

Montreal, March 26, 2018

Mr. Claude Doucet  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa (Ontario) K1A 0N2

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**Re: Application to process SCFP's Part 1 application regarding the *Exemption order for digital media broadcasting undertakings* (CRTC 2012-409) as required by the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure***

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Sir,

1. The Canadian Union of Public Employees (CUPE, or SCFP) asks the Canadian Radio-television and Telecommunications Commission to post the Part 1 application submitted last month by SCFP (SCFP application), and to issue its decision regarding the CRTC process initiated by the SCFP application.
2. On February 13, 2018 SCFP submitted an application to re-examine the *Exemption order for digital media broadcasting undertakings* pursuant to Part 1 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (Rules)*.
3. On March 7, 2018, three weeks later, a member of the CRTC's staff advised SCFP in writing the above-mentioned application would not be handled. Mr. Scott Hutton, Executive Director, Broadcasting, explained the application's rejection in these terms as follows:

"I note that the elements raised by SCFP in the application resemble those brought forward by SCFP in response to the public proceeding initiated by *Call for comments on the Governor in Council's request for a report on future programming distribution models*, Broadcasting Notice of Consultation CRTC 2017-359. The issue as to the pertinence of maintaining or modifying the Order was also raised by a number of other intervenors who participated in that proceeding.

It does not therefore appear appropriate for the Commission to initiate a separate public proceeding to consider your application.

Your application will consequently not be handled.”<sup>1</sup> [translation; underlining added]

4. This response is not a decision of the Commission. For this reason, SCFP considers that the file is still active, and that its Part 1 application awaits posting and a decision by the CRTC.

## The Law

5. The *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (Rules)* enacted under the *Broadcasting Act* stipulate in section 3 that “A matter may be brought before the Commission by an application or complaint...” [underlining added]
6. Part 1 of the *Rules*, under which SCFP’s application was submitted to the CRTC,
  - a) establishes under section 5 that any person may ask the CRTC to exercise its power: “The Commission may exercise any of its powers under these Rules at the request of a party or interested person or on its own initiative.” [underlining added]
  - b) provides under section 23 that “The Commission must post on its website all applications that comply with the requirements set out in section 22.” [underlining added]
  - c) establishes under section 8 that the CRTC has the power to reject deficient applications: “If an application or complaint does not comply with a requirement of these Rules, the Commission may return the application or the complaint to the applicant or the complainant so that the deficiencies may be remedied or it may close the file.”<sup>2</sup> [underlining added]
  - d) adds under section 9 that “The Commission must not dismiss an application or complaint by reason solely of a defect in form.” [underlining added]
  - e) states in section 10 that the CRTC has the authority to combine two or more proceedings, or to adjourn a proceeding:

The Commission may

    - (a) if it is of the opinion that the circumstances or considerations of fairness permit, adjourn a proceeding;<sup>3</sup>
    - (b) if it is of the opinion that the circumstances or considerations of fairness permit, combine two or more proceedings;<sup>4</sup>
  - f) provides in section 11 that “... the Commission may approve the whole or any part of an application or grant any relief in addition to or in substitution for the relief applied for.” [underlining added]

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<sup>1</sup> CRTC, Letter from Scott Hutton to Nathalie Blais re: *Demande de la partie 1 – Réexamen de l’Ordonnance d’exemption relative aux entreprises de radiodiffusion de médias numériques* (Ottawa, March 7, 2018).

<sup>2</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 8.

<sup>3</sup> *Ibid.*, s. 10(a).

<sup>4</sup> *Ibid.*, s. 10(b).

## The Facts

7. On February 13, 2018 SCFP submitted a Part 1 application asking the CRTC to re-examine exemption order CRTC 2012-409. The CRTC's website instantly confirmed receipt of the application (see Appendix 1). The French and English versions of the application, initially filed only in French, are available on SCFP's website: <http://scfp.qc.ca/memoires-du-scfp/>.
8. A week later two telephone calls with CRTC staff persons – on February 20<sup>th</sup> and 21<sup>st</sup> of 2018 – also confirmed that the CRTC had received SCFP's Part 1 application, and that it was being analyzed. The February 21 telephone call said that SCFP would be informed in writing of the course of events in the next few days or weeks.
9. On March 7, 2018 Mr. Scott Hutton, Executive Director, Broadcasting, of the CRTC, acknowledged receipt of SCFP's Part 1 application in a letter sent by e-mail to its representative, Ms. Nathalie Blais. The letter stated that the application to review the exemption order would not be handled, because the same subject had been raised in another CRTC proceeding:<sup>5</sup>

“I note that the elements raised by SCFP in the application resemble those brought forward by SCFP in response to the public proceeding initiated by *Call for comments on the Governor in Council's request for a report on future programming distribution models*, Broadcasting Notice of Consultation CRTC 2017-359. The issue as to the pertinence of maintaining or modifying the Order was also raised by a number of other intervenors who participated in that proceeding.

