuses would be an absolute requirement in order to avoid having a basic tier heavily dominated by news services. However, as desirable as that might appear, CCAU is concerned over how such a bonusing regime would work in practice and whether this approach, which would require subjective assessments of the programming on services, would achieve the Commission’s goals of streamlining and making the regulatory system more transparent.
11. More critical to CCAU than access by certain services to digital basic is the question of access by programming services to BDU systems in affordable discretionary packages. At the present time, there is universal access by services other than Category 2 services. If the Commission were to deem it appropriate to reduce the number of services with guaranteed access, one of two things would likely happen.

12. First, BDUs could be expected, in order to maximize their revenues, to drop Canadian services in exchange for cheaper foreign services on which they could make greater mark-ups. Second, (and this seems to be a far more likely alternative since the Commission heard BDUs say that it is very hard to drop services), BDUs would not actually do anything more than threaten programming services with removal which would engender significant rate (or other) concessions by the programming services. Since CPE dollars would then be reduced in lockstep, we would have a broadcasting system in which dollars that would have been directed into Canadian programming via CPE will now be directed to BDU bottom lines. CCAU feels strongly that this is bad public policy and that it does nothing to further the goals of the *Broadcasting Act*.
13. If, however, the Commission were persuaded that the Canadian broadcasting system should move to a such a regime, then, in CCAU's respectful view, at least those services that air significant amounts of drama should retain their must carry status. As filed previously with the Commission in its October, 2007 comments, CCAU would commend the following services as candidates for continued must carry status:

**English-Language Pay and Specialty Services
over \$20 million revenue with guaranteed access
and which support Canadian drama
(expenditures on Canadian drama in 2006: \$M)**

| Specialty Services | | Pay Services | |
|---------------------------|------|---------------------|------|
| Teletoon | 21.6 | TMN | 20.0 |
| Showcase | 18.1 | Movie Central | 10.4 |
| YTV | 14.5 | Family | 7.2 |
| Comedy | 14.4 | Mpix | 2.5 |
| Space | 8.6 | Encore | 0.4 |
| W | 4.2 | | |
| TVTropolis | 3.6 | | |
| Bravo | 3.1 | | |
| Vision | 1.0 | | |
| History | 0.5 | | |

14. In addition to those listed, one would need to add Super Channel (assuming that its promises continue to match those of the incumbent pay television services with which it competes).

15. Moreover, in addition to continued guaranteed access for those services that air significant amounts of drama, there should be some protection against the unwarranted relocation of such services by BDUs. More specifically, if a BDU wants to drop such a service to a lower tier that causes a significant loss of penetration, then the BDU should have to show evidence and a business case justifying its behaviour to an independent arbitrator.
16. With respect to access, the status quo is better than anything CCAU has heard during this process. Moving to preponderance is a BDU plan and a bad one. There are far more Canadian than non-Canadian services on the dial now so a simple preponderance rule –whether 66% or 50%+1 or any other rule, just gives BDUs the ability to drop some Canadian services and to hold the access hammer over the remaining ones in order to secure concessions.
17. In addition, CCAU wonders how a 50% +1 rule would satisfy the requirement of section 3(1)(f) of the *Broadcasting Act* which reads as follows:

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources; [emphasis ours]
18. If 49% of the services carry exclusively non-Canadian programming, and the average on the remaining 51% is (at best) 60% Canadian and 40% non-Canadian, how can a 50%+1 preponderance test be said to satisfy the “predominant use” let alone the “maximum use” provisions of that requirement of the *Broadcasting Act*? At the present time, given the overwhelming number of Canadian services currently required to be carried by BDUs, that subsection is not engaged.
19. From a public policy perspective, it seems anomalous that the Commission would be considering proposals that would result in less, not more, Canadian content programming exhibition and expenditure. Such an outcome can be avoided by maintaining the current rules.

