

CANADIAN CABLE TELEVISION ASSOCIATION

ASSOCIATION CANADIENNE DE TÉLÉVISION PAR CÂBLE

Suite 1010 • 360 rue Albert Street • Ottawa • Ontario • Canada • K1R 7X7
Telephone: (613) 232-2631 • Facsimile: (613) 232-2137

Richard Stursberg
President & C.E.O.
Président et chef de la direction

March 29, 1996

VIA TELECOPIER (416) 368-8206

Mr. Christopher Leafloor
Barrister & Solicitor
347 Bay Street, Suite 603
TORONTO, Ontario
M5H 2R7

Dear Mr. Leafloor:

Re: Complaint to the CRTC filed by Cable Watch Citizen's Association pursuant to section 12 of the Broadcasting Act

On 8 March 1996, the Secretary General of the Canadian Radio-television and Telecommunications Commission (the "CRTC" or the "Commission") referred for our consideration a copy of the letter of complaint which you filed on 28 November 1995 on behalf of your client, Cable Watch Citizen's Association ("Cable Watch"), along with a request from the Commission that we provide you written comments addressing all the matters raised in this letter.

Rogers Cablesystems Ltd. ("Rogers"), was also requested to provide you with comments. Rogers is the party at the centre of the complaint and the respondent in an earlier application brought by Mr. Keith Mahar, the principal of Cable Watch, in the Ontario Court of Justice (General Division) on the same matter (which was dismissed on jurisdictional grounds by Mr. Justice Sharpe). The CCTA was afforded the opportunity to review the comments of Rogers and is in agreement with them as to their substance.

The complaint filed by Cable Watch relies essentially on four contentions, one relating to jurisdiction (Part I), and three relating to process (Part II):

- (1) It is contended that the CRTC was acting without proper authority when it added subsection 18(6.3) to the *Cable Television Regulations, 1986* (the "Cable Regulations" or "Regulations");

... /2

C	C	T	A
A	C	T	C

- (2) It is contended that the CRTC failed to provide Canadian cable television subscribers with notice of its intention to add subsection 18(6.3) to the Cable Regulations;
- (3) It is contended that the CRTC failed to properly notify Canadian cable television subscribers of the cost consequences that would result from the addition of subsection 18(6.3) to the Cable Regulations;
- (4) It is contended that the cable television companies which have contributed to the Cable Production Fund, in accordance with subsection 18(6.3), have significantly altered their fees charged to their customers without providing proper advance notice to their customers.

The CCTA rejects all the contentions of Cable Watch and will address them in turn.

PART I: JURISDICTION

(1) CRTC had Power to Make Regulations Regarding Contributions to Production of Canadian Programming (Subsection 18(6.3) of *Cable Television Regulations, 1986*)

Cable Watch contends that the CRTC "did not have the authority to add subsection 18(6.3) to the Cable Television Regulations so as to require subscribers to pay fees to maximize contributions to the Cable Production Fund" (Cable Watch Complaint, page 4). More specifically, it argues that "nothing in the Broadcasting Act permits the CRTC to require cable television subscribers to pay a surcharge to maximize contributions towards a fund designed to encourage the production of Canadian programming" (Cable Watch Complaint, page 4). We disagree.

The CRTC has broad regulation-making powers to further its objects under the *Broadcasting Act* (the "Act"). These objects, as defined in the Act, are "to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in [it]". In so doing, the Commission is to have proper regard to the regulatory policy also set out in the Act. One of the policy objectives set out in the Act is that "each element of the Canadian broadcasting system shall *contribute* in an appropriate manner to the creation and presentation of Canadian programming". The regulatory policy, for its part, provides that the Canadian

broadcasting system "should be regulated and supervised in a flexible manner that ... facilitates the provision of Canadian programs to Canadians". In order to accomplish this, the CRTC is given the power to make regulations in respect of several matters, including "*such other matters as it deems necessary* for the furtherance of its objects". [Italics added for emphasis]

It is clear, therefore, that in adding subsection 18(6.3) to the Cable Regulations, the CRTC was validly exercising its statutory regulation-making power in furtherance of one of its objects, namely, establishing a regime for cable television licensees to support the creation and production of Canadian programming through financial contributions to the Cable Production Fund. In our opinion, the Commission was fully acting within its jurisdiction when it decided to add subsection 18(6.3) to the Cable Regulations.

PART II: PROCESS

(2) No Failure on CRTC's Part to Properly Notify Cable Television Subscribers of Intention to Add Subsection 18(6.3) to the Cable Regulations

Cable Watch contends that the CRTC failed to provide subscribers with proper notice when it added subsection 18(6.3) to the Cable Regulations. This contention is not supported by the facts.

The process leading to the establishment of the Cable Production Fund can be traced back to the following key events:

- ▶ **CRTC - Notice of Public Hearing 1992-13** (issued on 3 September 1992): Giving rise to the so-called "Structural Hearing", this notice of public hearing sought comments on, among other things, the establishment of a regulatory framework for the distribution and packaging of programming services that would "provide Canadians with a wide range of general interest and special interest programming to choose from that is accessible and affordable" (CRTC - NPH 1992-13, p. 4).
- ▶ **Structural Public Hearing** (commencing 1 March 1993): As noted in Public Notice CRTC 1993-74 (see next paragraph, below), "the Commission considered comments from the public on a number of issues set out in CRTC - Notice of Public Hearing 1992-13 ... and on several related matters", among which "financial support for Canadian programming". It is the intervention of groups acting on behalf of the general public during this hearing that placed on the agenda the idea of a production fund to encourage Canadian programming. In response to such interventions made on behalf of the general

public, the cable industry offered, in its written reply in advance of the oral hearing to allocate \$100 million over five years for the production of new Canadian programming. During this proceeding, the Commission heard oral submissions from 126 parties and considered 438 written submissions.

