Broadcasting Decision CRTC 2006-193

Ottawa, 18 May 2006

Spotlight Television Limited
Across Canada

Romen Podzyhun and C.J. (Cal) Millar, on behalf of a corporation to be incorporated
Across Canada

Allarco Entertainment Inc.
Across Canada

Archambault Group Inc.
Across Canada

Applications 2004-0991-3, 2005-0452-3, 2005-0454-9, 2005-0451-5, 2005-0755-1
Public Hearing in the National Capital Region
24 October 2005

Applications for new pay television services

The Commission ***approves*** *the application by Allarco Entertainment Inc. for a broadcasting licence to operate a new national English-language general interest pay television programming undertaking and* ***denies*** *the competing applications by Spotlight Television Limited, Romen Podzyhun and C.J. (Cal) Millar, on behalf of a corporation to be incorporated, and Archambault Group Inc. It further* ***denies*** *the application by Archambault Group Inc. for a broadcasting licence to operate a new national French-language general interest pay television programming undertaking.*

Introduction

1. In *Call for applications for a broadcasting licence to carry on a national general interest pay television undertaking*, Broadcasting Public Notice CRTC 2005-6, 14 January 2005 (the Call for applications), the Commission announced that it had received an application for a broadcasting licence to carry on a national English-language general interest pay television programming undertaking that would be distributed on a digital basis, with entitlement to access to broadcasting distribution undertakings (BDUs) as provided under section 18(5)(a)(ii) of the *Broadcasting Distribution Regulations* (the Distribution Regulations).[1]

[1] This section specifies that, subject to condition of licence, a Class 1 BDU operating in an anglophone market shall distribute, to the extent of available channels, “each English-language pay television service, the operator of which is authorized to provide the service to all or part of the licensed area of the undertaking, other than a single or limited point-of-view religious pay television service.”

2. In Broadcasting Notice of Public Hearing CRTC 2005-6, 21 July 2005 (the Notice of Public Hearing), the Commission announced that it had received four applications in response to its call. These, together with the application that prompted the call, were considered at the 24 October 2005 public hearing in the National Capital Region.

The applications

Spotlight Television Limited

3. Spotlight Television Limited (Spotlight Ltd.) proposed to operate a national English-language general interest pay television programming undertaking to be known as Spotlight. The undertaking would be distributed on a digital basis with entitlement to distribution by BDUs under section 18(5) of the Distribution Regulations.

4. Initially, the applicant presented an ownership structure for Spotlight Ltd. that is as follows:

- 75% of the voting interest in Spotlight Television Inc., (Spotlight Inc.), which owns 100% of Spotlight Ltd., is held by Premium Entertainment Group Limited (Premium). Premium is 100% controlled by Mr. George Burger through two companies, 1300268 Ontario Inc. and Premium Entertainment Corporation.

- 25% of the voting interest in Spotlight Inc. is equally held by Spotlight Limited Partnership, the partners of which are Kilmer Enterprises Inc. and Insight Sports Ltd.

5. On 15 July 2005, the Commission was informed that Premium had entered into an agreement with Bell Canada under which, if a licence were issued, Bell Canada would have the right to:

- acquire an interest in Premium of up to 20%. Bell Canada could assign this interest to any subsidiary or to Bell ExpressVu Inc. If this option were exercised, Mr. Burger’s interest in Premium would be reduced from 100% to 80%;

- require Premium and Spotlight Inc. to amalgamate. In that event, Bell Canada would end up with a 15% interest in the amalgamated corporation and Mr. Burger’s indirect interest in the amalgamated corporation would be reduced from 75% to 60%; and

- nominate one of the three board members of Premium and, if the amalgamation occurred, to nominate one of the five board members.

6. Spotlight’s programming would consist of limited series and long form drama, comedy series, feature films and long form documentaries, as well as occasional major international sporting events and concerts. The proposed service would devote 30% of

the time period between 6:00 p.m. and 11:00 p.m. and 25% of the remainder of the broadcast day to Canadian programming. The applicant proposed to spend $15 million on Canadian programming in the first full year of operations, $20 million in the second year, and 32% of the previous year's gross revenues in each subsequent year. As part of its Canadian programming expenditures, the applicant proposed to spend $10.5 million on script and concept development over 7 years.

7. With respect to regional production, Spotlight Ltd. indicated that it would cooperate with independent producers across the country, and that its development officers would regularly visit all regions of Canada. A section of Spotlight's web site would be specifically designed to facilitate communication with independent producers across Canada.

8. Spotlight Ltd. noted that section 6.1 of the *Pay Television Regulations, 1990* (the Pay Regulations), provides that no pay television licensee "shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage." Spotlight Ltd. expressed concern that the incumbent pay television licensees might enter into long-term agreements with Hollywood studios that would preclude Spotlight Ltd. from bidding for exclusive programming rights from some of those studios. Accordingly, Spotlight Ltd. submitted that the Commission should issue a statement specifying that an undue preference or disadvantage under section 6.1 of the Pay Regulations could occur if a general interest pay television licensee, singly or together with another general interest pay television licensee, precludes a new general interest pay television licensee from negotiating to purchase exclusive national Canadian pay television rights to first-run movies from at least two major U.S. film studios. This interpretation would apply from the date of the decision to a period two years after the launch of the new pay television service. At the hearing, Spotlight Ltd. stated that, if the Commission did not implement its proposal with respect to exclusive programming rights, it would not be able to fulfil its proposed upfront commitment to spend $35 million dollars on Canadian programming in the first two years of operations. Instead, Spotlight Ltd. would devote $4 million to Canadian programming expenditures in the first year of operations, and 32% of the previous year's gross revenues in years 2 to 7.

9. The applicant applied for permission to broadcast programming produced by the licensee or related persons. Such programming would be limited to 25% of its Canadian programming schedule and 25% of its annual expenditures on Canadian programming.

Romen Podzyhun and C.J. (Cal) Millar, on behalf of a corporation to be incorporated

10. Romen Podzyhun and C.J. (Cal) Millar, on behalf of a corporation to be incorporated, (CFC) proposed to operate a national English-language general interest pay television programming undertaking to be known as the Canadian Film Channel. CFC requested that its service be distributed, at no additional fee, to all of the subscribers of English-language pay television services offered by all Class 1, Class 2, and Class 3 BDUs, as well as by direct-to-home (DTH) BDUs that distribute pay television services. The applicant also requested that BDUs offer its service in a package with each of the current English-language pay television services.

11. Mr. Podzyhun and Mr. Millar also have ownership interests in the Category 2 services Moviola and Silver Screen Classics.

