



ACTRA

DGC
DIRECTORS GUILD OF CANADA
LA GUILDE CANADIENNE
DES RÉALISATEURS



**Writers Guild
of Canada**

Via electronic filing: telecomreview@ic.gc.ca

15 September 2005

Mr. Allan MacGillivray
Executive Director
Telecommunications Policy Review Secretariat.
Room 1031,
280 Albert Street,
Ottawa, Ontario,
K1A 0C8

Dear Mr. MacGillivray,

RE: ACTRA, the DGC and the WGC Second Round Submission to the Telecommunications Policy Review Panel

1. The Alliance of Canadian Cinema Television and Radio Artists (ACTRA), the Directors Guild of Canada (DGC), and the Writers Guild of Canada (WGC) are pleased to submit this Second Round submission to the Telecommunications Policy Review Panel.
2. ACTRA, the DGC and the WGC did not submit a first round submission to the panel, because the Consultation Paper of 6 June 2005 did not raise broadcasting issues. However, a number of parties did address such issues in their first round submissions. In particular, we note that comments relating to broadcasting issues were made by Astral Media Inc. ("Astral"), Global Communications Limited ("Global"), Shaw Communications Inc. ("Shaw"), the Canadian Cable Telecommunications Association ("CCTA"), and Kenneth Goldstein ("Goldstein").
3. In view of this, ACTRA, the DGC and the WGC have prepared this second round submission to respond to these comments. ACTRA, the DGC and the WGC respectfully submit that the Telecommunications Policy Review Panel (the "Panel") should limit its recommendations to those relating to telecommunications and should not stray into broadcasting matters which are governed by the *Broadcasting Act* and which have much different imperatives.



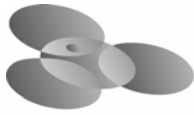
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4. ACTRA description
5. The Directors Guild of Canada (DGC) is a national labour organisation representing key creative and logistical personnel in the motion picture industry. Founded in 1962, today it represents over 3,800 members in 48 different craft and occupational categories covering all areas of filmmaking: direction, production, editing and design. The DGC actively promotes the continued growth of a healthy Canadian film and television industry at both the policy and professional levels. The DGC negotiates collective agreements with the Canadian Film and Television Production Association (CFTPA) and administers and enforces these agreements for English-language production in Canada. The DGC is currently negotiating collective agreements with the Association des producteurs de films et de télévision du Québec (APFTQ) and the National Film Board of Canada (NFB). The DGC is a member of the Coalition of Canadian Audio-visual Unions (CCAU) and works with directors organisations worldwide as a member of the International Association of English-speaking Directors Organisations (IAESDO). The DGC hosts the annual DGC Awards, publishes the quarterly magazine *Montage* on the art and craft of filmmaking and administers the Directors Rights Collective of Canada (DRCC) to collect royalties and levies from secondary uses abroad.
6. The Writers Guild of Canada (WGC) is a national association representing 1,800 professional screenwriters working in English-language film, television, radio and new media production. WGC members are the creators of feature films like *Where the Truth Lies*, indigenous dramatic series such as *Da Vinci's Inquest* and *Corner Gas*, popular mini-series like *Trudeau*, and renowned children's programming like the *Degrassi* series. The WGC is committed to building a vibrant industry showcasing Canadian imagination and talent and preserving our unique culture. For over sixty years, the WGC and its predecessor have negotiated collective agreements which set out minimum rates and terms for screenwriters working with producers and broadcasters. As a result, the WGC has negotiated separate Independent Production Agreements with the Canadian Film and Television Production Association (CFTPA), which represents English-language independent producers in Canada, and the Association des producteurs de films et de télévision du Québec (APFTQ), representing English and French-language independent producers in Quebec. The WGC has also negotiated agreements with broadcasters such as CBC Radio, CBC-TV, CTV, Global, the NFB and TVOntario. In addition, by hosting events such as the Canadian Screenwriting Awards, and publishing *Canadian Screenwriter* magazine, the WGC promotes the efforts and achievements of professional screenwriters.



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A) *The Panel's Mandate*

7. The Panel was established in April 2005 following the budget pronouncement in February. The Terms of Reference set out in the Budget read as follows:

The government recognizes the critical importance of the telecommunications sector to Canada's future well being and the need for a modern policy framework. To ensure that the telecommunications industry continues to support Canada's long-term competitiveness, the government is appointing a panel of eminent Canadians to review Canada's telecommunications framework. The panel is asked to make recommendations on how to move Canada toward a modern telecommunications framework in a manner that benefits Canadian industry and consumers. – Budget 2005.