- ▶ **Public Notice CRTC 1993-74** (dated 3 June 1993): The CRTC released a policy document in which it proposed a number of possible amendments to the Cable Regulations. In this policy document, the Commission clearly endorsed the notion of a cable production fund. It then went on to explain how the implementation of the existing "sunset" provisions in subsections 18(6.1) and 18(6.2) of the Cable Regulations would be suspended for those licensees who contributed to such a fund an amount equal to one half of the amount by which their basic rate would otherwise decrease.
- ▶ **CRTC Public Notice 1993-137** (dated 7 October 1993): The proposed amendments to the Cable Regulations are issued for public comment. The normal *Canada Gazette* process as required in the *Broadcasting Act*, along with publication in the major newspapers in Canada, was used. The Commission considered 113 written submissions in respect of these proposed amendments.

The events outlined above indicate that the creation of a Cable Production Fund in order to encourage the production of Canadian programming was certainly discussed as part of a well publicized and open policy process. The record clearly shows that the CRTC gave proper public notice of its intention to change the Cable Regulations and add subsection 18(6.3).

The CCTA submits that there is no further requirement, statutory or otherwise, to give notice beyond what was given. Moreover, the CCTA sees no reason for the Commission, as demanded by Cable Watch, to revise its rules and procedures in order to implement a different notice process. Nothing in the established process, and in the rules and procedures under which the Commission operates, has been shown to be in any way deficient. Any interested party has had adequate notice and full opportunity to voice any concern relating to any potential changes in the Regulations.

(3) No Failure on CRTC's Part to Properly Notify Cable Television Subscribers of Cost Consequences that Would Occur as a Result of Subsection 18(6.3) to the Cable Regulations

Cable Watch contends that the CRTC failed to provide subscribers with proper notice as to the cost consequences that would occur as a result of adding subsection 18(6.3) to the Cable

Regulations. The CCTA believes, as discussed in the preceding section, that the CRTC provided adequate public notice of its intention to add subsection 18(6.3) to the Cable Regulations. The meaning and effect of this subsection is clear and unambiguous. Furthermore, in Public Notice CRTC 93-74, at pages 22 and 23, the CRTC addresses specifically the purpose and effect of the proposed changes to section 18(6). Indeed, after announcing its decision to maintain the existing "sunset" provision in the Regulations, the Commission made very clear that, for the initial five-year period, contributions to the fund would be generated by revenues currently included in the existing basic monthly fee. It also indicated that a subsequent public notice would be issued, "calling for comments in the operational and organizational details of the fund". This was eventually done in Public Notice CRTC 1993-105, dated 15 July 1993. The CCTA submits that no further notice or explanation to the public was required.

(4) No Requirement in Regulations for Cable Licensees to Provide Notice to Subscribers of Intention to Invoke Subsection 18(6.3) and Maintain Capital Portion of Fees

Cable Watch finally contends that cable licensees who chose to contribute to the Cable Production Fund were obligated to notify their subscribers of their action, along with the rate consequences of such actions.

Neither subsection 18(6.3), nor any other provision in the Cable Regulations, requires that a cable licensee notify its subscribers of its intention to contribute to the Cable Production Fund. The rules under which the regime is financed are clearly defined and leave no room to interpretation. The funding mechanism is intended to operate automatically. There is no uncertainty as to what amounts are involved when a cable licensee chooses to contribute to the Fund and no "surcharge" or additional fees are being levied on subscribers whose basic monthly fee remain unchanged from the time when subsection 18(6.3) was added to the Regulations.

Since there is no further *increase* in the fee charged to subscribers, no further approval is required from the Commission when a decision to contribute to the Fund is made and no further notice to subscribers is warranted. There is no basis in law to support the contrary view, and Cable Watch has alluded to none.

Mr. Christopher K. Leafloor, Barrister & Solicitor
re: Cable Watch Citizen's Association
March 29, 1996
Page 6 of 6

Conclusion

The contentions advanced by your client as a basis for this complaint are without merit. The jurisdiction of the CRTC to add subsection 18(6.3) to the Cable Regulations is clearly established in the *Broadcasting Act*, and the alleged failures to fulfill various notice requirements are either unsupported by the facts or inexistant for want of any ascertained legal obligation to give notice to begin with. Therefore, it is the view of the CCTA that the CRTC should dismiss your client's complaint as being without proper foundation.

Sincerely



Richard Stursberg

RS/sg

cc: Allan J. Darling, CRTC / FAX (819) 994-0218
Paul Temple, Rogers Cablesystems Ltd. / FAX (416) 391-7247
Rosalie Daly-I'odd, Canadian Consumer Association / FAX (613) 563-2254

j:\...sg\legal\mahar\crtc0329.96f