12. The proposed service would be entirely dedicated to presenting Canadian programming, which would include feature films, short films, mini features, documentaries and animation, the majority of which would be English-language drama. CFC proposed to spend 50% of its gross annual revenues on Canadian programming.

13. CFC proposed to derive its revenue from a levy on the gross revenues of other licensed English-language pay television services. To achieve this, the applicant proposed that a new condition of licence be imposed on other English-language pay television licensees that would require them to direct 12.9% of their gross revenues to the Canadian Film Channel each month. In return, English-language pay television services would receive the rights to broadcast programming first broadcast by the Canadian Film Channel on a second window basis.

Allarco Entertainment Inc.

14. Allarco Entertainment Inc. (Allarco) proposed to operate a national English-language general interest pay television programming undertaking to be known as Allarco Entertainment. The undertaking would be distributed on a digital basis with entitlement to distribution by BDUs under section 18(5) of the Distribution Regulations.

15. Allarco is wholly-owned by Mr. Charles R. Allard. Mr. Allard also owns Touch Canada Broadcasting Inc., which operates radio stations in Calgary and Edmonton, Alberta.

16. The majority of Allarco Entertainment's programming would consist of feature films, original series, specials and dramatic mini-series offered in high definition format. The proposed service would devote 30% of the time period between 6:00 p.m. and 11:00 p.m. and 25% of the remainder of the broadcast day to Canadian programming. The applicant also proposed to spend $4 million in the first year of operations, and 32% of the previous year's gross revenues in each subsequent year, on Canadian programming. Above and beyond this commitment, Allarco proposed to expend not less than $2 million each broadcast year, excluding overhead costs, on script and concept development, for a total of $14 million over the licence term.

17. With respect to regional production, Allarco indicated that, in addition to the amounts set out above, it would allocate $7 million over the licence term for regional outreach. Senior creative development staff would be located in each province with a mandate to develop creative projects with independent producers and to make these productions available to viewers. Allarco would also work directly with Quebec French-language producers to make their productions available to English-speaking viewers.

18. Allarco made two proposals to amend the Pay Regulations that would limit licensees of pay television services from entering into exclusive arrangements for the rights to deliver non-Canadian programming. Its first proposal was to add a new section 6.1(3) to the Pay

Regulations which would state: “For the purposes of subsection 1, a Pay Television licensee shall be considered to have given itself an undue preference if the licensee distributes a non-Canadian Pay Television program for which the licensee has acquired exclusive or other preferential rights.”

19. As an alternative, Allarco proposed to add a new section 6.1(3) to the Pay Regulations that would state: “For the purposes of subsection (1), a Pay Television licensee shall be considered to have given itself an undue preference if the licensee distributes a non-Canadian feature film for which the licensee has acquired exclusive or other preferential rights, if the feature film has achieved theatrical box office exhibition revenues ranked within the one hundred and fifty highest earning feature films as measured by Variety Magazine, during twelve months following the theatrical release of the feature film, where the feature film was produced, financed or distributed from a major U.S. studio that is a member of the Motion Picture Association of America, a subsidiary or affiliate of that member, or exclusive distributor in Canada of feature films released by that company.”

Archambault Group Inc.

20. Archambault Group Inc. (Archambault) proposed to operate two national general interest pay television programming undertakings, one in English and one in French, both to be known as BOOMTV. The undertakings would be distributed on a digital basis with entitlement to distribution by BDUs under section 18(5) of the Distribution Regulations. As such, distribution of the French-language service would be mandatory in French-language markets, and distribution of the English-language service would be mandatory in English-language markets.

21. Archambault is involved in the distribution and sale of recordings, books, periodicals, videos, digital video discs and software in Quebec. Archambault is wholly owned by Quebecor Media Inc. (QMI). QMI and its subsidiaries are involved in the ownership of conventional television stations, specialty services, video-on-demand services, as well as daily and weekly newspapers and magazines in Quebec.

22. Each of the two BOOMTV services would feature first-run dramatic programs and series that would be broadcast at a later date on conventional television services. Archambault proposed to provide programming along four axes: feature films (64%), sports (13%), television drama (12%) and events (11%). Although the French-language and the English-language services would not offer identical programs, they would be subject to the same conditions of licence.

23. The proposed services would devote 30% of the time period between 6:00 p.m. and 11:00 p.m. and 25% of the remainder of the broadcast day to Canadian programming. Archambault indicated that, if it received licences for both an English-language and a French-language service, it would spend a combined total of $28.9 million on Canadian programming in the first year of operations, and 32% of the previous year’s gross

revenues in each subsequent year. Archambault would also spend 1% of the previous year's gross revenues on script and concept development in the form of a contribution to Fonds Québecor.

24. Archambault also applied for permission to broadcast programming produced by the licensee or related persons. The applicant proposed that such programming be limited to 30% of its Canadian programming each year.

Background – Pay television in Canada to date

25. When it first licensed pay television services in 1982, the Commission favoured a model characterized by a measure of competition. It considered that such a model would be more likely to enhance diversity and opportunities for consumer choice than a monopoly market structure. Accordingly, in *Pay Television*, Decision CRTC 82-240, 18 March 1982 (Decision 82-240), the Commission approved applications for broadcasting licences to operate one national English-language and one national French-language general interest pay television service, as well as three regional English-language general interest pay television services, noting that there would be no more than two general interest pay television services competing in any one area. The Commission stated that "the licensing of additional discretionary general interest pay television services would jeopardize the ability of applicants licensed as a result of this decision to maximize opportunities for funding of Canadian programming."[2]

26. In Decision 82-240, the Commission also noted the absence of a regional French-language service and invited interested parties to submit applications for the provision of such a service. A regional French-language pay television service was approved later that year in *Regional French-language Pay Television Service for Eastern Canada (Quebec, Ontario and the Atlantic Region)*, Decision CRTC 82-1023, 23 November 1982.

27. In 1984, the Commission approved the consolidation of the national and regional French-language pay television services into a single national general interest service in Decision CRTC 84-32, 24 January 1984. Later that same year, due to significant financial difficulties in the English-language pay television market, the Commission issued *Reorganization of English-language general interest pay television networks*, Decision CRTC 84-654, 16 August 1984, which approved a reorganization of the English-language general interest pay television services such that only two licensees would provide pay television services: one serving eastern Canada; the other serving western Canada. The Commission was of the view that, given the unfavourable economic conditions at that time, such a reorganization was necessary to ensure the survival of pay television in Canada.

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[2] Decision 82-240 also approved applications for two services that were not general interest in nature: a cultural channel known as C Channel and a multilingual service known as World View Television.