C) Fee for Carriage and Drama

20. While CCAU was pleased at the outset of the hearing when the Chairman suggested that there would be no fee for carriage without strings attached, we were disappointed to note that virtually all of the discussion from the broadcasters revolved around local programming.
21. CCAU has the following thoughts regarding the broadcasters' proposal. First, we find it appalling, although not surprising, that CTV/Canwest would not propose to set aside any of the fee for carriage money for the creation of new Canadian dramatic productions. This brings into stark relief the fact that if the Commission does not create mechanisms to require them to do so, they will not support Canadian drama.
22. Second, the "evidence" relating to local programming was sparse, to avoid saying non-existent. The evidence that local programming is in dire need was largely anecdotal in nature. CCAU has been presenting hard evidence for 7 years as to the decline in spending on original Canadian drama. Where is the evidence with respect to the costs for local and proof that local programming will not happen in the absence of a subsidy? Regrettably, the Commission's statistics do not allow for meaningful public input as local expenditures are not isolated.
23. Even then, there could be a number of reasons why local programming may be curtailed. The bottom line is that a case was not made out for the use of what could amount to a billion dollars over the next licence term for local programming.
24. On the other hand, Canadian drama has been abundantly demonstrated to be in urgent need of such regulatory mechanisms. The mandate of local over the air English-language broadcasters includes both Canadian drama and local programming, and drama is in much greater need than local programming. In the period 2000-2006, these broadcasters managed to increase their spending on non-Canadian programming, mostly drama, from about 27% of revenue to about 40% of revenue. Since they were relieved from any requirement to spend on Canadian dramatic productions, roughly the same period, expenditures in this sector plummeted from \$73 million to about \$40 million, or 2.3% of advertising revenue. And even then it was propped up by truly incremental transfer benefits which expire shortly.

25. Clearly something has to be done if Canada expects to remain in the business of producing Canadian dramatic stories. CCAU will be addressing this issue in the OTA renewal hearings next year and will be recommending measures to require the OTA broadcasters to adjust the imbalance between Canadian and U.S. program spending. In the interim, the Commission should not introduce measures that permit the imbalance to continue or, worse, to increase.
26. As CCAU has strongly urged in the past, if the Commission intends to establish a fee for carriage regime, then incremental revenues should be put to work for the benefit of the Canadian broadcasting system, particularly for the creation of Canadian drama. The Commission has the requisite legal authority to introduce a fee for carriage regime, but should ensure that funds received from it are directed to the programming area of greatest need for financial support, namely that of Canadian drama.
27. Whether or not the Commission is so inclined, CCAU has proposed, and continues to propose, that no less than 7% of conventional television broadcasters' revenues should be spent on Canadian dramatic productions.

D) Category 2 CPE in exchange for access.

28. During the hearing, Commissioner Cugini asked whether CCAU would support a "quid pro quo" of guaranteed access for Category 2 services in exchange for step-ups in such services' CPE and/or Cancon conditions of licence. In principle, if a Category 2 service wishes to accept the imposition of a CPE requirement and increase its Cancon exhibition requirement in exchange for guaranteed access, then that would be acceptable to CCAU. This approach would leave open the CPE/Cancon levels to be established. However, that could be done on a case by case basis at renewal time rather than attempting to create a "one size fits all" number. Indeed, that is how CPE/Cancon levels are established now for discretionary services.

E) Genre Protection

29. CCAU has proposed a four part test that would allow for the entry of a newcomer into a genre only after the Commission had thoroughly explored the proposed contribution that the newcomer would make to the achievement of the objectives of the *Broadcasting Act* when assessed against any potential negative impact. The four parts to the test were as follows:
 - (a) A sufficient supply of distinct programming content within the genre;
 - (b) Matching or higher CPE and other obligations;

- (c) Consumer demand; and
 - (d) No self-dealing.
30. During our appearance, Commissioner Cugini questioned whether the four part test we suggested would entrench established players and not allow for increased diversity. We do not believe it would. Indeed, this is the very approach that the Commission took with respect to the licensing of Allarco and its Super Channel service two years ago.
 31. While this approach does not eliminate genre protection, it does provide some regulatory flexibility to show that the Commission is prepared to hear proposals on a case by case basis. In addition, as CCAU indicated at the public hearing, we do not think that BDUs or Canadian consumers should be stuck with an underperforming service just because it occupied a genre first.
 32. Picking up on a comment made by Commissioner Cugini, we would have no problem with allowing a BDU to be able to apply to the Commission at the licence renewal of a service for permission not to carry that service if it was not contributing to meeting the objectives of the *Broadcasting Act*. That would allow parties, and not only the BDU but all interested parties, to make their views known.
 33. Obviously, the sort of criteria to be developed by the Commission would need to ensure that a “bad year” would not be sufficient grounds to permit a BDU to drop a service. Rather, BDUs would be called upon to display, using objective and measurable criteria, their rationale for suggesting that a given service be dropped. But it should not be a BDU that decides of its own volition and untested by any other authority, that a service licensed by the CRTC should no longer have access to its system.