8. The government's stated objective in establishing the Panel is:

To ensure that Canada has a strong, internationally competitive telecommunications industry, which delivers world-class affordable services and products for the economic and social benefit of all Canadians in all regions of Canada.

9. ACTRA, the DGC and the WGC note that there is no mention of "broadcasting" in the budget document or in the government's stated objective for the Panel. As the government has recently conducted reviews of the broadcasting industry, this is understandable.
10. Yet CCTA and Shaw have used this opportunity to attempt to reopen the debate relating to the regulation of broadcasting distribution undertakings ("BDUs"). ACTRA, the DGC and the WGC have no issue with those entities making whatever comments they want in this forum. Indeed the Consultation Paper invited parties to make comments as wide-ranging as they wanted. However, ACTRA, the DGC and the WGC take issue with the fact that these parties have asked that the Panel make recommendations relating primarily to broadcasting.
11. ACTRA, the DGC and the WGC note that there are many stakeholders in the Canadian broadcasting system who would certainly wish to comment on the type of deregulation proposed by CCTA and Shaw if they had understood that the Panel was going to wade in on broadcasting matters. They are not represented



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in this proceeding because this is a telecommunications process. It would, if nothing else, be a procedural mistake to make recommendations that could dramatically impact third parties without their having been given adequate notice.

B) The first round submissions

12. ACTRA, the DGC and the WGC recognize that the worlds of what has traditionally been known as “broadcasting” and “telecommunications” are evolving. According to Shaw and the CCTA’s first round comments, the appropriate regulatory response to this evolution is to have the broadcasting sector move quickly to the telecom model. In other words, in their view, the Commission should free BDUs from their regulatory obligations so they can better compete with traditional telephone companies.
13. In ACTRA’s, the DGC’s and the WGC’s view, this is not the correct way to proceed. ACTRA, the DGC and the WGC note as well that Rogers and Quebecor (Canada’s largest cable BDUs in English and French Canada respectively) did not see fit to join CCTA and Shaw in their deregulatory proposal.
14. Goldstein comes at the issue from a different direction, raising questions from the perspective of an educated observer. His key thesis, if we might be allowed to paraphrase, is that a new approach is warranted in the near future because the world of broadcasting is increasingly fragmented and borders are eroding. Without wanting to comment on issues such as the CBC and competitive tendering of public service broadcasters, ACTRA, the DGC and the WGC take issue with a key underpinning of Goldstein’s thesis.
15. His suggestion that “borders are eroding” is, in our submission, exaggerated and misplaced. Copyright owners still sell their product geographically so there are significant financial forces at work to maintain an orderly market, particularly in regard to conventional, specialty and pay television. The “death star” satellite threat did not diminish the need for regulation nor result in the demise of Canadian broadcasters. And the economics of the Internet have thus far not encouraged producers to abandon conventional television, pay and specialty services.
16. These types of arguments are not sufficient to justify letting in non-Canadian services without restriction, as that would certainly undermine the Canadian rights marketplace. That is why it is crucial that the CRTC continue to be able to determine which foreign broadcast services a cable or satellite company can



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carry, how and in which packages they may be carried, and how to apply simultaneous substitution rules to such services.

17. Accordingly, ACTRA, the DGC and the WGC support the views of Astral and, to a lesser extent, Global, insofar as they caution against unintended consequences in the broadcasting sphere of decisions taken within the context of a telecom review. The solution proposed by Global is that the Panel “explicitly recognizes these cross-sector ties in its eventual report and highlight areas of convergence where telecommunications recommendations trespass on broadcasting issues that are outside the Panel’s Terms of Reference”.
18. Astral, for its part, submits that, “in view of the above-noted challenges to broadcasting policy in the IP world, the Canadian telecommunications regulatory framework will need to evolve in a manner that takes into account the impact of such evolution on the existing broadcasting regulatory framework.” It then recommends that “a specialized regulator (the CRTC) that is capable of taking into account the underlying distinct policy rationales governing each of the broadcasting and telecommunications sectors will be needed.”
19. ACTRA, the DGC and the WGC agree with the approaches outlined by Astral and Global. It may be that the areas where telecommunications recommendations “trespass” (to use Global’s word) on broadcasting issues that are outside the Panel’s Terms of Reference could form the basis of another process.