28. Since that time, the Commission's policies with respect to the licensing of new pay or specialty services have generally precluded the licensing of new services that would be directly competitive with existing pay or specialty services, in order to ensure that existing services can continue to meet their objectives under the *Broadcasting Act* (the Act).

29. Currently, there are six pay television services that must be carried under the BDU Regulations by BDUs operating in certain areas. All are controlled either by Astral Broadcasting Group Inc. (Astral) or Corus Entertainment Inc. (Corus).

30. Astral operates two regional English-language general interest pay television services known as TMN and MoviePix that provide service to Ontario, Quebec and the Atlantic provinces. TMN concentrates on the presentation of first-run feature films and made for pay television drama, while MoviePix presents movies copyrighted at least five years prior to the broadcast year in which they are distributed. As well, Astral operates Super Écran, the only national French-language general interest pay television service. Astral also owns 100% of The Family Channel Inc., licensee of The Family Channel, a national pay television service that provides programming for children, youth and teens.

31. Corus controls two English-language general interest pay television services known as Movie Central and Encore Avenue that provide service to British Columbia, Alberta, Saskatchewan, Manitoba, the Yukon Territory, the Northwest Territories and Nunavut. Movie Central concentrates on the presentation of first-run pay television programming, while Encore Avenue presents movies copyrighted at least five years prior to the broadcast year in which they are distributed.

32. The pay television services have shown growth between 2001 and 2005. Combined subscribers to TMN and Movie Central, the two English-language first-run pay television services, increased from 1,338,024 to 1,774,121 during that period. During that same period, total revenues increased from $114,779,000 to $175,535,000. Combined profit before income and tax (PBIT) margin for the two services was 28% in 2005.

33. In the French-language market, subscribers to Super Écran grew from 357,115 to 478,704 between 2001 and 2005, and total revenues increased from $35,617,000 to $47,423,000. The PBIT margin for the service was 26% in 2005.

Overview of interventions

34. The Commission received over 400 interventions in connection with the applications for new pay television services. This section provides a brief overview of the interventions received. More specific concerns of interveners are discussed in detail in the section of this decision that sets out the positions of parties on particular issues. The Commission has considered all interventions in reaching its determinations.

35. Astral and Corus, operators of the existing general interest pay television services, opposed the licensing of new pay television services. Astral and Corus submitted that the proposed new services, particularly those of Allarco and Spotlight Ltd., would devote much of their programming to the same U.S. movies already broadcast by TMN and Movie Central, resulting in a lack of programming diversity. Corus and Astral were also concerned that, under the Spotlight Ltd. proposal, which would limit the number of studios from which pay services could obtain exclusive rights to top U.S. movies, consumers would find it necessary to purchase two pay television services in order to receive all of the top U.S. movies that they now get from one service.

36. Astral and Corus, as well as the other applicants for new pay television services, were opposed to CFC's proposal under which other pay television services would be obliged to assign 12.9% of their annual revenues to support the Canadian Film Channel.

37. With respect to the Archambault application for a French-language service, Astral submitted that QMI's ownership of Archambault raised concerns about preferential treatment that could be accorded to BOOMTV by other QMI affiliates, to the detriment of Astral's French-language pay television service Super Écran.

38. Other broadcasters that operate conventional and/or specialty services were concerned that the licensing of a new pay television service would result in the movement of some programming now available on specialty and conventional television services to pay television services.

39. The applications for new pay television services were, however, strongly supported by many independent producers on the basis of the commitments that the applicants made with respect to the funding and promotion of Canadian programming. Many producers considered that the licensing of new pay television services would provide another opportunity for them to market their programming. With respect to the CFC application, significant support was expressed in interventions from parties, including independent producers and filmmakers, who submitted that there was a need for more stable sources of financing and greater exposure for new Canadian feature films and other Canadian productions. Several interveners considered that the Canadian Film Channel would provide a launching pad for the work of new Canadian producers.

40. Some independent producers, however, opposed the licensing of the services proposed by Spotlight Ltd., Allarco and Archambault, expressing concerns similar to those of Corus and Astral. Some producers were of the view that competition for first-run U.S. movies could drive up the cost of such programming, leading to a reduction in the net amount of money available to be spent on Canadian programming.

41. The Association des producteurs de films et de télévision du Québec (APFTQ) was concerned about the implications of approval of the Archambault application for a broadcasting licence to operate a French-language service. The APFTQ submitted, among other things, that the possibility of Archambault obtaining a program and showing it in several "windows," for example, on pay television, on specialty services and then on conventional television stations owned by QMI, would not increase the production of

Canadian programming and could reduce the licence fees paid by conventional television services to independent producers. The APFTQ was also concerned that QMI's control of many programming windows could lead to a situation where independent producers would be obliged to sell their broadcast rights for all windows to QMI at the same time and would not be able to negotiate for a better price with a competitor for the rights to individual broadcast windows.

42. The Canadian Film and Television Production Association (CFTPA), the Alliance of Canadian Cinema Television and Radio Artists (ACTRA), the Canadian Association of Film Distributors and Exporters (CAFDE), and the Writers Guild of Canada/Directors Guild of Canada (WGC/DGC) all generally supported competition in the pay television sector, provided that it resulted in a significant increase in the amount of money made available to fund the production of Canadian films and drama programming.

43. BDUs and their representatives also generally endorsed the licensing of competitive pay television services, but did not consider that the proposed services should be guaranteed access to distribution systems. Rather, they considered that carriage arrangements should be negotiated between BDUs and the licensees of new pay services, as is the case with Category 2 services.

Positions of parties on issues

Licensing of competitive pay television services

44. As indicated above, the Commission has not licensed directly competitive pay television services since the reorganization of pay television services that occurred in 1984 and has implemented a policy that generally precludes the licensing of new services that are directly competitive with existing pay and specialty services. In the Notice of Public Hearing, the Commission invited interested parties to comment on whether an exception should be made to this policy, and the implications that such an exception would have on existing pay television services and the pay television industry.

Applicants

45. Spotlight Ltd. argued that the interests of the Canadian broadcasting system would be better served under a competitive scenario. Spotlight Ltd. submitted that the incumbent general interest pay television services have had a 20-year monopoly and are very profitable. It argued that a new player would drive growth in the Canadian program production industry and would provide an additional window for new programming. Spotlight Ltd. also argued that its proposed service would serve as a driver for digital services, increase consumer choice, and help combat the appeal of the grey and black markets. Spotlight Ltd. further argued that a competitive market had been the Commission's original intent for pay television, and that the introduction of a viable competitive structure was now appropriate.