F) VOD/SVOD

34. CCAU reiterates its concern over these BDU-owned VOD/SVOD services competing with linear channels. CCAU endorses the concept that the rules should be harmonized between VOD and linear services.
35. CCAU has a particular concern over SVOD and its ability to provide for the back-door entry into Canada of unauthorized foreign services. With “normal” VOD services, subscribers that want to access programming do so by ordering and paying for programs on a one-off basis.

36. But with SVOD, a subscriber only pays once (usually monthly) to gain access to a significant library of different programs. This makes it similar to a linear service except that, with SVOD, program access occurs at the time or times selected by the subscriber as opposed to times selected by the programming department of the service provider.
37. CCAU has expressed its concern that SVOD can provide a unique back-door vehicle for non-Canadian programming services to gain entry into Canada. CCAU understands that at the present time, full program schedules from certain unauthorized foreign services are now available for a monthly fee through the SVOD offerings of BDUs.
38. If this technique is left unchecked, what prevents a VOD provider from offering HBO via SVOD? While this would be higher profile than the current non-Canadian offerings of BDUs, that sort of a service could provide subscribers with access, for a monthly fee, to HBO's full programming schedule. This could occur notwithstanding that HBO is not authorized for distribution in Canada and would obviously have very harmful effects on licensed Canadian pay television services.
39. Also, as a matter of process, CCAU does not believe that the Commission should be asking parties to supply untested evidence regarding VOD/SVOD in the Reply phase of this hearing and then devising a regulatory regime for it on the fly. CCAU sees no reason why the Commission could not collect the relevant information and then roll its examination of the rules for that sector into the New Media hearing which CCAU understands will be moving forward in the months to come.

G) Network PVR ("NPVR")

40. This is not an area in which CCAU possesses a great deal of expertise but it is important to note that the use of NPVR by a BDU would require the consent of the program rightsholder for any storage undertaken by a BDU. This means that a significant number of rights clearances would have to take place.
41. While CCAU is not aware of the details of the Cablevision litigation that was mentioned by the Shaw representatives regarding NPVR, the requirement for consent in Canada is an important difference. Canada's *Copyright Act* does not contain a "time-shifting right" such that the activity in Canada, unlike in some other jurisdictions (including the United States) would infringe copyright. The creation of such a right in Canada may never occur or, if it does, may not occur

in the short term. Accordingly, CCAU does not believe that the NPVR situation should be of a concern to the Commission with respect to this rulemaking.

42. In addition, as with the VOD/SVOD situation, CCAU does not believe that the Commission should be asking parties to supply untested evidence regarding this technology in the Final Comments phase of this hearing without any comments being permitted with respect to those after the fact submissions of interested parties.
43. Given the copyright issues, and given that the NPVR technology is cutting edge, CCAU suggests that if the Commission wishes to explore the issue further, it could be rolled into the New Media hearing much in the same way that the conventional broadcasters' request that the Commission again explore their fee for carriage ideas found its way into the Pay, Specialty and BDU framework process.

H) Distant Signals

44. CCAU has a concern that retransmission consent (for the importation of distant Canadian signals into local markets), as opposed to the current Commission approach which could be characterized as a "failing to object" model, may require stations to obtain BDU retransmission rights from program suppliers. This is not an insignificant challenge and may be sufficient to render the concept impractical.
45. In CCAU's January 25, 2008 submission, we articulated some of the rights problems associated with distant signals and non-simultaneous substitution. It is not clear that the approach advocated by the broadcasters in this proceeding is free from rights issues either.
46. More particularly, it is CCAU's understanding that broadcasters traditionally secure over the air rights for particular shows in particular markets. Normally, broadcasters are not permitted to "authorize" BDUs to retransmit their programming in distant markets. If BDUs simply do so as a matter of Commission and copyright policy, then broadcasters are in a position to maintain that they did not "authorize" the BDU to carry the signal.
47. However, the situation may change dramatically the moment the Commission imbues the broadcaster with the right to say yes or no to the BDU that wishes to carry its signal. CCAU is not at all clear what the reaction of the program supplier would be in such a scenario.