C) *The importance of the Broadcasting Act*

20. It has been said many times, and bears repeating here, that television programs, in particular dramatic productions, are not like widgets. They define the soul of a nation and need protection. That is why most of the countries of the world have some sort of equivalent to Canada’s *Broadcasting Act*. It is why legislators in this country decided it was important to have a domestic broadcasting system.
21. For many years, the cable industry was the government’s chosen vehicle for the delivery of the best of Canadian and non-Canadian services. The elaborate regulatory scheme established over the years has evolved and will continue to evolve. But it should not be discarded.
22. In many cases, the system requires BDUs to carry Canadian services to Canadian households. But it also allows BDUs to carry foreign services, other than those which are deemed directly competitive with Canadian services. The packaging and linkage rules are designed to give Canadian services, which must



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make all of their revenues in the Canadian market, a fighting chance of survival in a lineup where non-Canadian services can be dumped into Canada having already recovered their costs in other locations.

23. This arrangement has been very good for the Canadian consumer, for the Canadian programming services, and also for Canadian BDUs. If Canadian BDUs have the funds necessary to invest in infrastructure and to compete with the phone companies and others in new ventures, it is because the broadcasting regulatory system has allowed them to prosper.
24. Shaw and the CCTA appear to be suggesting that because the cable BDUs are non-dominant players on the telephony side, the Commission should eliminate the rules on the broadcasting side, even though cable remains dominant in that sector. In fact, as the programming world becomes more and more fragmented, and the BDU world becomes more and more consolidated, BDUs are more and more in the driver's seat in negotiations with programming services.
25. The result of the approach favoured by the CCTA and Shaw would be to eliminate the current set of rules in favour of what they call a more consumer-oriented regulatory scheme. ACTRA, the DGC and the WGC believe that such an approach would allow the BDU to substitute itself for the regulator. It would choose which services to import, which to offer to consumers and in what type of packages. The BDU would effectively take the place of the CRTC.
26. One can reasonably surmise that it would be of no concern to BDUs if TSN were to be replaced by ESPN, if YTV were to cede its dial position to the N Channel (formerly Nickelodeon), or if TMN were to disappear at the hands of HBO. For that matter, would they care if they themselves were bought out by Time Warner?
27. What is missing from the cable submissions in this proceeding is recognition of the overriding cultural reason that Canada has a *Broadcasting Act*. Their submissions seem to be about widgets (notwithstanding the throw-away assertion in the Shaw filing that "Shaw supports the Canadian broadcasting system").
28. The view that cultural products can be treated as widgets is not a view that is shared by the government. If the rules that cable wanted were adopted, why have a *Broadcasting Act* at all? The broadcasting system would quickly come to resemble Canada's movie screens where very few Canadian films get exposure.



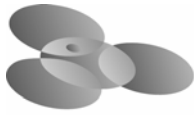
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29. The whole idea of the *Broadcasting Act* is to ensure that there is an adequate supply of news and entertainment programming made by Canadians and viewed by Canadians. Thus Canadian programming services are licensed (and given significant Canadian programming obligations), and BDUs are obliged (albeit in a decreasing percentage of cases) to carry them. BDUs are, however, allowed significant benefits in exchange as part of the regulatory tradeoff.
30. Curiously, then, Shaw asserts that “the broadcasting system is regulated in a manner that continues to focus primarily on the protection of Canadian programming services.” This criticism is misguided. In its submission, Shaw attempts to portray licensed Canadian programming services as coddled while licensed Canadian BDUs have to compete vigorously in the marketplace.
31. This is simply not correct. In fact, Shaw’s high market share and ownership of both direct to home (DTH) and cable undertakings would not be allowed in many jurisdictions. Rather than compare how Shaw and how programming services are regulated, it is more appropriate to compare how Shaw and how telephone companies operating Class 1 BDU licences are regulated,
32. Interestingly, the CRTC’s Broadcast Monitoring Report for 2004 shows Class 1 BDUs holding 72% of the BDU marketplace with DTH (i.e. Shaw’s Star Choice service and Bell ExpressVu) holding 24% of the marketplace. On the other hand, all Canadian programming services together hold 71.5% of the viewing in Canada with non-Canadian services holding just under 23% (and VCR and other, holding the rest). It would thus appear that the programming universe in Canada is just as competitive as the BDU universe. The reason Canadian programming services are able to compete is that the Commission in many cases sets out the carriage framework which mandates their distribution.
33. Shaw’s shopping list of complaints (page 13 of the Shaw submission) includes the 1.9% fee for the CRTC (the same fee programming services pay) and the fact that the CRTC decides what programming services can be distributed. ACTRA, the DGC and the WGC do not feel it is worthwhile to go item by item through the cable “wish list” at this point. In this area, surely the Panel ought to acknowledge that the government of Canada believes that the *Broadcasting Act* must be preserved, and that a regulatory structure should be upheld to ensure pride of place for Canadian stories.
34. Instead of jettisoning the *Broadcasting Act* and the rules made under it, it is important that the Panel confirm that the current broadcasting system is worth