46. Allarco argued that a certain level of competition has already been introduced to the pay television industry through the licensing of the complementary MoviePix and Encore Avenue services. It also submitted that other types of services, such as video-on-demand, provide programming that competes with that provided by pay television services. Allarco agreed that exceptions to the Commission's policy that generally precludes the licensing of new services that are directly competitive with existing pay and specialty services should only be granted if it would result in clear and unequivocal benefits to the Canadian broadcasting system and argued that its proposal met this criterion.

47. Archambault argued that the Commission's policy that generally precludes the licensing of new services that would be directly competitive with existing pay and specialty services is no longer appropriate for general interest pay television services. It considered that the Commission's policy had helped create a very profitable market for the incumbent pay television licensees who, Archambault submitted, had failed to inject substantial monies into the production of original Canadian programming, including feature films.

48. CFC did not comment on this issue.

Incumbent pay television licensees

49. Astral argued that the Commission's policy that generally precludes the licensing of new services that are directly competitive with existing pay and specialty services has been a key mechanism for ensuring that new services add diversity to the broadcasting system without undercutting existing services. Astral considered that a departure from this policy would dilute the value of the incumbent pay television services by splitting their programming, eroding their subscriber base, increasing their programming costs and increasing costs to consumers. Astral also argued that the PBIT margin of pay television services was similar to that of specialty services and noted that the Commission was not proposing to introduce directly competitive services into the specialty service sector. Astral considered that the licensing of directly competitive pay television services would introduce instability and uncertainty into the pay and specialty environment, and that it would be difficult to confine such a precedent to the pay television sector.

50. Corus argued that the original competitive scenario for pay television had failed for reasons that are still relevant today. It submitted that the growth and prosperity of pay television in Canada had been achieved only after the notion of licensing competitive services was discarded and conditions of licence consistent with the revenues achieved by the industry and the nature of the services offered to subscribers were established. Corus further submitted that the niche nature of pay television, which is based on offering new movies, faces additional competitive pressure from many other forces such as pay-per-view services, video-on-demand, movie-based specialty services and movies distributed via the Internet.

Other interveners

51. In general, broadcasters supported the Commissions' policy that generally precludes the licensing of new services that are directly competitive with existing pay and specialty services and did not support the granting of an exception in the case of the applications that were the subject of this proceeding. The Canadian Association of Broadcasters (CAB) submitted that the Commission's policy has provided a measure of stability for the broadcasting industry and has enhanced the industry's ability to make a significant contribution to the achievement of the objectives of the Act. It argued that a separate policy proceeding should be conducted to establish criteria for making exceptions to the Commission's policy before the Commission approves applications that involve exceptions to this policy. Pelmorex Media Inc. (Pelmorex) argued that the Commission's policy has been successful, and that the root causes of the past failure of competitive pay television services continue to be relevant today. CHUM Limited (CHUM) argued that the Commission's policy, which serves to limit competition in pay television, has been of benefit in that it has resulted in programming not acquired by TMN or Movie Central being available to specialty services. CHUM was further of the view that licensing competitive pay television services would increase the cost of non-Canadian programming for all television broadcasters, leaving less money available to spend on the production and acquisition of Canadian programming.

52. Producers expressed a variety of views on whether an exception should be made to the Commission's policy that generally precludes the licensing of new services that compete directly with existing pay and specialty services in order to permit the introduction of competitive pay television services. The CFTPA argued that the current strength of the incumbent pay television licensees is attributable, in large part, to their protected market position. It noted, however, that the applicants had put forward compelling arguments that competition would stimulate the pay television industry, attracting additional subscribers and thereby increasing money for the production of Canadian programming. It was of the view that the determining factor should be the amount of new money that competition would make available for Canadian programming, submitting that "the entry of new players must result in a significant amount of new money available to fund the creation of more original Canadian independent production." The CFTPA added: "We will not have accomplished anything if we merely fragment the contribution that the pay television sector makes to fund the same amount of programming." The Producers Roundtable took essentially the same position. The WGC/DGC argued that competitive markets should be favoured when the market can support it, as long as there is no dilution of Canadian content.

53. The APFTQ did not support the licensing of competitive pay television services, noting that pay television already competes with other types of services and new technologies that deliver programming. Première Bobine was concerned that the licensing of additional pay television services would only serve to inflate the price of U.S. programming, which serves as the driver for pay television services, and decrease new revenues available to support Canadian programming.

54. Many individual producers, however, supported the licensing of competitive pay television services, considering that it would increase programming choice for Canadians, increase the penetration of pay television services, increase money available to produce and promote Canadian programming, and provide another buyer for Canadian programming. ACTRA also supported competitive licensing, submitting that it would increase opportunities for the production of new Canadian television drama and films.

Approach to programming

Spotlight Ltd. and Allarco

55. The existing pay television services TMN and Movie Central rely heavily on the most popular U.S. films and U.S. made-for-pay television programming to attract subscribers to their services. Both Spotlight Ltd. and Allarco indicated that they would adopt a similar strategy.

56. Spotlight Ltd. characterized U.S. films and U.S. made-for-pay television programming as the "locomotive that essentially drives the marketing of our brand." In addition, Spotlight Ltd. indicated that it would fill out the non-Canadian portion of its programming schedule with other material that it acknowledged was already widely available in the larger broadcasting system. Spotlight Ltd. submitted that such programming would be attractive because subscribers would be able to choose from many movies that are commercial-free, unedited and uninterrupted. As indicated above, Canadian programming would comprise 30% of the time period between 6 p.m. and 11 p.m. and 25% of the remainder of the broadcast day.

57. For its part, Allarco indicated that approximately 30% of its schedule would be made up of top U.S. films. The remaining non-Canadian programming would come from other U.S. sources such as independent filmmakers and non-American sources. Allarco considered that this programming would be attractive to subscribers because of its availability in high definition format. As is the case with Spotlight Ltd., Canadian programming on Allarco's service would comprise 30% of the time period between 6 p.m. and 11 p.m. and 25% of the remainder of the broadcast day. It would also offer a Proudly Canadian channel as one of its multiplexes, which would be entirely devoted to Canadian programming.

58. Astral and Corus submitted that the services proposed by Spotlight Ltd. and Allarco would not add programming diversity to the Canadian broadcasting system. With respect to Spotlight Ltd., Astral submitted that, according to material filed by the applicant, 90% of the airtime devoted to Canadian and non-Canadian films would consist of movies already available or soon to be made available by existing pay, specialty and conventional television services. Corus also argued that many of the film and other program titles identified by Spotlight Ltd. had already been broadcast by Movie Central or by specialty services.

59. With respect to Allarco, Astral and Corus submitted that very little of the premium programming that would be broadcast would be new to pay television. Both Astral and Corus also submitted that Allarco would have to acquire a very large inventory of programming, and repeat that programming at a high level, in order to fill its proposed multiplex channels.