48. Yet that is what the broadcasters are seeking. They want to be able to trade on their right to say yes or no. Presumably, they think that they can either obtain cash or BDU concessions towards their specialty or other services by obtaining this negotiating “hammer”. CCAU remains unconvinced at this point that the scheme would not fall apart as a result of the problems it would engender with the rights owners.

I) Estimated cost of CCAU proposals

49. At the public hearing, Vice Chair Arpin asked for a quantification of the dollars involved should the Commission agree to act on certain proposals recommended by CCAU and these are set out below.
50. First, CCAU has recommended that 7% of OTA broadcasters’ revenues should be spent on Canadian drama. This would amount to about \$151 million per annum but it would not all be incremental. In 2007, broadcasters spent about \$40 million on Canadian drama so the difference would amount to about \$111 million. It is to be recalled that the Commission set the bar at 6% of revenues to be reached over a 5 year period, when it instituted the ill-fated advertising minutes incentive plan in 2004.
51. Second, CCAU has proposed the elimination of the use of licence fee top-up money by broadcasters to satisfy CPE obligations. Although the use of licence fee top-up money reached \$45 million in 2007, the average annual use is more like \$30 million. Since about 60% of the CTF envelope is directed to Canadian drama that would result in a further \$18 million per year.
52. Third, CCAU proposed the current 5% of VOD/PPV contributions to production funds be raised at the time of their next licence renewals. Since the current 5% translates into approximately \$8 million per year, CCAU estimates that if that were doubled to 10%, it would generate about \$8 million per year of additional funds, of which approximately 80%, or \$6.4 million per year, would be spent on Canadian dramatic productions (the 80% estimate simply reflects the nature of their business but would need to be specified by the Commission).
53. Fourth, BDUs should have their 5% contribution increased to at least 6%. At that level, an additional \$55 million would be directed to a fund, of which an estimated 60% or \$33 million would be used for Canadian dramatic productions.
54. Fifth, CCAU has heard a variety of estimates as to the value of local avails on U.S. specialty services. One estimate pegged this amount at \$60 million. If that

were the case, and if 50% were directed to Canadian drama, this would amount to about \$30 million per annum.

55. Sixth, the Commission has been asked to consider fee for carriage as part of this proceeding and various possible subscriber rates and models have been advanced. By CCAU's calculations, if the Commission were to impose a fee for carriage of \$0.50 per subscriber per local signal per month, it would amount to \$174 million each year just in respect of the 3 major English-language OTA broadcasters alone. CCAU has recommended that any funds generated by fee for carriage should be directed into Canadian drama.
56. Seventh, CCAU has advocated the re-institution of transfer benefits for BDUs. This figure cannot be quantified at this time because it is not known whether any transactions which result in changes of control will occur. Nor is it known at what level the Commission might set the bar.
57. Eighth, in its October 19, 2007 filing, CCAU endorsed the "Modest Proposal" first mooted by Peter S. Grant the preceding month. That proposal considered the possibility of a group approach to reaching a percentage of revenue target for Canadian drama. For example, a company whose specialty services "overachieved" on CPE expenditures in a year could apply such overachievement in satisfaction of the requirement to be placed on that company's OTA stations to spend a certain percentage of revenue on Canadian drama. This is not a promise that is incremental to the first point made in this section. Rather, it is a method of funding of a percentage of revenue condition to be attached to the OTA broadcasters as soon as possible.
58. Finally, CCAU endorses the notion of some methodology to harness the out-of-control spending in Hollywood by Canada's OTA broadcasters. None were specifically outlined by CCAU in this process but we will have a proposal to present at the time of the renewals of the OTA broadcasters next year.
59. All of which is respectfully submitted.

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