It does not therefore appear appropriate for the Commission to initiate a separate public proceeding to consider your application.

Your application will consequently not be handled.”<sup>6</sup> [translation; underlining added]

10. As of today's date, SCFP's Part 1 application has still not been posted on the CRTC's website, despite its compliance with the requirements of section 22 of the *Rules*.

## Contravention of the *Rules of Practice and Procedure*

11. The fact that SCFP's Part 1 application has not been posted contravenes the CRTC's *Rules of Practice and Procedure*. This omission prevents the establishment of a public process and deadlines for the process as provided for by the *Rules*<sup>7</sup>, which are prerequisites for a CRTC decision.<sup>8</sup>
12. Mr. Scott Hutton's response also constitutes an irregular practice, as it deals with SCFP's Part 1 application in a manner and for reasons that are not provided for by the *Rules*, and which, moreover, treat SCFP in an inequitable fashion.

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<sup>5</sup> CRTC, Letter from Scott Hutton to Nathalie Blais re: *Demande de la partie 1 – Réexamen de l'Ordonnance d'exemption relative aux entreprises de radiodiffusion de médias numériques* (Ottawa, March 7, 2018).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 24 ff. Part 1.

<sup>8</sup> *Broadcasting Act*, s. 20.

13. First, the letter does not confirm that the CRTC itself reached the conclusion that SCFP's application as inappropriate. It does not, moreover, confirm who made this finding: "It does not therefore appear appropriate for the Commission to initiate a separate public proceeding to consider your application." [underlining added]. The letter does not return SCFP's Part 1 application so that it can be amended, and does not state whether the matter has been terminated.<sup>9</sup> The letter does not refer to adjourning the proceeding, or to combining it with another proceeding.<sup>10</sup>
14. Meanwhile, Mr. Hutton mentions in his letter "... that the elements raised by SCFP in the application resemble those brought forward by SCFP in response to the public proceeding initiated by Call for comments on the Governor in Council's request for a report on future programming distribution models, Broadcasting Notice of Consultation CRTC 2017-359. The issue as to the pertinence of maintaining or modifying the Order was also raised by a number of other intervenors who participated in that proceeding." The letter's conclusion that dealing with SCFP's Part 1 application would be inappropriate is based on these arguments.
15. Yet, as we explain below, Broadcasting Notice of Consultation CRTC 2017-359 and SCFP's Part 1 application are two separate proceedings directed at different outcomes. Moreover, the *Rules* do not provide at any point that a Part 1 application may be refused because it touches on an issue already raised in another CRTC proceeding, and nothing prohibits a party or intervenor from commenting on the same subject in two separate CRTC proceedings.

#### **Expectation of procedural fairness and the rule of law**

16. The refusal to post SCFP's Part 1 application because it addresses a question already raised in another CRTC proceeding (CRTC 2017-359) also brings up a serious problem of procedural fairness and, more generally, application of the rule of law.
17. Broadcasting Notice of Consultation CRTC 2017-359, initiated by an order of the Governor in Council, asked the public to comment on the following three points:
  - The distribution model or models of programming that are likely to exist in the future;
  - How and through whom Canadians will access that programming; and
  - The extent to which these models will ensure a vibrant domestic market that is capable of supporting the continued creation, production and distribution of Canadian programming, in both official languages, including original entertainment and information programming.<sup>11</sup>
18. It is in that context that SCFP and other intervenors mentioned the importance of reviewing the *Exemption order for digital media broadcasting undertakings* (CRTC 2012-409).

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<sup>9</sup> *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 8.

<sup>10</sup> *Ibid.*, s. 10.

<sup>11</sup> CRTC, *Call for comments on the Governor in Council's request for a report on future programming distribution models*, Broadcasting Notice of Consultation CRTC 2017-359 (Ottawa, October 12, 2017).