CFC

60. The Canadian Film Channel would feature only Canadian films. Acquired programming would be complemented by 78 hours of original Canadian programming annually. With respect to acquired programming, CFC indicated that its own database contains 3,429 fiction films and documentaries of which 712 are currently available for acquisition. The applicant submitted that, given the wealth of available Canadian material, the overall degree of exposure of Canadians to Canadian films is extremely limited, and that it would address the situation by "unlocking the vault of Canada's cinematic and story telling heritage."

61. No intervener disputed that sufficient Canadian programming was available to program the Canadian Film Channel. However, concern was expressed by some parties such as WGC/DGC that the overall programming approach, including the limited budgets for the service's original programming, would not be attractive in the context of a premium pay television service.

Archambault

62. As indicated earlier, Archambault proposed to offer general interest pay television services that would provide programming along four axes: feature films (64%), sports (13%), television drama (12%) and events (11%).

63. With respect to sports programming, the applicant indicated that it would present sports that would complement that available from other broadcasters, and that it would not broadcast any major league sports. As to its television drama programming, the applicant argued that some high-quality television drama was already being broadcast by pay television services before it is broadcast by conventional television stations. Archambault argued that broadcasting such programming first on BOOMTV would whet the appetite of the public for such programs, and not significantly affect the audience these programs would receive when they are aired later on conventional television. Events broadcast would include concerts, variety shows and other cultural events.

64. Interveners did not dispute the availability of programming for Archambault to fulfil its programming proposals, but were concerned that the proposed service would not add significantly to the diversity of programming available in the Canadian broadcasting system. For its part, the APFTQ considered that the types of programming Archambault proposed were already available from existing conventional and specialty television services.

65. Astral noted the emphasis that Archambault placed on using BOOMTV as a first window for television drama and submitted that it had not been demonstrated that viewers were ready to pay to see drama that would also be shown later on conventional television. It further considered that international sports were already well covered by specialty services.

Limits on exclusive program rights

66. The incumbent pay television services acquire, or have the ability to acquire, exclusive rights for the broadcast of certain programs. Spotlight Ltd. and Allarco were concerned that such agreements would prevent them from obtaining the rights to broadcast the most popular U.S feature films. Accordingly, Spotlight Ltd. and Allarco put forward proposals under which pay television services would be restricted in their ability to acquire exclusive rights to U.S. feature films, as described in paragraphs 8, 18 and 19 above.

67. Archambault and CFC did not request that the Commission implement measures limiting the negotiation of exclusive programming rights.

68. Both Astral and Corus, licensees of the incumbent general interest pay television services, considered that the Spotlight Ltd. and Allarco proposals regarding exclusivity were unworkable and unnecessary. They considered that both proposals were bad for consumers submitting that, under Allarco's proposal, the result would be pay television services that offered very similar programming, while under Spotlight Ltd.'s proposal, consumers would have to pay for two services rather than one to receive all the top U.S. movies. Astral and Corus further considered that problems in this area could be addressed through the current provisions of the Distribution Regulations dealing with undue preference.

Distribution

69. Section 18(5) of the Distribution Regulations provides that Class 1 BDUs must carry all pay television services, with the exception of Category 2 pay television services,[3] operating in the official language of the majority of the population within their licensed area, to the extent of available channels. Further, under section 18(11.1) of the Distribution Regulations, Class 1 and Class 2 BDUs that have a capacity of at least 750 MHz and that make use of digital technology must distribute at least one pay television service in each official language. Under section 38(2) of those same regulations, DTH BDUs must carry all pay television services, with the exception of Category 2 pay television services, to the extent of available channels.

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[3] Category 2 services are defined in *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000, as "services that meet basic licensing criteria and are not directly competitive with any existing pay or specialty, or Category 1 service. These services may be competitive with one another and are not assured digital access."

70. In the Notice of Public Hearing, the Commission sought comments on whether or not it should require that BDUs carry the proposed digital pay television services, as is the case for the current pay television services, or make carriage the subject of negotiation between licensees and BDUs, as is the case for Category 2 services.

71. At the hearing, all of the applicants confirmed their position that BDUs should be required to carry their services. In the absence of such a requirement, they were concerned that their services might not be viable. Spotlight Ltd., for example, indicated that, if BDUs were not required to carry its service, it would still accept the licence but would not be able to devote $35 million dollars to Canadian programming during the first two years of operations.

72. The CCTA supported the licensing of new pay television services, but argued against the imposition of distribution requirements for such services. The CCTA submitted that distribution requirements would limit the flexibility of BDUs to select programming services that provide the greatest competitive benefit, thereby maximizing their ability to exploit available capacity so that they can offer the best possible range of programming and non-programming services. In the CCTA's view, distribution requirements for new pay television services would be particularly burdensome in light of the other demands likely to be placed on BDUs with respect to the distribution of high definition programming and the migration to fully digital distribution.

73. Star Choice Communications Inc., the parent corporation of Star Choice Television Network Incorporated, which operates a DTH BDU, as well as TELUS Communications Inc., Saskatchewan Telecommunications, and MTS Allstream Inc., operators of Digital Subscriber Line BDUs, also opposed a mandatory carriage regime for new pay television services.

Commission's analysis and determinations

English-language market

74. The Commission considers that the licensing of a competitive English-language general interest pay television service has the potential to significantly increase support for Canadian programming, especially feature films and other high-quality drama, in terms of expenditures, promotion and exhibition of programming. The Commission notes that the pay television industry has historically been a highly significant contributor to the Canadian feature film industry. The need for increased support for the feature film industry was emphasized by the Standing Committee on Canadian Heritage in its November 2005 report *Scripts, Screens and Audiences: A New Feature Film Policy for the 21st Century*. Interveners from the production industry were virtually unanimous in the view that the pay television sector should provide increased support for feature films and high-quality drama, and that a competitive pay television service should be licensed if it would lead to a significant amount of new money to create more independently produced Canadian programming. Many individual producers were also of the view that licensing a competitive service would generate additional support for producers of feature films and high-quality drama, and provide independent producers with another

service to which they could market their programming. Based on its analysis of the subscriber projections filed by the applicants, the Commission is of the view that the introduction of a competitive English-language general interest pay television service could lead to a net increase in the range of $70 million on Canadian programming expenditures for Canadian feature films and drama over seven years.

75. The Commission also considers that a new pay television service that offers programming in high definition format would serve to support the transition to digital broadcasting and distribution by increasing interest in high definition programming, resulting in more subscribers to the digital service offered by BDUs. It would also provide viewers with an additional choice for pay television programming.