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saving. ACTRA, the DGC and the WGC urge the Panel to avoid making rules in a telecom proceeding that could negatively affect the *Broadcasting Act*

D) The drama file - a case in point

35. Without Canadian broadcasting regulation it is unlikely that quality Canadian dramatic programming would be made. Given the small size of the Canadian market, further divided into English and French language audiences, developing, producing and airing indigenous dramatic programming is an expensive and risky business. Yet drama continues to be the most popular genre of television programming, and the production of Canadian drama is central to our cultural sovereignty. Without broadcasting regulation Canadian audiences would not have access to their own dramatic television stories, nor would they themselves reflected back to the world. Instead, the only type of dramatic programming offered to Canadians would be Hollywood fare produced for audiences abroad.
36. The CRTC is committed to ensuring that Canadian audiences will have the choice to watch their own dramas, and is working to ensure that licensees will develop, produce and air Canadian dramatic programming. Reduced broadcaster support for English language drama is an acute problem addressed in the June 2005 report prepared by the Coalition of Canadian Audiovisual Unions (CCAU). This report is attached as Schedule 1 to this intervention. The report addresses the problems of leaving matters as important as the production and scheduling of Canadian drama to the marketplace.
37. While supportive of the CRTC's drama incentives policy, the CCAU proposed a new regulatory safety net to ensure that the production of Canadian drama does not fall below an acceptable level. The CCAU's 14 recommendations are listed in the report attached in Schedule 1, in the Executive Summary on page 4 and at the end of the report
38. Ideas such as those proposed by the CCTA and Shaw in the current proceeding simply reinforce the need for ongoing regulatory scrutiny. For example, Shaw opposes the requirement that BDUs allocate 5% of revenues to Canadian programming (referred to on page 13 of the Shaw submission.) This payment is part of a list of items that Shaw maintains "interfere with consumer choice and limit[s] innovation with respect to the broadband distribution of video and audio services...." By characterizing contributions to Canadian programming this way, Shaw rejects the key cultural objective of the *Broadcasting Act*. Furthermore, far from interfering with consumer choice, Canadian programming expands it.



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39. The guilds do not expect the Panel to comment on the CCAU drama report nor take any action in respect of it. The production of Canadian drama is a broadcasting matter. However, it does highlight the types of issues that the Commission wrestles with daily in performing its functions under the *Broadcasting Act*.

E) Conclusion

40. While ACTRA, the DGC and the WGC appreciate that the Panel has asked for a broad spectrum of comments relating to telecommunications, the guilds believe that it would be inappropriate for the Panel to make determinations which would impact the broadcasting system outside a more fulsome review of that sector. ACTRA, the DGC and the WGC believe their view is shared by other broadcasting stakeholders. Major cable players like Rogers and Quebecor were able to file comprehensive first round comments in this proceeding without producing a wish list of matters better dealt with by the CRTC under the *Broadcasting Act*.

41. Some of the matters mentioned in the submissions by Shaw, Goldstein and the CCTA may be worthy of consideration in another forum. However, the record of this proceeding is not complete enough for the Panel to be addressing the complexities inherent in those issues.

42. The ACTRA, the DGC and the WGC appreciate having the opportunity to raise these points with the Panel.

Sincerely,

Stephen Waddell
National Executive Director
ACTRA

Pamela Brand
National Executive Director
Directors Guild of Canada

Maureen Parker
Executive Director
Writers Guild of Canada