19. The CRTC's 2017-359 proceeding will not in and of itself lead the CRTC to review the exemption order, because the government's order only requires the production of a report by June 1, 2018.<sup>12</sup> SCFP therefore submitted a separate Part 1 application to have the CRTC initiate a public proceeding to review the *Exemption order for digital media broadcasting undertakings* (CRTC 2012-409) which would lead to a CRTC decision about the relevance of amending or abolishing this order. The application falls entirely within the CRTC's supervisory and regulatory mandate set out in section 5 of the *Broadcasting Act*.
20. SCFP also notes that the CRTC published at least two Part 1 applications related to Broadcasting Notice of Consultation CRTC 2017-359 during and after its intervention period:
- a) On January 30, 2018 the CRTC posted a Part I application dated January 29, 2018 on its website from Asian Television Network International Limited on behalf of the 'FairPlay' coalition which addressed elements similar to those raised by the Governor in Council, specifically:
    - i. the models of programming distribution
    - ii. the manner in which Canadians access such programming, and
    - iii. the impact of these models on the creation, production and distribution of Canadian programming.
  - b) On February 28, 2018 the CRTC posted an application dated February 22, 2018 on its website from Canadian Cable Systems Alliance Inc. The application asks the CRTC to permit one of Canada's largest broadcasting distribution systems to launch new discretionary programming services and to repackage other discretionary services. The elements raised in this application are similar to those raised by Broadcasting Notice of Consultation CRTC 2017-359, namely,
    - i. models of programming distribution, and
    - ii. Canadians' access to such programming.
21. As SCFP's Part 1 application has not been posted on the CRTC's website, in contrast with the two applications noted above, one may conclude that the CRTC treats certain applicants unfairly by rejecting their applications even as it posts other parties' applications that also address topics set out in Broadcasting Notice of Consultation CRTC 2017-359.

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<sup>12</sup> *Order in Council*, P.C. 2017-1195, September 22, 2017, p. 2.

## Mr. Hutton's letter is not a CRTC decision

22. The CRTC's mandate is to regulate and supervise "... all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy."<sup>13</sup>
23. To do this it has the power to grant, modify, renew, suspend or revoke licences, and to set conditions for these licences<sup>14</sup> and regulations.<sup>15</sup> It may also "... by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part ...."<sup>16</sup>
24. Section 3 of the *Canadian Radio-television and Telecommunications Commission Act* establishes that the CRTC consists "... of not more than 13 members, to be appointed by the Governor in Council", who exercise its powers.<sup>17</sup> It is the members, or panels of at least three Commissioners, who decide the matters for which the CRTC is responsible.<sup>18</sup>
25. SCFP notes that Mr. Hutton is not a member of the Commission. There is no record of his appointment in the *Canada Gazette* and he does not appear among the CRTC members on the CRTC's website.<sup>19</sup> It is therefore reasonable to believe that Mr. Hutton, who identifies himself as Executive Director, Broadcasting, of the CRTC, is a member of the CRTC's staff.
26. Consequently, even though Mr. Hutton's letter of March 7, 2018 lets it be understood that it is a decision of the CRTC, it is no such thing. The Federal Court of Appeal has on two occasions determined that letters from CRTC staff or individual CRTC Commissioners are not decisions of the CRTC (*Centre For Research-Action On Race Relations v. Canadian Radio-Television and Telecommunications Commission*, 2000 CanLII 16685 (FCA); *Communications, Energy and Paperworkers Union of Canada v. CanWest MediaWorks Inc.*, 2008 FCA 247 (CanLII)). It is worth highlighting that in *Centre For Research-Action On Race Relations* the letter that was the subject of the appeal had been written by Jean-Pierre Blais, then "CRTC Executive Director, Broadcasting".<sup>20</sup>
27. The Federal Court of Appeal decisions confirm that without a decision of the CRTC, an administrative letter makes it impossible for SCFP to rely on section 31(2) of the *Broadcasting Act*, as "An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction".<sup>21</sup>

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<sup>13</sup> *Broadcasting Act*, s. 5.

<sup>14</sup> *Ibid.*, s. 9.

<sup>15</sup> *Ibid.*, s. 10.

<sup>16</sup> *Ibid.*, s. 9 (4).

<sup>17</sup> *Canadian Radio-television and Telecommunications Commission Act*, s. 12 (1).

<sup>18</sup> *Broadcasting Act*, s. 20 and *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, s. 3.

<sup>19</sup> <https://crtc.gc.ca/fra/acrtc/organ.htm>, accessed on March 23, 2018.

<sup>20</sup> *Centre For Research-Action on Race Relations v. Canadian Radio-Television and Telecommunications Commission*, 2000 CanLII 16685 (FCA), ¶ 3.

<sup>21</sup> *Broadcasting Act*, s. 31(2), underlining added.

28. As Mr. Hutton's letter is not only misleading, but also silent as to the procedure to follow in these circumstances, SCFP has no choice but to ask the CRTC anew to handle its Part 1 application as provided by the *Rules*.
29. The Commission has now had six weeks to determine the process to put in place. This is more time than it took to post the two Part 1 applications mentioned above at paragraph 20, and more time than would be considered reasonable by the federal courts.
30. Therefore, the CRTC is asked to post SCFP's Part 1 application of February 13, 2018 on the Commission's website, at the latest by 5 pm (EST) Thursday, March 29, 2018, and to issue its decision in terms of process; in the absence of which SCFP will take appropriate legal recourse.

With the hope that the Commission will respond positively to this request, I remain.

Sincerely yours,

*Original signed by*

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Denis Bolduc  
Président, SCFP-Québec