76. The Commission is further of the view that the English-language general interest pay television industry is robust, and that the introduction of a single competitive service would not have an undue negative impact on the existing English-language general interest pay television services operated by Astral and Corus, while permitting the new service to fulfil its business plan and its programming commitments, including those related to expenditures, exhibition and promotion of Canadian programming.

77. In light of the above, the Commission finds that the licensing of a new English-language general interest pay television service would be in the public interest and that an exception should be granted to its policy that generally precludes the licensing of new services that compete directly with existing pay and specialty services.

78. As noted earlier, there are four applicants for new national English-language general interest pay television services: CFC, Archambault, Spotlight Ltd. and Allarco.

79. Under CFC's proposal, the Canadian Film Channel would broadcast only Canadian films, and would devote 78 hours, or about one per cent of its total annual programming hours calculated on a 24-hour basis, to original Canadian programming funded by the applicant.

80. The Commission acknowledges the interventions received in support of this application but has serious concerns with the business plan that CFC has put forward. CFC's business plan is based on required carriage of its service by any BDU in a package with other general interest pay television services. It would be financed through a requirement that other English-language pay television licensees direct, each month, 12.9% of their gross revenues to CFC.

81. The Commission is not convinced that the benefits that would be achieved under CFC's proposal would outweigh the burden that would be placed on other pay television services if the Commission were to approve the proposed funding model.

82. With respect to the Archambault application for an English-language pay television service, the Commission notes that the proposed service would be less strongly oriented to feature films and drama than the services proposed by the other applicants. Under Archambault's proposal, almost two-thirds of its Canadian programming expenditures

would be directed to sports over the first licence term. Further, according to the applicant's projections, the percentage of programming expenditures going to sports would increase over the licence term. The Commission considers that its priority in the licensing of a new pay television service must be to increase the level of support for Canadian feature films and other high-quality drama, and is of the view that Archambault's proposal does not provide as much support in this area as do those of Spotlight Ltd. and Allarco. The Commission is also of the view that sports are currently well covered by conventional television and specialty services, and is further of the view that the applicant did not provide adequate evidence of demand for more sports programming by viewers in the English-language market.

83. The Commission is of the view that both Spotlight Ltd. and Allarco have presented proposals that would increase support for Canadian feature films and high-quality drama in terms of expenditures, promotion and exhibition. It notes, however, that both applicants have requested that the Commission intervene in order to place limits on the ability of pay television services to acquire exclusive rights to major U.S. films. The Commission considers that the current approach of allowing pay television services to obtain exclusive rights to programming will provide an opportunity for pay television services to diversify the programming that they obtain. Having considered the submissions made by the applicants and interveners, the Commission is not convinced that it would be appropriate to intervene in private contractual relations between the pay television licensees and the distributors of programming rights in these circumstances. The Commission further considers that an unregulated market for the acquisition of non-Canadian programming is a more effective approach for introducing rivalry to the pay television industry. For these reasons, the Commission will not take action to limit pay television licensees in their ability to obtain exclusive rights to programming, as proposed by Spotlight Ltd. and Allarco.

84. After carefully considering the Spotlight Ltd. and Allarco applications, the Commission is of the view that Allarco has presented the stronger proposal with respect to financial support for Canadian feature films and other high-quality drama. Spotlight Ltd. has stated that, should the Commission not implement its proposal to limit the ability of pay television services to obtain the rights to major U.S. films, it would not be able to fulfil its proposed upfront commitment to spend $35 million on Canadian programming over the first two years of operations. Given that the Commission has decided not to limit the ability of pay television licensees to obtain exclusive programming rights, both Spotlight Ltd. and Allarco would devote $4 million dollars to Canadian programming expenditures in the first year of operations, and 32% of the previous year's gross revenues in years 2 to 7. However, Allarco has also proposed to devote $14 million to script and concept development over seven years that would be over and above its Canadian programming expenditures commitment. In contrast, Spotlight's script and concept development commitments would be included in its Canadian programming expenditures commitment. The Commission considers that Allarco's additional commitment for script and concept development constitutes an important form of support that will foster the production of original Canadian programming.

85. The Commission further considers that Allarco has presented a strong package of proposals designed to stimulate regional production and to promote Canadian programming that is in addition to the initiatives set out above. Allarco has made a commitment to spend $7 million over the licence term that would be allocated to regional outreach initiatives. As part of its regional outreach program, Allarco would establish senior creative development staff in each province, with a mandate to develop creative projects with independent producers and to make these productions available to viewers. The creative producers would also work with each other as a coordinated cross-country unit, and individually with producers, unions, suppliers, agencies and minority communities. Allarco also indicated that it would work directly with French-language producers in Quebec to provide increased opportunities for successful French-language films to reach English-language audiences through either dubbing or captioning. As well, Allarco has proposed to establish an Accelerated Fund, which is designed to pay out a portion of licence fees to producers during production. The Commission considers that this initiative would provide valuable support to producers by decreasing the overall financing costs that they must pay.

86. With respect to promotion of Canadian programming, Allarco would offer a multiplex channel called the Proudly Canadian channel, which would be devoted entirely to Canadian programming, thereby providing a showcase for Canadian productions. In addition, Allarco has committed to spend $7 million dollars over the licence term solely on the promotion of Canadian programming. The Commission considers that this package of initiatives would provide significant support for regional production and for the promotion of Canadian programming.

The French-language market

87. As noted above, the Commission received only one application, which was submitted by Archambault, to establish a new French-language general interest pay television service that would compete with the incumbent service Super Écran, which is operated by Astral. As is the case with Archambault's proposed English-language service, the French-language service would present programming along four different axes: feature films (64%), sports (13%), television drama (12%) and events (11%). Although Archambault's approach is different from that of Super Écran, the Commission is of the view that Archambault's application raises a number of fundamental concerns.

88. Pay television services have historically played a major role in the funding of Canadian drama, especially feature films. The production of more high-quality, original Canadian drama has been of continuing concern to the Commission, and has led to such initiatives as the adoption of incentives for the broadcast of Canadian television drama by television licensees.[4] However, under Archambault's proposal, almost two-thirds of its Canadian programming expenditures would be directed to sports over the first licence term. Further, according to the applicant's projections, the percentage of programming expenditures going to sports would increase over the licence term. The Commission

[4] See *Incentives for English-language Canadian television drama*, Broadcasting Public Notice CRTC 2004-93, 29 November 2004, and *Incentives for original French-language Canadian television drama*, Broadcasting Public Notice CRTC 2005-8, 27 January 2005.

considers that, under Archambault's proposal to devote a high level of funding to sports, combined with a lower rate of growth over the licence term in subscription revenues for Super Écran due to the licensing of a competitor, it is not clear that there would be an increase in the amount of money going to support feature films and drama in the French-language market if Archambault's application were approved. The Commission is also of the view that sports are currently well covered by conventional television and specialty services, and is further of the view that the applicant did not provide adequate evidence of demand for more sports programming by viewers in the French-language market.

89. The Commission also notes the concern expressed by interveners that, under Archambault's approach by which programming broadcast by BOOMTV would be shown later on other broadcast windows provided by QMI affiliates, there may not be a large increase in the overall production of Canadian French-language television programming. Rather, additional opportunities would be provided for viewing the same programming on different types of services.

90. Further, the Commission does not consider that the possible benefits of introducing a competitor to Super Écran are sufficient to outweigh the risks, given the relatively small size of the French-language market.

Conclusions with respect to licensing

91. In light of all of the above, the Commission considers that, in the English-language market, it is appropriate to grant an exception to its policy that generally precludes the licensing of a service that directly competes with existing pay and specialty services. Accordingly, the Commission **approves** the application by Allarco Entertainment Inc. for a broadcasting licence to operate a new national English-language general interest pay television programming undertaking and **denies** the competing applications by Spotlight Television Limited, Romen Podzyhun and C.J. (Cal) Millar, on behalf of a corporation to be incorporated, and Archambault Group Inc. It further **denies** the application by Archambault Group Inc. for a broadcasting licence to operate a new national French-language general interest pay television programming undertaking.

Terms and conditions for the new pay television service to be operated by Allarco

Requirements for distribution

92. As part of its application, Allarco requested that BDUs be required to distribute its service in the same manner as the incumbent pay television services, as provided under sections 18(5), 18(11.1) and 38(2) of the Distribution Regulations. BDUs and their representatives generally supported the licensing of a competitive general interest pay television service, but submitted that the terms of distribution for such a service should be subject to negotiation between the pay television licensee and the licensees of BDUs.

93. The Commission notes that the new Allarco pay television service will compete directly with the incumbent English-language pay television services offered by Astral and Corus, both of which enjoy the benefits of incumbency, including significant subscriber bases and existing arrangements with BDUs and content providers. Under such

circumstances, the Commission considers that it would be unreasonable to expect the new Allarco service to meet its business plan, including its commitments with respect to expenditures, promotion and exhibition of Canadian programming, and to provide an attractive service, without comparable distribution requirements.

94. Consequently, BDUs will be required to distribute the Allarco pay television service as provided under sections 18(5), 18(11.1) and 38(2) of the Distribution Regulations. The Commission notes that Allarco will provide a digital-only service, and that Allarco has indicated that it would not seek distribution by BDUs that do not offer digital services, even though some of these BDUs offer the service of one of the incumbents.

Canadian programming

95. In accordance with Allarco's commitments, the Commission is imposing **conditions of licence** requiring that not less than 30% of the time between 6 p.m. to 11 p.m. and at least 25% of the remainder of the broadcast day be devoted to Canadian programs. As well, Allarco must, by **condition of licence**, ensure that not less than 50% of the time devoted to Canadian programs is devoted to Canadian dramatic programs.

96. With respect to expenditures on Canadian programming, the Commission is imposing **conditions of licence** that require Allarco to devote at least $4 million to the acquisition of, or investment in, Canadian programming during the first year of operations, and 32% of the previous year's revenues in each subsequent year. The licensee will further be required, by **condition of licence** to expend not less than $1 million in each broadcast year on regional outreach programs, and not less than $2 million in each broadcast year, for a minimum of $14 million over the licence term, on script and concept development.

Closed captioning and video description

97. In accordance with its commitments, the Commission is requiring Allarco, by **condition of licence**, to provide closed captioning for not less than 90% of all programs aired during the broadcast year. The Commission is also imposing a **condition of licence** requiring Allarco to broadcast two hours per week of described video programming as of the second year of operations, three hours per week of described video programming as of the fourth year of operations, and four hours per week of described video programming in the sixth year of operations.

Employment equity

98. In accordance with *Implementation of an employment equity policy*, Public Notice CRTC 1992-59, 1 September 1992, the Commission encourages the applicant to consider employment equity issues in its hiring practices and in all other aspects of its management of human resources.

Cultural diversity and on-air presence

99. The Commission expects Allarco, and other specialty and pay television licensees, to contribute to a broadcasting system that accurately reflects the presence in Canada of ethno cultural minorities and Aboriginal peoples, as well as persons with disabilities. The Commission further expects licensees to ensure that their on-screen portrayal of all such groups is accurate, fair and free of stereotypes. These expectations are fully in keeping with section 3(1)(d)(iii) of the Act, which states that the Canadian broadcasting system should, "through its programming and employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of Aboriginal peoples within that society."

100. In this regard, Allarco has indicated that it would include a "best practices" commitment in contracts with independent producers. Its regional creative development specialists would have a mandate to establish mentoring programs and to review scripts with the intention of including members of under-represented communities, where appropriate. Allarco would also become part of the Spark Plug initiative, which is designed to enhance opportunities for the integration of culturally diverse storytelling into the mainstream media, and to strengthen the abilities of visible minority and Aboriginal producers who have an interest in developing television drama.

101. The Commission expects Allarco to file a corporate plan on cultural diversity within three months of the date of this decision. As outlined in *Introduction to Broadcasting Decisions CRTC 2004-6 to 2004-27 renewing the licences of 22 specialty services,* Broadcasting Public Notice CRTC 2004-2, 21 January 2004, the corporate plan should include specific initiatives related to corporate accountability, the reflection of diversity in programming and community involvement as well as how progress will be assessed with respect to each proposed initiative. The Commission expects the applicant to provide annual reports on its progress in achieving the plan's objective. Such reports should be filed no later than 31 January of each year of the licence term, starting January 2008.

102. The Commission reminds Allarco that the expectations set out above with respect to cultural diversity are over and above the longstanding and more general expectations concerning employment equity. Specifically, the Commission expects the applicant to ensure that the on-air presence of the four designated groups (women, Aboriginal persons, disabled persons and members of visible minorities) is reflective of Canadian society, and that members of these groups are presented fairly, accurately and in a manner free of stereotypes.

103. The licence will expire 31 August 2012 and will be subject to the **conditions** set out in the appendix to this decision.

Issuance of the licence

104. The licence for this undertaking will be issued once the applicant has informed the Commission in writing that it is prepared to commence operations. The undertaking must be operational at the earliest possible date and in any event no later than 24 months from the date of this decision, unless a request for an extension of time is approved by the Commission before 18 May 2008. In order to ensure that such a request is processed in a timely manner, it should be submitted at least 60 days before that date.

Secretary General

Appendix to Broadcasting Decision CRTC 2006-193

Conditions of licence

1.(a) The licensee shall provide a national English-language general interest pay television programming service, with programming intended for all audiences.

(b) The licensee may distribute programming from all categories of programming set out in item 6 of Schedule I to the *Pay Television Regulations, 1990*, with the exception of programming from categories 1 News, 4 Religion, 5(a) Formal education and pre-school, 5(b) Informal education/Recreation and leisure and 14 Infomercials, promotional and corporate videos.

(c) The licensee shall not devote more than 5% of its programming schedule during each semester to programming from category 6 Sports, with a maximum of 20 hours in any week.

(d) The licensee shall devote at least 50% of its programming schedule during each semester to dramatic programs.

2. In each year of the licence term, the licensee shall devote to the distribution of Canadian programs not less than:

(a) 30% of the time from 6:00 p.m. to 11:00 p.m. (Eastern time); and

(b) 25% of the remainder of the broadcast day.

For the purpose of this condition, a 150% credit will be given for time during which the licensee distributes a new Canadian production that commences between 6:00 p.m. and 11:00 p.m. (Eastern time) or, in the case of a new Canadian production intended for children, at an appropriate viewing hour between 6:00 a.m. and 9:00 p.m., and the licensee will receive such a credit for each subsequent showing in the specified time periods of such a production within a two-year period from the date of first showing by the licensee.

3. In each broadcast year, the licensee shall devote to the distribution of Canadian dramatic programs not less than 50% of the time that it is required to devote to the distribution of Canadian programs.

4.(a) During the first broadcast year of operations, the licensee shall expend, on the acquisition of, or investment in, Canadian programming, a minimum of $4 million. For each subsequent broadcast year, the licensee shall expend, on the acquisition of, or investment in, Canadian programs, 32% of its revenue for the previous broadcast year.

(b) In any broadcast year of the licence term excluding the final broadcast year, the licensee may expend an amount on Canadian programming that is up to 5% less than the minimum required expenditure for that broadcast year, as set out and calculated in accordance with this condition of licence.

(c) Should the licensee avail itself of this flexibility in any broadcast year, it shall expend in the next broadcast year of the licence term, in addition to the minimum required expenditure for that broadcast year, the full amount of the previous broadcast year's underspending.

(d) In any broadcast year of the licence term, the licensee may expend an amount on Canadian programming that is greater than the minimum required expenditure for that broadcast year as set out and calculated in accordance with this condition of licence; in such case, the licensee may deduct:

(i) from the minimum required expenditure for the next broadcast year of the licence term, an amount not exceeding the amount of the previous broadcast year's overspending; and

(ii) from the minimum required expenditure for any subsequent broadcast year of the licence term, an amount not exceeding the difference between the overspending and any amount deducted under paragraph (i) above.

(e) Notwithstanding the above, during the licence term, the licensee shall expend on Canadian programming, at a minimum, the total of the minimum required expenditures as set out and calculated in accordance with this condition of licence.

5. In addition to the expenditures required under condition of licence 4, the licensee shall expend on regional outreach programs not less than $1 million in each broadcast year.

6.(a) In the broadcast year where it no longer has a cumulative deficit, the licensee shall expend on investment in Canadian programs by way of equity investment or bridge financing, an amount equal to its operating profit after tax for that year, less any amount used to reduce the deficit; and

(b) In each subsequent broadcast year during the term of its licence, the licensee shall expend on investment in Canadian programs by way of equity investment or bridge financing an amount equal to its operating profit after tax for that year.

7. During the licence term, the licensee shall devote to the acquisition of Canadian programs not less than 60% of its expenditures on the acquisition of, or investment in, Canadian programs. The required expenditure is calculated pursuant to condition of licence 4.

8. In addition to the expenditures required under condition of licence 4.(a), the licensee shall expend on script and concept development, including bursaries for writers, excluding overhead costs, not less than $2 million in each broadcast year for a minimum of $14 million over the licence term.

9. In making the calculations required for the purposes of conditions 4 to 8, only actual cash outlays shall be taken into account.

10.(a) The licensee shall offer its multiplexed channels only together in a package.

(b) With respect to each multiplexed channel, the licensee shall adhere to the Canadian programming requirements set out in conditions of licence 2 and 3.

11. The licensee shall provide closed captioning for not less than 90% of all programs aired during the broadcast year.

12. The licensee shall broadcast two hours per week of described video programming beginning in the second year of operations, three hours per week of described video programming beginning in the fourth year of operations, and four hours per week of described video programming beginning in the sixth year of operations.

13. The licensee shall adhere to the guidelines on gender portrayal set out in the Canadian Association of Broadcasters' *Sex-role portrayal code for television and radio programming*, as amended from time to time and approved by the Commission. The application of the foregoing condition of licence will be suspended as long as the licensee is a member in good standing of the Canadian Broadcast Standards Council.

14. The licensee shall adhere to the *Pay television and pay-per-view programming code regarding violence*, as amended from time to time and approved by the Commission.

15. The licensee shall adhere to the *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services,* as amended from time to time and approved by the Commission.

16. In these conditions

"broadcast day" means a 24-hour period beginning at 6:00 a.m. Eastern time.

"broadcast year" means each twelve-month period beginning on 1 September in any year.

"expend" and "expenditure" means actual cash outlay.

“expend on acquisition” means

a) expend to acquire exhibition rights for the licensed territory, excluding overhead costs;
b) expend on script and concept development, excluding overhead costs; or
c) expend on the production of filler programming, as defined in section 2 of the *Pay Television Regulations, 1990*, including direct overhead costs; and

“expenditure on acquisition” has a comparable meaning.

“expend on investment” means expend for the purposes of an equity investment or an advance on account of an equity investment, but not overhead costs or interim financing by way of a loan; and

“new Canadian production” means:

(a) a Canadian dramatic program

(i) which exceeds 75 minutes in duration and in relation to which all financial expenditures made by the licensee were made prior to the commencement of principal photography or taping and in which principal photography or taping was completed after 1 January 1985; and

(ii) which is intended for children and exceeds 22:30 minutes and in relation to which all financial expenditures made by the licensee were made prior to the completion of principal photography or taping.

(b) and which is a program that has never been broadcast in English in the licensed territory.

“revenue” means revenue from residential and bulk cable, SMATV and DTH BDU subscribers as well as any return on an investment in programming.

“script and concept development expenditures” means those expenditures, excluding overhead costs, that are incurred prior to the commencement of pre-production and before the financing of the project is in place. Spending on programs that are assured of going to air at the time of the expenditure are not considered as script and development expenditures.

“semester” means each six-month period beginning on 1 September and 1 March.